BRB No. 09-0608 BLA

DONALD SORRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/25/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5775) of Administrative Law Judge Richard A. Morgan rendered on a claim[1] filed pursuant to the

[1] Claimant filed this claim for black lung benefits on May 31, 2007. Director's Exhibit 2. On his application for benefits, claimant stated that he had thirteen years of coal mine employment. *Id.* The district director credited claimant with only 1.81 years of coal mine employment; one year for coal mine employment during 1967 with Eastern Coal Corporation in Virginia and 0.81 of a year of coal mine employment during 1979 with Mountain Coal Development Company/Marrowbone Development Company in Kentucky. Director's Exhibits 5, 6. In a Proposed Decision and Order dated June 18,

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[2] The administrative law judge credited claimant with 1.81 years of coal mine employment. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical evidence of record established that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203 or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding only 1.81 years of coal mine employment, instead of thirteen years of coal mine employment. Claimant also contends that, assuming more than 1.81 years of coal mine employment are established, Dr. Hussain's initial medical opinion, dated December 14, 2007, would be appropriate to use to establish the existence of legal pneumoconiosis and total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's length of coal mine employment finding and the denial of benefits.

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,

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2008, the district director denied benefits based on claimant's failure to establish any of the elements of entitlement. Director's Exhibit 19; *see* Decision and Order at 2. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibit 21. The administrative law judge held a hearing on December 17, 2008, in Charleston, West Virginia. *See* Decision and Order at 2.

[2] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact, if any, of Section 1556 of Pub. L. No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims and became effective on March 23, 2010. *Sorrell v. Director, OWCP*, BRB No. 09-0608 BLA (Mar. 30, 2010)(unpub. Order). Both claimant and the Director, Office of Workers' Compensation Programs, have filed supplemental briefs indicating that the recent amendment does not impact this case because claimant has less than fifteen years of coal mine employment. We concur with the parties' position that the recent amendments do not apply in this case, as there is no evidence of, and no allegation that, claimant has at least fifteen years of coal mine employment.

and in accordance with applicable law.[3] 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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant initially contends that the administrative law judge erred in crediting him with only 1.81 years of coal mine employment. Specifically, claimant alleges that he should have been credited for the years he spent picking up and delivering equipment for various employers engaged in the business of repairing coal mine equipment. Claimant argues further that the administrative law judge failed to take into account claimant's testimony that he "worked to pick up equipment that was essential to the coal extraction and processing that needed repair and would transport said equipment back to the mine after it was repaired." Claimant's Brief at 5. Claimant concludes that he should have been credited with additional years of coal mine employment. *Id*. The Director, however, argues that claimant only had 1.81 years of coal mine employment and that claimant was not a miner while working for other employers. Director's Brief at 4-5.

After consideration of the administrative law judge's Decision and Order, the parties' arguments on appeal, and the evidence of record, we conclude that the Decision and Order is rational, supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-68, 1-72 (1996)(*en banc*); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). In considering the evidence submitted by claimant, the administrative law judge may use any reasonable method of calculation. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988).

[3] The administrative law judge noted that this case comes under the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Decision and Order at 2 n1. However, the record indicates that claimant's most recent coal mine employment was in Kentucky. Director's Exhibits 4, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant argues that his employment at three different companies from 1968-1977 and 1980–1982 constituted coal mine employment and should have been included in the administrative law judge's length of his coal mine employment determination.[4] Claimant thus contends that he has a total of thirteen years of coal mine employment. The record contains claimant's written summary of his employment history, his hearing testimony and his Social Security Administration earnings records. Director's Exhibits 3, 4; Hearing Transcript at 8-28, 33-38, 41. After noting that the Director credited claimant with only 1.81 years of coal mine employment, the administrative law judge considered whether claimant had additional years of coal mine employment at Williamson Oil Company, West Virginia Armature, and Young's Machine Shop, under the situs-function test to determine whether claimant's work for these employers was that of a miner under the Act.[5] 20 C.F.R. §725.202. The "situs prong" of the test requires that claimant's work occurred in or around a coal mine or coal preparation facility. *See Whisman v. Director, OWCP*, 8 BLR 1-96 (1985); *see also Slone v. Director, OWCP*, 12 BLR 1-92 (1988). The "function prong" requires that the work be integral to the extraction or preparation of coal and not merely ancillary to the delivery and commercial use of processed coal. *See Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989).

Addressing whether claimant's work was coal mine employment, the administrative law judge stated that:

> The claimant delivered oil, lubricants, and tires to mine sites for Williamson Oil Co., in 1968 and 1970. Williamson's two shops were not at the mine sites. At West Virginia Armature, 1968-1977 and 1980-1982, his job was to write-up and issue parts, as well as picking up equipment at mines to be repaired and returning it to machine shops not on mine property, in West Virginia. He would perform assessments of the equipment at the mine shop. No more than once a month, he would pick up or drop off equipment in a mine. Occasionally, he would retrieve equipment from inside a mine, but did not service or repair equipment at

[4] Claimant asserts that employment with Williamson Oil Company from 1968-1970, KJM (Baker International, West Virginia Armature) from 1968-1977 and 1980-1982, and Young's Machine Shop during 1981 constitutes coal mine employment. Claimant's Brief at 5-6.

[5] The United States Courts of Appeals for the Fourth and Sixth Circuits have adopted a two-prong situs-function test. *See Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986).

> mine sites. His work at Young's Machine Shop, not located on a mine site, was similar to that at West Virginia Armature.

Decision and Order at 2-3 (citations omitted). In evaluating whether claimant's employment with these various employers satisfied the situs-function test, the administrative law judge determined that:

> Although the claimant possibly met the situs requirement, his occasional forays into the mines and occasional assessments are not established as the type of work, added to his routine delivery work, which is needed to meet the function test; rather, at most it was ancillary to coal extraction or preparation.

Decision and Order at 3. The administrative law judge discussed all of the relevant evidence of record, set forth a rational basis for his conclusion that claimant's delivery work was ancillary to coal extraction and preparation, and thus, rationally determined that claimant did not satisfy the function test. We conclude that substantial evidence supports his findings, and that he reasonably credited claimant with 1.81 years of coal mine employment. *See Dawson*, 11 BLR at 1-60. The administrative law judge considered all the evidence in this case and rationally determined that claimant was not a miner under the Act and regulations while working at Williamson Oil Company, West Virginia Armature and Young's Machine Shop. *See Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 930, 13 BLR 2-38, 2-41-42 (6th Cir. 1989); *Clemons*, 873 F.2d at 922, 12 BLR at 2-278; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Therefore, we affirm the administrative law judge's length of coal mine employment finding.

Pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), the administrative law judge considered Dr. Hussain's medical opinion. Dr. Hussain[6] examined claimant on June 27, 2007, recorded a thirteen year coal mine employment history and a forty-eight year one pack per day smoking history, and obtained non-qualifying arterial blood gases showing hypoxemia, qualifying, but invalid, pulmonary function studies showing severe airway obstruction, and a negative chest x-ray showing chronic obstructive pulmonary disease (COPD). Director's Exhibit 10. Dr. Hussain diagnosed coronary artery disease, hypoxemia, and COPD due to smoking and aggravated by coal dust exposure. *Id*. Subsequently, on December 14, 2007, in response to questions posed by the district

[6] The administrative law judge noted that Dr. Hussain is Board-certified in internal medicine with a subspecialty in pulmonary diseases. Decision and Order at 7; *see* Claimant's Exhibit 1.

director, Dr. Hussain stated that claimant had pneumoconiosis and was totally disabled due to his twelve years of coal mine employment. *Id*. Thereafter, on March 13, 2008, after being asked by the district director to assume that claimant had only 1.81 years of coal mine employment, Dr. Hussain revised his opinion and stated that claimant's COPD and disability were due to smoking and were not caused by coal mine dust exposure. *Id*. Viewing Dr. Hussain's reports in light of the fact that claimant established 1.81 years of coal mine employment, the administrative law judge found that Dr. Hussain's revised opinion did not establish legal pneumoconiosis or that claimant's total disability was due to pneumoconiosis. Decision and Order at 11, 16. Thus, the administrative law judge concluded that the medical opinion evidence did not establish pneumoconiosis or total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.204(c).

As set forth above, we have rejected claimant's argument that he should have been credited with additional years of coal mine employment and we have affirmed the administrative law judge's finding of 1.81 years of coal mine employment. Claimant does not otherwise challenge the administrative law judge's analysis and weighing of Dr. Hussain's opinion with respect to the presence of legal pneumoconiosis and disability causation. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge