BRB No. 02-0701 BLA

SAMMIE L. FRALEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
QUALITY COAL CORPORATION	)	
	)	DATE
Employer-Respondent	)	ISSUED:___________
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Sammie L. Fraley, Big Rock, Virginia, *pro se*.

[1]

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

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[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order (01-BLA-0600) of Administrative Law Judge Edward Terhune Miller 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).[2] This case involves a claim filed on June 9, 1997.[3] In the initial decision, Administrative Law Judge Richard A. Morgan found that the evidence was insufficient to establish either the existence of pneumoconiosis or total disability. Accordingly, Judge Morgan denied benefits.

Claimant subsequently filed a timely request for modification. Administrative Law Judge Edward Terhune Miller found, *inter alia*, that the newly submitted evidence (the evidence submitted subsequent to Judge Morgan's denial of benefits) was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), he found that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, he found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied claimant's request for

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[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 16, 1994. Director's Exhibit 58. The district director denied the claim on January 5, 1995. *Id.* Claimant filed a request for a hearing on March 14, 1995. *Id.*

Claimant filed a second claim on June 9, 1997. Director's Exhibit 1. In his Decision and Order dated July 23, 1999, Administrative Law Judge Richard A. Morgan indicated that the district director denied claimant's hearing request filed on March 14, 1995 because it was made more than sixty days after the district director's denial of claimant's 1994 claim. *See* Director's Exhibit 39. However, in the Decision and Order currently under review, Administrative Law Judge Edward Terhune Miller (the administrative law judge) accurately noted that the record does not contain evidence of the district director's denial of claimant's hearing request. *See* Decision and Order at 2 n.3. In light of our affirmance of the administrative law judge's denial of benefits on the merits, *see* discussion, *infra*, we need not address whether claimant's 1994 claim was finally denied. *Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

modification pursuant to 20 C.F.R. §725.310 (2000). On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 under 20 C.F.R. Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In his consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c),[4] the administrative law judge found that Dr. Castle's opinion that

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[4]Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (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).

claimant's total disability was not due to pneumoconiosis[5] was entitled to greater weight than Dr. Forehand's contrary opinion[6] based upon Dr. Castle's superior qualifications.[7] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 19; Director's Exhibits 13, 36; Employer's Exhibit 1. The administrative law judge also found that Dr. Castle's opinion, that claimant's total disability was not due to pneumoconiosis, was corroborated by the opinions of two similarly credentialed physicians, Drs. Hippensteel and Fino.[8] Decision and Order at 19; Director's

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[5]Dr. Castle examined claimant on February 19, 2001. In a report dated March 12, 2001, Dr. Castle opined that claimant was "very likely" permanently and totally disabled due to bronchial asthma, a disease of the general public and unrelated to his coal mine employment and coal dust exposure. Employer's Exhibit 1. Dr. Castle opined that there was no evidence of coal workers' pneumoconiosis. *Id.* However, even if claimant had radiographic evidence of simple pneumoconiosis, Dr. Castle explained that his opinion regarding claimant's lack of an impairment from that process would remain unchanged. *Id.*

[6]Dr. Forehand examined claimant on July 28, 1997. Dr. Forehand opined that that:

> A non[-]diagnostic x-ray notwithstanding, the job descriptions, length of time in underground mining and lack of additional contributory factors make coal workers' pneumoconiosis [the] principal cause of respiratory impairment and disability.

Director's Exhibit 13.

Dr. Forehand reiterated his opinion in a "Progress Record" dated April 16, 1998. Director's Exhibit 36. Dr. Forehand noted that claimant's coal dust exposure was of a sufficient length for claimant to develop coal workers' pneumoconiosis with a respiratory impairment. *Id.*

[7]Dr. Castle is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 1. Although Dr. Forehand's qualifications are not found in the record, the administrative law judge took judicial notice of the fact that Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology. Decision and Order at 9.

[8]Dr. Hippensteel examined claimant on December 10, 1997. In a report dated February 10, 1998, Dr. Hippensteel opined that there was insufficient evidence to make a diagnosis of coal workers' pneumoconiosis or any coal dust related lung disease. Director's Exhibit 24. Dr. Hippensteel also reviewed the medical evidence. Dr. Hippensteel opined that the additional evidence showed that claimant had problems referable to allergies and bronchial asthma attacks.

Exhibits 24, 31, 38. The administrative law judge also properly questioned Dr. Forehand's opinion because he failed to address the significance of claimant's "severe history of bronchial asthma." Decision and Order at 19. A physician's unfamiliarity with a miner's other medical conditions may provide a basis for giving the physician's opinion as to the cause of disability less weight. *See Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence submitted subsequent to the denial of claimant's 1994 claim is insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

The administrative law judge did not address the evidence submitted in connection with claimant's 1994 claim. However, Dr. Iosif completed the only medical report submitted in connection with this claim. Dr. Iosif examined claimant on October 5, 1994. In a report dated October 5, 1994, Dr. Iosif noted that claimant's chest x-ray did not show evidence of pneumoconiosis. Director's Exhibit 58-9. Dr. Iosif opined that:

> The history of allergic rhinitis in conjunction with the respiratory symptoms, presence of multiple allergies and findings of airways obstruction with significant response to bronchodilator are consistent with a diagnosis of extrinsic bronchial asthma.

Director's Exhibit 58-9.

Dr. Iosif further stated that:

> I would consider the degree of respiratory impairment to be severe enough to prevent [claimant] from returning to the same type of

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Id. Dr. Hippensteel opined that claimant's allergies were not due to coal dust but to irritants in the general environment. *Id.* Dr. Hippensteel reiterated his opinions during an April 1, 1998 deposition. Director's Exhibit 31.

Dr. Fino reviewed the medical evidence. In a report dated June 1, 1998, Dr. Fino opined that there was insufficient evidence to justify a diagnosis of simple coal workers' pneumoconiosis. Director's Exhibit 38. Dr. Fino further opined that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.* Dr. Fino opined that claimant's respiratory abnormality was due to asthma. *Id.*

Drs. Hippensteel and Fino are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 24, 38.

> occupation as a coal miner or for that matter, to any other occupational exposure to dust, fumes, etc. It is clear from the history that his asthma was significantly exacerbated throughout the time of coal mine employment and although I am not aware of any direct, etiological relationship between exposure to coal dust and asthma, coal dust *probably* acted for many years as a nonspecific airways irritant that *might* have accelerated and/or aggravated the severity and progression of the asthma related airways obstruction.

Director's Exhibit 58-9 (emphasis added).

We hold that Dr. Iosif's opinion is too speculative to support a finding that claimant's total disability is due to pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Consequently, the administrative law judge's failure to consider Dr. Iosif's opinion in his consideration of the evidence pursuant to 20 C.F.R. §718.204(c) was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986). We, therefore, 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 20 C.F.R. §718.204(c).

Since claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *Trent*, *supra*; *Gee*, *supra*; *Perry*, *supra*.

In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), we decline to address the administrative law judge's other findings in his consideration of claimant's request for modification. *Larioni, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge