BRB No. 98-1423 BLA

HOMER SUMNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Robert M. Braden, Corbin, Kentucky, for claimant.

Cathryn Celeste Helm (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-1671) of Administrative Law Judge Robert L. Hillyard with respect to 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 1.5 years of coal mine employment and determined, based upon claimant's testimony and the information recorded in the medical opinions of record, that claimant had a 38 pack year history of cigarette smoking. The administrative law judge noted that inasmuch as the record contained a prior claim, he would initially consider whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 with respect to the second claim, filed on January 3, 1996.[1] Applying the standard adopted by

[1]Claimant filed an application for benefits on March 16, 1978. Director's Exhibit

the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, the administrative law judge stated that in order to demonstrate a material change in conditions, claimant was required to prove at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994). The administrative law judge determined that the concession by the Director, Office of Workers' Compensation Programs (the Director), that claimant is suffering from pneumoconiosis, was sufficient to establish a material change in conditions.

The administrative law judge turned, therefore, to a consideration of the merits of claimant's 1996 claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record supported a finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c). The administrative law judge further determined, however, that claimant failed to prove, in accordance with the standard adopted by the United States Court of Appeals for the Sixth Circuit, that he is totally disabled due, at least in part, to pneumoconiosis under 20 C.F.R. §718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the relevant medical opinions under Section 718.204(b). The Director has responded and urges affirmance of 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

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25. Following an informal conference, the district director issued a Proposed Memorandum of Conference in which benefits were denied on the ground that claimant did not establish any of the elements of entitlement. *Id.*. Claimant took no further action with respect to this claim.

[2]We affirm the administrative law judge's finding of 1.5 years of coal mine employment and a 38 pack year history of cigarette use and his findings under 20 C.F.R. §§718.203(c), 718.204(c)(1)-(4), and 725.309, as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 under 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The administrative law judge determined correctly that the record contains two medical opinions relevant to the cause of claimant's totally disabling impairment. Decision and Order at 13. Dr. Wright examined claimant on July 27, 1996 and recorded a coal mine employment history of 16 years and a smoking history of 1 to 2 packages of cigarettes per day for 25 years. Director's Exhibit 20. Based upon a physical examination, chest x-ray, pulmonary function study, and blood gas study, Dr. Wright indicated that he could not exclude the presence of "coal workers' pneumoconiosis 2/1." *Id.*. Dr. Wright also diagnosed chronic obstructive pulmonary disease and a severe obstructive impairment. *Id.*. Dr. Wright stated that the impairment was related in part to coal mining but also, in large part, to smoking. *Id.*. Dr. Broudy reviewed the medical evidence of record and concluded that claimant is suffering from an obstructive impairment that would prevent him from engaging in arduous manual labor. Director's Exhibit 22. Dr. Broudy stated that claimant's impairment was caused solely by his cigarette smoking, explaining that when pneumoconiosis causes an impairment, it is typically restrictive in nature and is associated with x-ray evidence of significant fibrosis, progressive massive fibrosis, or complicated pneumoconiosis. *Id.*.

The administrative law judge determined that:

> Dr. Wright based his opinion on an erroneous coal mine employment history which may have influenced his opinion. I find Dr. Broudy's opinion at least as, if not more documented and reasoned as Dr. Wright's and entitled to equal if not more weight. Consequently, I find that claimant has failed to prove by a preponderance of the evidence that his total disability is due to pneumoconiosis.

Decision and Order at 13-14. Claimant argues that the administrative law judge erred in determining that Dr. Wright's opinion was insufficient to establish total disability due to pneumoconiosis under Section 718.204(b). Claimant also contends that the administrative law judge erred in crediting Dr. Broudy's opinion, inasmuch as Dr. Broudy determined that claimant does not have pneumoconiosis and did not examine claimant. Finally, claimant maintains that the administrative law judge did not provide an adequate rationale for his reliance upon Dr. Broudy's opinion.

Claimant's allegations of error are without merit. The administrative law judge acted rationally in treating Dr. Wright's opinion, that claimant's impairment is due to both smoking and coal dust exposure, as less than fully credible on the ground that Dr. Wright relied upon an inaccurate coal mine employment history. Decision and Order at 5, 13; Director's Exhibit 20; *see Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

With respect to the administrative law judge's treatment of Dr. Broudy's opinion, that claimant's impairment is attributable solely to cigarette smoking, the administrative law judge was not required to discredit Dr. Broudy's report based upon his status as a nonexamining physician. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). In addition, contrary to claimant's argument, Dr. Broudy did not base his opinion regarding the source of claimant's impairment upon a determination that pneumoconiosis is not present. In his consultative report, Dr. Broudy did not state that claimant is not suffering from pneumoconiosis. Rather, he explained his conclusion that smoking, rather than pneumoconiosis, was the cause of claimant's disabling obstructive impairment, based upon the nature of the impairment revealed on the objective studies of record and the absence of evidence of complicated pneumoconiosis, significant fibrosis, or progressive massive fibrosis. Director's Exhibit 22. The administrative law judge acted within his discretion, therefore, in crediting Dr. Broudy's opinion on the ground that it is supported by claimant's 38 pack year history of smoking. Decision and Order at 3, 13-14; Director's Exhibit 22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Thus, claimant is incorrect in alleging that the administrative law judge did not provide an adequate rationale for his treatment of Dr. Broudy's medical report.[3] *See Clark*, *supra*.

Inasmuch as the administrative law judge's weighing of the medical opinions relevant to Section 718.204(b) was rational and supported by substantial evidence, we affirm the administrative law judge's determination that these opinions do not support a

[3]Moreover, the Director, Office of Workers' Compensation Programs, is correct in noting that even if the administrative law judge erred in crediting Dr. Broudy's opinion under 20 C.F.R. §718.204(b), his ultimate determination that the evidence of record does not support a finding of total disability due to pneumoconiosis would not be affected, inasmuch as the administrative law judge acted within his discretion in discrediting the opinion of Dr. Wright, the only physician of record who concluded that coal dust exposure contributed to claimant's totally disabling impairment. Decision and Order at 5, 13; Director's Exhibit 20; *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

finding that claimant is totally disabled due, at least in part, to pneumoconiosis. *See Adams*, *supra*. In light of claimant's failure to establish this essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge