BRB No. 08-0863 BLA

E.G.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/20/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ann Marie Scarpino (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denying Benefits (07-BLA-5583) of Administrative Law Judge Donald W. Mosser 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). The administrative law judge credited claimant with one year of coal mine employment[1] and found that the evidence established

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). However, the administrative law judge found that the evidence did not establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that he is not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the denial of benefits.[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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Pursuant to Section 718.203(c), the administrative law judge noted correctly that because claimant established less than ten years of coal mine employment,[3] he was required to prove by "competent evidence" that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c). The administrative law judge considered the medical reports of record and noted that all of the physicians diagnosed pneumoconiosis; however, he noted that each of the physicians relied upon a coal mine employment

[2] The administrative law judge's finding of one year of coal mine employment is affirmed, as it is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] In finding that claimant established one year of coal mine employment, the administrative law judge determined that claimant's drilling work in road construction for over twenty years did not constitute coal mine employment. Decision and Order at 3. Claimant has not challenged that finding on appeal. *See Skrack*, 6 BLR at 1-711.

history of more than twenty-five years.[4] The administrative law judge found that these reports were "not competent enough evidence to meet the claimant's burden under Section 718.203(c) because the opinions are based on erroneous information regarding the extent of the claimant's coal mine employment." Decision and Order at 5. The administrative law judge noted further that when Dr. Rasmussen reconsidered his opinion based on a history of two years of coal mine employment, he concluded that claimant "has occupational pneumoconiosis, specifically non-coal mine related silicosis." *Id.*, *quoting* Director's Exhibit 13. The administrative law judge, therefore, found that competent evidence did not establish that claimant's pneumoconiosis arose out of coal mine employment.

As the Director points out, in challenging the administrative law judge's denial of benefits, claimant does not allege any error in the administrative law judge's finding that claimant failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). Rather, claimant challenges only the administrative law judge's finding that the medical evidence failed to establish total disability pursuant to Section 718.204(b)(2).

It is well-established that a party challenging the administrative law judge's decision must identify specific errors in the administrative law judge's analysis of the evidence or application of the law. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 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). Here, claimant has not alleged any error with regard to the administrative law judge's finding that the medical evidence is insufficient to establish that claimant's pneumoconiosis arose out of

[4] Dr. Jarboe noted a work history of twenty-eight to thirty years of surface mining and diagnosed simple coal workers' pneumoconiosis based on an x-ray reading. Director's Exhibit 60. Dr. Broudy noted that claimant had twenty-eight to thirty years of coal mine employment, working at a strip mine and on road construction, operating a rotary drill. He noted that claimant's x-ray changes were suggestive of silicosis and diagnosed mild obstructive airways disease, largely due to cigarette smoking. Director's Exhibit 59. Dr. Baker noted twenty-five years of coal mine employment and diagnosed pneumoconiosis due to coal dust exposure, as well as chronic bronchitis and chronic obstructive pulmonary disease due to both coal dust exposure and cigarette smoking. Director's Exhibit 14. Dr. Rasmussen noted twenty-five years of coal mine employment and diagnosed pneumoconiosis arising from claimant's coal mine employment. Director's Exhibit 10. In response to a claim examiner's letter asking Dr. Rasmussen to reconsider his opinion in light of a history of two years of coal mine employment, Dr. Rasmussen opined that claimant "has occupational pneumoconiosis, specifically non-coal mine related silicosis." Director's Exhibit 13.

coal mine employment and, therefore, the Board has no basis upon which to review the administrative law judge's finding at Section 718.203(c).[5] *See Cox*, 791 F.2d at 446, 9 BLR at 2-49; *Sarf*, 10 BLR at 1-121; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish*, 6 BLR at 1-109. Accordingly, because claimant has not challenged the administrative law judge's finding that the evidence did not establish that claimant's pneumoconiosis arose out of coal mine employment, we affirm this finding pursuant to Section 718.203(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c), an essential element of entitlement, we affirm the denial of benefits under Part 718. *See Hill*, 123 F.3d at 415-16, 21 BLR at 2-196-7; *Trent*, 11 BLR at 1-27. Consequently, we need not address claimant's contention regarding the administrative law judge's finding that the medical evidence did not establish total disability pursuant to Section 718.204(b)(2). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] Moreover, even if we concluded that claimant challenged the administrative law judge's finding at 20 C.F.R. §718.203(c), substantial evidence supports the administrative law judge's determination. He acted within his discretion as fact-finder in discounting opinions as to the cause of claimant's pneumoconiosis that were based on inaccurate coal mine employment histories. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Further, Dr. Rasmussen specified that claimant's pneumoconiosis is unrelated to coal mine employment. Director's Exhibit 13.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

I concur in the result only.

_____
REGINA C. McGRANERY
Administrative Appeals Judge