

BRB Nos. 05-0575 BLA

ORLAND PARKS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED: 01/24/2006
)	
and)	
)	
PITTSTON COMPANY)	
)	
Employer/Carrier-)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-6580) of Administrative Law Judge Pamela Lakes Wood 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). The administrative law judge found, based on employer's concession, a coal mine employment history of thirty-one years and that, in

this subsequent claim, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 by proving the presence of a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), the element of entitlement on which claimant's previous claim was denied.¹ Decision and Order at 3, 4, 6-7. Turning to the merits of entitlement, the administrative law judge found that claimant was unable to establish disability causation *i.e.*, that his totally disabling respiratory impairment was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding disability causation established pursuant to 20 C.F.R. §718.204(c). Employer responds and urges that the denial of benefits be affirmed. In its response brief, employer also challenges the administrative law judge's determination that the newly submitted evidence of record establishes the presence of a totally disabling respiratory impairment pursuant to Section 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of the elements of entitlement precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

¹ Claimant initially filed a claim for benefits on July 6, 1987, but withdrew the claim on August 10, 1988. Director's Exhibit 1. Claimant filed a second claim on January 7, 1999, which was denied by the district director on the basis of claimant failing to establish total disability. Director's Exhibit 2. Claimant took no further action until the filing of the instant claim on April 18, 2002. Director's Exhibit 4.

² The administrative law judge's length of coal mine employment determination is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.³ In order to establish disability causation pursuant to Section 718.204(c), claimant must affirmatively establish that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *see also Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

In the instant case, the administrative law judge considered the two opinions supportive of claimant's burden at Section 718.204(c), those of Dr. Forehand, who opined that claimant's respiratory impairment was attributable to pneumoconiosis, Director's Exhibit 14, and Dr. Rasmussen, who opined that coal dust exposure was the major cause of claimant's disabling respiratory impairment, Claimant's Exhibit 1. The administrative law judge found that Dr. Forehand's opinion was deficient in that the physician did not review the recent evidence of record and failed to explain his conclusions. Decision and Order at 18-19. The administrative law judge further found that Dr. Rasmussen's opinion was "fairly" conclusory, that the opinion lacked analysis, and that the physician did not explain in detail his conclusions. *Id.* Accordingly, the administrative law judge accorded little weight to each of these opinions.

Claimant does not challenge the administrative law judge's finding that these opinions were entitled to little weight because they were deficient in their analysis. Rather, he contends merely that "Dr. Rasmussen's opinion is sufficient under the holding of *Gross*, to carry [c]laimant's burden of proof." Claimant's Brief at 6. In *Gross*, the Board held that claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. *Gross*, 23 BLR at 1-18. Here, the administrative law judge acknowledged that Dr. Rasmussen's opinion, attributing claimant's lung disease to both smoking and coal mine employment, would, if reasoned, be sufficient under *Gross* to establish causation. Decision and Order at 18. The administrative law judge rejected Dr. Rasmussen's opinion, however, because it was not reasoned. Decision and Order at 18. Claimant does not contend that the administrative law judge erred in finding unreasoned the opinions of Drs. Rasmussen and Forehand which are the only opinions which could, if credited, support a finding of disability causation. *See Cox v. Benefits Review Board*,

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because claimant has failed to challenge with specificity the administrative law's discrediting of the only evidence of record supportive of his case pursuant to Section 718.204(c), we need not consider claimant's contentions regarding the administrative law judge's analysis of the opinions of Drs. McSharry and Hippensteel which do not support a finding of disability causation.

Accordingly, we affirm the administrative law judge's finding on the merits that claimant has failed to establish that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment pursuant to Section 718.204(c), a requisite element of entitlement under Part 718, *see Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), and we need not reach employer's assertion, raised in its response brief, that the administrative law judge erred in determining that claimant established total disability pursuant to Section 718.204(b). We, therefore, affirm the administrative law judge's determination that entitlement is precluded in this case.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge