BRB No. 03-0480 BLA

ALMA MARSHALL (o/b/o GEORGE W. MARSHALL, deceased miner)	)	
Claimant-Respondent	)	
v.	)	
PINEY CREEK COAL COMPANY	)	DATE ISSUED: 01/30/2004
and	)	
KESSLER COAL COMPANY and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order On Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Alma Marshall, Beckley, West Virginia, *pro se*.

John P. Scherer (File, Payne, Scherer & Brown), Beckley, West Virginia, for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Second Decision and Order On Remand Awarding Benefits (97-BLA-1392) of Administrative Law Judge Daniel F. Sutton rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This is the third time this case has been before the Board. The administrative law judge noted that his findings of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that the miner was totally disabled were previously affirmed by the Board. *Marshall v. Piney Creek Coal Co.*, BRB No. 01-0305 BLA (Dec. 5, 2001)(unpub.). In this decision, the administrative law judge found that Dr. Rasmussen's opinion was sufficient to establish disability causation under the standard set forth at 20 C.F.R. §718.204(c)(1), the sole issue before him on remand. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding the existence of pneumoconiosis, disability, and disability causation established. Claimant has not responded. The Director, Office of Workers' Compensation Programs, responds, arguing that the administrative law judge properly found that Dr. Rasmussen's opinion established that pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to Section 718.204(c)(1), the sole issue before him on remand. The Director further argues that employer's attempt to reargue the other elements of entitlement on appeal should be rejected as those elements of entitlement were already found to have been established and those findings have been affirmed by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer argues that the evidence of record does not support the administrative law judge's findings that the miner suffered from pneumoconiosis or was totally disabled due to pneumoconiosis. As the Director points out, however, employer is seeking to re-argue every element of entitlement, repeatedly raising arguments that were resolved in the prior appeal. *Marshall*, BRB No. 01-0305 BLA. Likewise, in a Decision and Order on Reconsideration, the Board considered, and dismissed, employer's allegations of error with respect to the substance of Dr. Rasmussen's report, *i.e.*, the Board held that Dr. Rasmussen had adequate knowledge of and considered the miner's cardiac disease and smoking history in rendering his opinion on disability causation. Decision and Order on Reconsideration dated May 31, 2002. We do not address issues which were previously addressed and disposed of. *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24, 1-28 n.3 (1994). Thus, as the Director contends, the only issue before the administrative law judge, on remand, was whether Dr. Rasmussen's opinion established disability causation under 20 C.F.R. §718.204(c)(1).

The administrative law judge, based on his review of the rule making record accompanying the revised regulation at Section 718.204(c), agreed with the position of the Director that the Department by the addition of the words "material" and "materially" clearly intended for the new disability causation language at Section 718.204(c) to reflect the general body of federal precedent on disability causation, including the precedent set forth by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)(pneumoconiosis must be "at least a contributing cause" of the totally disabling respiratory impairment). The administrative law judge concluded, therefore, that because pneumoconiosis was defined as being a "substantially contributing" cause of total disability if it had "a material adverse effect on the miner's respiratory or pulmonary condition" or it "materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment," 20 C.F.R. §718.204(c)(1), (i), (ii), his reliance on *Robinson*, 914 F.2d 35, 14 BLR 2-68, in his prior decision was proper, and his analysis with respect to the revised regulation is entirely consistent with the Board's instructions on remand.[2]

[2] The Director, Office of Workers' Compensation Programs, contends that the addition of the words "material" and "materially," to define "substantially contributing" was meant only to clarify the meaning of when a miner is totally disabled due to pneumoconiosis and to provide that evidence which makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish total disability due to pneumoconiosis. 65 Fed. Reg. at 79,946 (Dec. 20, 2000).

Further, the administrative law judge concluded that, even assuming that the revised language, "substantially contributing" constitutes a more rigorous standard, Dr. Rasmussen's reasoned opinion that pneumoconiosis was a "major contributing cause" of the miner's disability is sufficient to establish disability causation under Section 718.204(c)(1). 20 C.F.R. §718.204(c)(1). This was rational. We, therefore, affirm the administrative law judge's finding that disability causation at 20 C.F.R. §718.204(c)(1), was established and affirm the award of benefits.

Accordingly, the Second Decision and Order on Remand Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge