BRB No. 99-1023 BLA

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| BOBBY MYERS | ) | |
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| Claimant-Petitioner | ) | |
| v. | ) | DATE ISSUED: |
| 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Bobby Myers, Princeton, Wisconsin, *pro se*.

Jennifer U. Toth ( 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1], without the benefit of counsel, appeals the Decision and Order Denying

[1]Claimant is Bobby Myers, the miner, who filed his initial claim with the Department of Labor (DOL) on May 17, 1989. Director's Exhibit 29. Following DOL's denial of the claim on December 12, 1989, claimant took no further action and this denial became final. Claimant then filed a duplicate claim with DOL on February 12, 1993. Administrative Law Judge Robert G. Mahony denied the case in a Decision and Order dated July 26, 1993. Director's Exhibit 23. Following claimant's appeal, the Board remanded the case back to the Office of Administrative Law Judges for a hearing in order to comply with the requirements set forth in *Shapell v. Director, OWCP*, 7 BLR 1-304

Benefits (98-BLA-0881) of Administrative Law Judge Jeffrey Tureck on a duplicate 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 case is before the Board for the second time. The administrative law judge initially accepted the concession by the Director, Office of Workers' Compensation Programs (the Director) that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c), and thus, established a material change in conditions pursuant to 20 C.F.R. § 725.309(d). The administrative law judge further found, however, that all of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, he denied benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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). The Director, in response, asserts that the administrative law judge's findings that the evidence fails to establish entitlement are supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

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(1984). *Myers v. Director, OWCP*, BRB No. 94-3735 BLA (Feb. 28, 1995)(unpub.); Director's Exhibit 24.

*Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). [2]

[2]We affirm, as unchallenged on appeal, and not adverse to claimant, the administrative law judge's findings that the evidence establishes ten years of qualifying coal mine employment, that the Director is the party potentially responsible for benefits if awarded, and that claimant is totally disabled. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

With respect to the administrative law judge's finding at Section 718.204(b), the administrative law judge correctly concluded that the record contained four relevant medical opinions. Decision and Order at 5. He rationally determined that Dr. Long's opinion that claimant did not have a totally disabling respiratory impairment due to pneumoconiosis was not entitled to any weight since the doctor relied in part on an erroneous coal mine employment history of only one month, Director's Exhibit 42, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985), and because it was poorly explained. Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc)*; Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge then permissibly discounted the opinion of Dr. Kryda, Director's Exhibit 21, because he found that it was not sufficiently explained, and thus, not well-reasoned. Decision and Order at 7; *see Clark, supra; Tackett, supra.* The administrative law judge then rationally found that Dr. Gimenez's opinions, Director's Exhibits 33, 40; Claimant's Exhibit 1, were not probative because the doctor did not explain the change in his diagnosis, Decision and Order at 7; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. U.S. Steel Co.*, 7 BLR 1-12 (1984), and because the doctor failed to explain how he arrived at his opinion despite the lack of corroborative evidence. Decision and Order at 7; *Clark, supra; Tackett, supra*. The administrative law judge then credited Dr. Harrison's opinion, that claimant was totally disabled from a respiratory impairment due to cigarette smoking, because he rationally found that Dr. Harrison's opinion was better supported his own objective data, and that it was well-reasoned. Decision and Order at 7; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent, supra*. Since claimant has not established his burden to demonstrate that his total disability arose out of coal mine employment pursuant to Section 718.204(b), *see Robinson v. Pickands Mather & Co.*, 914 F. 2d 35, 14 BLR 2-68 (1990), we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b), as supported by substantial evidence.[3] *See Robinson, supra.* As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra*; *Perry, supra*, we affirm the denial of benefits.

[3]We need not address the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis at Section 718.202(a), as they are rendered moot by our disposition of the case. *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge