BRB No. 98-0755 BLA

HAROLD PARHAM Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/8/99 DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon and Kelley, PSC), Madisonville, Kentucky, for claimant.

Richard Davis (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, by his representative[1], appeals the Decision and Order (96-BLA-1208) of Administrative Law Judge Mollie N. Neal 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). The administrative law judge credited claimant with thirty-five to thirty-six years of coal mine employment and found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that

1This claim was filed by the miner on April 19, 1993, Director's Exhibit 1, and a hearing before the administrative law judge was held on January 15, 1997. Prior to the issuance of the administrative law judge's Decision and Order, claimant died. The appeal of the miner's claim was filed by the miner's surviving spouse.

pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c). However, the administrative law judge found that the evidence failed to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant challenges the denial of benefits. Employer responds, arguing that the Board does not appear to have jurisdiction over the claim, and alternatively urging affirmance of the Decision and Order as supported by substantial evidence.. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.

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

In order to establish entitlement to benefits pursuant to 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Preliminarily, we must address employer's procedural challenge to this appeal. Employer asserts that the Board lacks jurisdiction to address this appeal, maintaining that when the instant appeal was filed on February 24, 1998, there was an outstanding motion for reconsideration pending with the administrative law judge, which was filed by claimant. Employer states that inasmuch as the administrative law judge's ruling on this motion was not issued until March 3, 1998, claimant failed to appeal the administrative law judge's final adjudication of his claim. Therefore, employer contends that pursuant to 20 C.F.R. §802.206(f),[2] the Board does not have jurisdiction to hear this appeal. We disagree.

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2 Section 802.206(f) states, in pertinent part:

> If a timely motion for reconsideration of a decision or order of an administrative law judge or a deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature.

20 C.F.R. §802.206(f).

Claimant's letter to the administrative law judge seeking to re-open the record for the introduction of post-hearing evidence was not characterized by any party or the administrative law judge as a motion for reconsideration of any order or decision previously made. The administrative law judge responded to claimant's request by issuing an Order Denying Claimant's Request To Reopen The Record. Thus, we hold that Section 802.206(f) is not applicable to the instant circumstance, and the Board properly obtained jurisdiction over this claim upon the filing of claimant's Notice of Appeal. *See* 20 C.F.R. §802.201.

Turning to the merits of this appeal, claimant first contends that the administrative law judge erred in failing to find that the evidence established the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. Inasmuch as 20 C.F.R. §718.202(a) (1)-(4) provide alternative methods by which a claimant may establish the presence of pneumoconiosis, *Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985), and the administrative law judge found that pneumoconiosis was established by x-ray evidence pursuant to Section 718.202(a)(1), she was not required to determine whether pneumoconiosis could also be established pursuant to Section 718.202(a)(4).

Next, claimant asserts that the administrative law judge erred in failing to find that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[3] Specifically, claimant asserts that the administrative law judge erred in his weighing of the medical reports of Drs. Myers, Anderson, Lane and O'Bryan.[4] In the instant case, the

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3 The administrative law judge also found that claimant could not avail himself of the irrebuttable presumption that total disability was due to pneumoconiosis under 20 C.F.R. §718.304 because the record contains no evidence that the miner suffered from complicated pneumoconiosis. Decision and Order at 11. This finding has not been challenged, and we therefore affirm the administrative law judge's finding that Section 718.304 is inapplicable to the instant claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

4 Claimant does not challenge the administrative law judge's finding that neither Dr. Traughber nor Dr. Gallo addressed the issue of causation of claimant's total disability.

administrative law judge found that only one physician, Dr. Myers, opined that claimant's total disability was due to pneumoconiosis. She found that Drs. Anderson, Lane and O'Bryan each attributed claimant's total disability to "emphysema due to cigarette smoking and that coal dust could contribute to his impairment." Decision and Order at 14. The administrative law judge concluded that "the medical opinions regarding the etiology of Claimant's pulmonary disability are, at most, in equipoise." *Id.* Therefore, she held that claimant failed to carry his burden of proof to establish, by a preponderance of the evidence, that his total disability was due to pneumoconiosis under Section 718.204(b). *Id.* We disagree.

Therefore, we affirm this finding as unchallenged on appeal. *See Skrack , supra.*

The administrative law judge correctly held that under 20 C.F.R. Part 718 claimant bears the burden of establishing each element of entitlement by a preponderance of the evidence. *Trent*, *supra*; *Perry*, *supra*. However, she failed to set out the required standard of proof in this instance. In *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998),[5] the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that in order to meet the requirement of Section 718.204(b), claimant must establish that pneumoconiosis is more than a *de minimis* contributory factor to his total disability. However, the court noted that it was not overruling its prior holding in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), that "the miner does not need to prove total disability by pneumoconiosis 'in and of itself' [but that] a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment." *Smith*, *supra*.

In the instant case, the administrative law judge pointed out that of the four physicians of record who addressed the issue of causation, only one, Dr. Myers, opined unequivocally that pneumoconiosis was a contributing factor to claimant's total disability. Decision and Order at 14; Director's Exhibits 35, 43. However, the administrative law judge did not discuss the specific findings of the other physicians regarding causation, and whether they support a finding of disability causation under the applicable Sixth Circuit standard. We note that Dr. Lane stated at deposition that cigarette smoking was the cause of claimant's impairment but that coal dust exposure may have been a contributing factor. Director's Exhibit 12 at pp. 9-10, 11. In addition, with respect to the etiology of claimant's respiratory disability, Dr. O'Bryan opined that "claimant's history of coal dust exposure would have caused some bronchitic symptoms." Employer's Exhibit 5. Likewise, Dr. Anderson testified that "the breathing of [coal] dust may [have] contribut[ed] to the symptoms of bronchitis." Director's Exhibit 12 at p. 17. Thus, although the administrative law judge correctly found that Drs. Lane, O'Bryan and Anderson suggested that pneumoconiosis may have contributed to the miner's total disability, she must additionally weigh this evidence within the context of the legal standard set out in *Adams.*

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5 Because *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998) was decided subsequent to the issuance of the Decision and Order on appeal here, we do not suggest that the administrative law judge should have referred to the standard set out therein. However, *Smith* merely expounds on the still viable standard established in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Moreover, in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036; 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit Court of Appeals held that the medical opinion of the physician who concluded that the miner's total disability was not due to pneumoconiosis, but rather was due to cigarette smoking, was of no probative value given that the physician diagnosed the absence of pneumoconiosis, which the administrative law judge found established by x-ray evidence. Thus, the court observed that a medical opinion at odds with the administrative law judge's factual findings carries no probative weight in the resolution of the case. *Tussey, supra*; *see Griffith v. Director, OWCP,* 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In the instant case, each of the physicians whom the administrative law judge credited as opining that pneumoconiosis did not contribute to the miner's total disability, also found that the miner was not suffering from pneumoconiosis. Thus, on remand, the administrative law judge must consider the relevant evidence pursuant to *Tussey*.

In light of the foregoing, we vacate the administrative law judge's findings under Section 718.204(b) and remand this case for reconsideration of this issue.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge