BRB No. 07-0645 BLA

C.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 03/31/2008
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05153) of Administrative Law Judge Jeffrey Tureck on a subsequent 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). This case has a lengthy and complex procedural history.[1] The administrative law judge initially determined that claimant

[1] Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 28, 1973, which was finally denied by the Department of Labor (DOL) on February 19, 1981. Director's Exhibit 20. Claimant filed a duplicate claim on August 17, 1993, which was denied by Administrative Law Judge Reno Bonfanti on the ground that claimant failed to establish that his pneumoconiosis arose

worked as a coal miner for no more than three to four years, and that he had a fifty-eight year history of smoking a pack of cigarettes per day. Based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant was totally disabled by a respiratory or pulmonary impairment, the administrative law judge determined that claimant had established a "change in conditions" pursuant to 20 C.F.R. §725.309(d). Decision and Order at 5. Considering the claim on the merits of entitlement, the administrative law judge noted the Director's concession that claimant established the existence of pneumoconiosis. The administrative law judge, however, determined that the evidence was insufficient to establish that claimant was totally

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from his coal mine employment, and that he was totally disabled. Director's Exhibit 32. Claimant appealed and the Board affirmed the denial of benefits. *[C.J.] v. Director, OWCP*, BRB No. 96-0165 BLA (Apr. 30, 1996)(unpub.); Director's Exhibit 41. However, the United States Court of Appeals for the Fourth Circuit vacated the Board's decision and remanded the case because the court agreed with the Director, Office of Workers' Compensation Programs (the Director), that Judge Bonfanti's reasoning was not sufficiently explained to enable a meaningful review. Director's Exhibit 51. On remand, the case was transferred to Administrative Law Judge Thomas Phalen, Jr., who issued an Order of Remand for further development of the medical record as to the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 53. After additional medical development before the district director, the claim was again denied, and claimant requested a hearing. Director's Exhibits 61, 62. On April 30, 1999, Administrative Law Judge Edward Terhune Miller found that claimant established total disability and a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), but denied the claim, finding that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 66. Claimant appealed, and the Director filed a simultaneous motion to remand, asserting that the administrative law judge erred in failing to find that claimant had pneumoconiosis, based on the Director's concession as to the existence of the disease, and that he erroneously discounted qualifying evidence for total disability. Director's Exhibit 69. The Director also asserted that a remand was required for further medical development on the issue of disability causation. *Id*. The Board, without ruling on Director's motion, affirmed the denial of benefits. *[C.J.] v. Director, OWCP*, BRB No. 99-0842 BLA (May 22, 2000); Director's Exhibit 70. However, on appeal to the Fourth Circuit, the Director's motion to remand was granted and the case was returned to the district director. Director's Exhibits 73-77. Following a new pulmonary evaluation by Dr. Rasmussen, the claim was again denied by the district director. Director's Exhibits 94, 97. Claimant requested a hearing, but later agreed to a decision on the record before Administrative Law Judge Jeffrey Tureck. A Decision and Order Denying Benefits was issued by Judge Tureck on March 19, 2007, and this appeal followed.

disabled due pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred as a matter of law in finding that the evidence fails to establish total disability due to pneumoconiosis, and asks the Board to reverse the denial of benefits and hold that claimant is entitled to benefits as a matter of law. The Director responds, urging affirmance.[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, 363 (1965).

In order to establish entitlement to benefits in a living 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 he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Scott v. Mason Coal Co.*, 289 F.3d 263, 268, 22 BLR 2-372, 2-382 (4th Cir. 2002).[3] Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). In this case, the administrative law judge denied benefits because he found that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant asserts on appeal that the administrative law judge did not specifically evaluate the evidence in accordance with the applicable standard. We disagree.

The regulation at Section 718.204(c) requires that a miner establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

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[2] We affirm, as unchallenged on appeal, the administrative law judge's finding regarding claimant's length of coal mine employment, and his finding of a change in conditions at 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1-3.

(i). Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii). Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

The administrative law judge correctly observed that "Dr. Rasmussen is the only doctor whose reports are contained in the record, who finds the claimant to be totally disabled, so only his reports are relevant to [the] discussion" of whether claimant's respiratory or pulmonary disability was due to pneumoconiosis.[4] Decision and Order at 5. As noted by the administrative law judge, Dr. Rasmussen reviewed claimant's medical records and issued his first report on May 11, 1995. Director's Exhibit 27. Dr. Rasmussen opined that it was reasonable to conclude that claimant had pneumoconiosis in light of the mixed x-ray evidence and the fact that "dust conditions in the coal mines prior to 1957 were sufficient that [nine] years of exposure would be sufficient to acquire coalworkers' [sic] pneumoconiosis." *Id.* Dr. Rasmussen opined that the pulmonary function studies were normal, but that claimant was totally disabled based on the results of his arterial blood gas testing. *Id.* However, Dr. Rasmussen reported that it was not possible for him to state with certainty that claimant's loss of capacity was due to primary lung or cardiac disease. *Id.* Because Dr. Rasmussen was unable to offer more than an equivocal opinion on the issue of disability causation, the administrative law judge properly concluded that "Dr. Rasmussen's opinion as expressed in his May 11, 1995 report cannot establish that the claimant's coal mine employment was a substantially contributing cause of his total disability." Decision and Order at 6.

Dr. Rasmussen prepared a second report on January 14, 1999. Director's Exhibit 64. Observing that a blood gas study revealed hypoxemia, Dr. Rasmussen noted that this could be caused by claimant's obesity, but the doctor also opined that it was reasonable to conclude that claimant's coal dust exposure was a contributing factor to his impaired function. *Id.* Dr. Rasmussen, however, also wrote that he could not state with certainty that coal dust was a major contributing factor to claimant's disabling respiratory insufficiency, and he concluded his report by stating: "I am sorry I can be of no assistance . . . in this case." *Id.* Because the administrative law judge permissibly found

[4] The administrative law judge noted that the record also contains the reports of Drs. Forehand, Vasudevan, and Spagnolo, and that "to the extent these doctors found any respiratory or pulmonary impairment, they attributed it to claimant's cigarette smoking, not his coal mine employment." Decision and Order at 5 n.7; *see* Director's Exhibits 8, 23, 57, 78.

Dr. Rasmussen's January 14, 1999 report to be ambiguous, in light of the doctor's closing statement, we affirm his finding that Dr. Rasmussen's January 11, 1999 report was insufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's total disability. Decision and Order at 6.

Lastly, the administrative law judge correctly noted that Dr. Rasmussen personally examined claimant on April 11, 2005 and issued his third report based on that examination. Director's Exhibit 94. Dr. Rasmussen opined that claimant was totally disabled due primarily to a fifty-five pack year history of cigarette smoking, but that claimant's three to four years of coal mine employment,[5] and his seven to eight years of dust exposure in construction also contributed. *Id.* Dr. Rasmussen noted claimant's occupational dust exposure, including seven to eight years of bridge construction and three to four years of coal dust exposure, and opined that all of the exposures contributed to claimant's impairment. *Id.* Dr. Rasmussen said that claimant's chest x-rays apparently provided evidence of pneumoconiosis, and he observed that the condition could come from coal dust exposure or other dusty occupations, but he concluded that the contribution of coal dust exposure to claimant's loss of lung function was minimal. *Id.*

In weighing Dr. Rasmussen's April 11, 2005 report, the administrative law judge found that Dr. Rasmussen's opinion on disability failed to satisfy claimant's burden of proof under Section 718.204(c). Although claimant contends that the administrative law judge erred in requiring Dr. Rasmussen to specifically use the phrase "substantially contributing cause" in assessing the effects of claimant's coal mine employment on his totally disabling condition, we see no merit in that contention. The administrative law judge did not require Dr. Rasmussen to use specific language as suggested by claimant. Rather he permissibly determined that Dr. Rasmussen's opinion, that claimant's short history of coal mine dust exposure had only a minimal effect on claimant's loss of lung function, "falls far short of the standard of a 'substantially contributing cause'" of claimant's impairment as defined in Section 718.204(c). Decision and Order at 6; *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Salyers v. Director, OWCP*, 12 BLR 1-193, 1-196 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Consequently, we affirm the administrative law judge's finding, pursuant to Section 718.204(c), that claimant has not proven that he is totally disabled due pneumoconiosis. Decision and Order at 7; Director's Exhibits 27, 64, 94; *see generally Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 822, 19 BLR 2-86, 2-94 (4th Cir. 1995); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Clark*, 12 BLR at 1-155.

[5] The district director asked Dr. Rasmussen to clarify his opinion, taking into consideration that claimant worked only three to four years in coal mine employment, as opposed to nine years as Dr. Rasmussen had previously reported. Director's Exhibit 95.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Trent*, 11 BLR at 1-27; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988). Because claimant was failed to establish disability caution, a requisite element of entitlement, benefits are precluded. *See Clark*, 12 BLR at 1-155; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge