

BRB No. 97-0645 BLA

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| GLEND A. BURGESS |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| JIM WALTER RESOURCES, |) | DATE ISSUED: |
| INCORPORATED |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand - Denying Benefits of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura & Quinn, LLP), Birmingham, Alabama, for claimant.

Stephen E. Brown (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-BLA-1112) of Administrative Law Judge Frederick D. Neusner denying benefits 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 case is before the Board for the second time on modification. In the initial Decision and Order, Administrative Law Judge James W. Kerr, Jr. accepted the parties' stipulation of six and three-quarter years of qualifying coal mine employment, but found that claimant failed to establish the existence of

¹Claimant filed her application for benefits on April 7, 1988. Director's Exhibit 1.

pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Kerr denied benefits. On appeal, the Board affirmed the denial of benefits. *Burgess v. Jim Walter Resources, Inc.*, BRB No. 89-6084 BLA (Oct. 24, 1991) (unpub.). Within one year of the Board's decision, claimant filed a second application for benefits on February 27, 1992. Administrative Law Judge Lawrence E. Gray considered claimant's February 1992 claim as a timely petition for modification pursuant to 20 C.F.R. §725.310. Judge Gray found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and thus, that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. After noting that total disability was an uncontested issue, Judge Gray determined that claimant established that pneumoconiosis caused her total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Gray awarded benefits. Employer appealed, and the Board vacated Judge Gray's findings pursuant to 20 C.F.R. §§718.202(a)(2), 718.204(b), and 725.310, and remanded the case for further consideration. *Burgess v. Jim Walter Resources, Inc.*, BRB No. 94-2634 BLA (Mar. 29, 1995) (unpub.).

On remand, Administrative Law Judge Frederick D. Neusner (the administrative law judge) found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further determined that claimant's pneumoconiosis arose out of her coal mine employment pursuant to 20 C.F.R. §718.203(c). However, the administrative law judge found that pneumoconiosis was not a substantially contributing factor to claimant's total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish that pneumoconiosis substantially contributed to her total disability pursuant to 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating his intention not to participate in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

²We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(c) and 725.310 inasmuch as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant argues that the medical opinions of Drs. Hawkins and May are reasoned and sufficient to establish disability causation under 20 C.F.R. §718.204(b).³ In determining whether claimant satisfied her burden under Section 718.204(b), the administrative law judge correctly noted that in accordance with the standard articulated in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990),⁴ claimant must

³Reflecting on claimant's most recent examination in June of 1987, Dr. Hawkins, claimant's treating physician, opined that claimant suffers a significant impairment due to lung dysfunction that is manifested by chronic obstructive lung disease and coal workers' pneumoconiosis. Claimant's Exhibit 1. On November 20, 1991, Dr. Hawkins stated that claimant underwent a thoracotomy and right upper and middle lobectomies for adenocarcinoma in June 1987. Director's Exhibit 49; Claimant's Exhibit 1.

In a letter dated June 30, 1992, Dr. May, another treating physician, opined that claimant has "some chronic obstructive pulmonary disease from both working in the mines and smoking. She is unable to work due to shortness of breath because of loss of lung tissue as well as abnormal remaining tissue." Director's Exhibit 51. Dr. May's reports from 1987 are regarding claimant's thoracotomy and lobectomies, but do not comment on the etiology of claimant's total respiratory disability. Director's Exhibit 10.

⁴Inasmuch as claimant's most recent coal mine employment occurred in the state of Alabama, the United States Court of Appeals for the Eleventh Circuit has appellate jurisdiction over the instant claim. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989); Director's Exhibit 2.

demonstrate that pneumoconiosis is a substantially contributing factor to her total respiratory disability. Decision and Order on Remand at 9. Subsequent to the administrative law judge's decision, the United States Court of Appeals for the Eleventh Circuit, in *Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996), explained that a claimant cannot satisfy his/her burden under *Lollar* by introducing evidence that pneumoconiosis played more than an "infinitesimal or *de minimis* part in claimant's disabling respiratory impairment." *Marcum*, 95 F.3d at 1083, 20 BLR at 2-333. The Eleventh Circuit court held, "A conclusion that a contributing cause played more than an infinitesimal or *de minimis* part does not mean that the contributing cause was substantial." *Id.*

In analyzing the medical opinion evidence, the administrative law judge noted that although Dr. May linked claimant's chronic obstructive pulmonary disease to "both working in the mines and smoking," Director's Exhibit 51, Dr. May's more thorough, earlier findings "strongly suggest" that claimant's disability is caused by her thoracotomy and right upper and middle lobectomies, see Director's Exhibit 10; Decision and Order on Remand at 8. Likewise, the administrative law judge found Dr. Hawkins' opinion insufficient to establish disability causation because Dr. Hawkins initially opined that claimant's disability was due to chronic obstructive lung disease related to her lung resection for bronchogenic carcinoma, Director's Exhibit 49. Decision and Order on Remand at 9. The administrative law judge reasonably questioned the reliability of the opinions of Drs. May and Hawkins, and consequently, we affirm his credibility determinations. See *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). We, therefore, affirm the administrative law judge's determination that the miner's pneumoconiosis was a substantially contributing cause of her total disability pursuant to 20 C.F.R. §718.204(b). See *Marcum, supra*; *Lollar, supra*.

Inasmuch as claimant failed to satisfy her burden of affirmatively establishing total disability causation at 20 C.F.R. §718.204(b), a requisite element of entitlement pursuant to Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge