

BRB No. 97-1274 BLA

DAL CARADINE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JIM WALTER RESOURCES, INCORPORATED)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR))
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura & Quinn), Birmingham, Alabama, for claimant.

Stephen E. Brown (Maynard, Cooper & Gale), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-909) of Administrative Law Judge Gerald M. Tierney awarding 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). This case involves a request for modification.¹ After noting claimant's coal mine employment history of thirty years, the

¹ The administrative law judge found that this involves a duplicate claim because claimant filed "the present claim more than one year after the previous denial of benefits." Decision and Order at 2. The record indicates that claimant filed a claim on May 19, 1992.

administrative law judge found that since claimant had previously been determined to have established pneumoconiosis arising out of coal mine employment and total disability, the sole issue for consideration was whether claimant had established causation pursuant to 20 C.F.R. §718.204(b). The administrative law judge considered the new evidence submitted by claimant, the medical reports by Dr. Kennedy, and found that it sufficiently established that claimant's total disability was caused by pneumoconiosis. The administrative law judge found that claimant had therefore established a "material change in conditions." Decision

Director's Exhibit 1. The Department of Labor made an initial finding that claimant had failed to establish entitlement to benefits. Director's Exhibit 18. After an informal conference, claimant was awarded benefits. After a formal hearing, Administrative Law Judge Mosser denied benefits. Director's Exhibit 43. Claimant appealed to the Board, which affirmed the denial of benefits for failure to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Caradine v. Jim Walter Resources, Inc.*, BRB No. 94-3819 BLA (Mar. 28, 1995)(unpub.). On June 29, 1995, claimant filed a request for modification and submitted additional medical evidence. Director's Exhibits 54, 56, 59. Inasmuch as claimant's request for modification was filed within one year of the affirmance of the denial of benefits by the Board, the administrative law judge erred in considering the issue to be whether claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309. The proper issue is whether claimant established a change in conditions pursuant to 20 C.F.R. §725.310. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). However, the administrative law judge's error in this regard does not require remand in light of the ultimate disposition in this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

and Order at 4. The administrative law judge then considered the record as a whole, found Dr. Russakoff's opinion entitled to little weight, and concluded that claimant established total disability due to pneumoconiosis based on Dr. Kennedy's medical reports. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in crediting Dr. Kennedy's opinion. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has indicated that he will not respond to claimant's appeal.

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On appeal, employer contends that Dr. Kennedy's medical reports fail to establish causation pursuant to Section 718.204(b). We agree. Claimant submitted Dr. Kennedy's medical notes based on his examinations of claimant from January 1995 to September 1995. Director's Exhibits 54, 56, 59. During the course of these visits, Dr. Kennedy noted that claimant had a history of coronary artery disease and well controlled congestive heart failure. Initially, Dr. Kennedy questioned the etiology of claimant's interstitial lung disease, but later, based on CT scans and history of coal dust exposure, found that claimant had pneumoconiosis.² Dr. Kennedy also performed pulmonary function studies on claimant and found that claimant had mild restrictive lung disease. Dr. Kennedy never stated that claimant was totally disabled, nor did he state that claimant's mild restrictive lung disease was due to pneumoconiosis. Director's Exhibits 54, 56, 59. Thus, as a matter of law, Dr. Kennedy's clinical notes are insufficient to establish causation at Section 718.204(b). *See* 20 C.F.R.

² On March 31, 1995, Dr. Kennedy's notes include an addendum in which he stated that a CT scan of claimant's chest was reviewed with a radiologist and felt to be consistent with coal workers' pneumoconiosis based on exposure and the appearance of high resolution CT scan. Director's Exhibit 56. A radiology report of the CT scan performed by Dr. Shin on February 3, 1995 states that the findings are consistent with asbestosis with cicatrizing pleuritis. *Id.*

§718.204(b); *Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). We therefore hold that the administrative law judge's findings cannot be affirmed inasmuch as they are unsupported by the record. Furthermore, as Dr. Kennedy's opinion cannot establish causation, and we have previously affirmed Administrative Law Judge Mosser's finding that the only other opinion of record, by Dr. Russakoff, does not establish causation, we reverse the administrative law judge's finding that claimant established entitlement to benefits. See 20 C.F.R. §725.310; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge