BRB No. 08-0260 BLA

E.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW HORIZONS COAL, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/26/2008
and	)	
	)	
THE HARTFORD	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

E.J., Grays Knob, Kentucky, *pro se*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order – Denial of Benefits (2006-BLA-5838) of Administrative Law Judge Larry S. Merck rendered 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).[2] The administrative law judge credited claimant with at least seventeen years of coal mine employment, based on a stipulation by the parties, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, thus, he found that claimant demonstrated a change in one of the applicable conditions of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Based on his review of all of the record evidence, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability pursuant to 20 C.F.R. §718.204(b)(2), but that claimant failed to prove that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

[1] Mr. Jerry Murphree, a benefits counselor with Stone Mountain Health Services, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but he is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed a prior claim for benefits on March 13, 1997, which was finally denied by Administrative Law Judge Rudolf L. Jansen on January 13, 1999, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. The Board affirmed Judge Jansen's denial of benefits in a Decision and Order issued on February 11, 2000. [*E.J.*] *v. New Horizons Coal, Inc.*, BRB No. 99-0465 BLA (Feb. 11, 2000)(unpub.); Director's Exhibit 1. Claimant took no further action until he filed a subsequent claim on April 23, 2001. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on November 25, 2002. Director's Exhibit 18. At claimant's request, the case was transferred to the Office of Administrative Law Judges for hearing, but was remanded to the district director so that claimant could be provided with a complete pulmonary evaluation pursuant to 20 C.F.R §725.406. Director's Exhibits 19, 20, 24, 26. The case was subsequently assigned to Administrative Law Judge Larry S. Merck (the administrative law judge), who conducted a hearing on August 2, 2007. The administrative law judge issued a Decision and Order – Denial of Benefits on November 28, 2007, which is the subject of this appeal.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with law.[4] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The regulation at 20 C.F.R. §718.204(c) provides that a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Tennessee Consol.*

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[3] We affirm the administrative law judge's findings that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as these findings are neither prejudicial to claimant nor challenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-11. We affirm the administrative law judge's determination that claimant proved the existence of pneumoconiosis on the merits under 20 C.F.R. §718.202(a)(1) on the same grounds. *Id.*; Decision and Order at 21.

[4] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction 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*); Director's Exhibit 1.

Coal Co. v. Kirk, 264 F.3d 602, 611, 22 BLR 2-288 (6th Cir. 2001). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially 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); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

Under 20 C.F.R. §718.204(c), the administrative law judge initially set forth the portion of Judge Rudolf L. Jansen's 1999 Decision and Order denying benefits in which Judge Jansen determined that claimant did not establish that he was totally disabled due to pneumoconiosis. Decision and Order at 29-30. The administrative law judge then addressed the newly submitted opinions of Drs. Broudy, Dahhan and Baker. Decision and Order at 29-30; Director's Exhibits 8, 11, 26. The administrative law judge found that the opinions of Drs. Broudy and Dahhan, who indicated that coal dust exposure did not play any role in claimant's pulmonary impairment, were not persuasive in light of their failure to diagnose pneumoconiosis. Decision and Order at 30; Director's Exhibits 11, 26. With respect to Dr. Baker's opinion,[5] the administrative law judge stated:

> In this case, Dr. Baker opined that coal dust exposure was insignificant in causing [c]laimant's pulmonary impairment and was unsure if coal dust exposure caused any of [c]laimant's pulmonary disability. Accordingly, I find his opinion regarding total disability causation unreasoned and I grant it little weight.

Decision and Order at 31; Director's Exhibit 26. The administrative law judge further determined that the newly submitted evidence was entitled to substantial weight because "it represents [c]laimant's current respiratory condition," and concluded that "the weight of the evidence is not sufficient to establish that [c]laimant's totally disabling respiratory impairment was due to pneumoconiosis under [20 C.F.R.] §718.204(c)." Decision and Order at 31.

The administrative law judge's findings under 20 C.F.R. §718.204(c) are rational and supported by substantial evidence. Because the administrative law judge permissibly relied upon the newly submitted evidence to find total disability established pursuant to

[5] In his report dated December 15, 2005, Dr. Baker opined that claimant has a Class 3 respiratory impairment due primarily to cigarette smoking and stated that "any contribution from coal dust to his impairment would be minimal and insignificant." Director's Exhibit 26. Dr. Baker also stated that "[t]here may have been some minor contribution [from coal dust exposure] of perhaps 10 to 15% with 85 to 90% due to cigarette smoking, but there is no way to exactly partition this." *Id.*

20 C.F.R. §718.204(b)(2), the administrative law judge acted within his discretion in giving substantial weight to the same evidence on the issue of total disability causation. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 31. In addition, the administrative law judge's finding that the medical opinions of Drs. Broudy and Dahhan are insufficient to establish that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) is supported by substantial evidence, as both physicians indicated that claimant's totally disabling impairment is unrelated to pneumoconiosis. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000); *Cross Mountain, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). The administrative law judge's determination that Dr. Baker's opinion is insufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.204(c), is also supported by substantial evidence, as Dr. Baker alternately indicated that pneumoconiosis played an "insignificant" role in claimant's impairment, and that he could not identify the extent to which pneumoconiosis contributed to claimant's total disability. Director's Exhibit 26; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 398-90, 21 BLR 2-615, 2-629 (6th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We affirm, therefore, the administrative law judge's finding that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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 of entitlement. *See Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because claimant has failed to establish that he is totally disabled due to pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we must affirm the administrative law judge's denial of benefits. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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REGINA C. McGRANERY
Administrative Appeals Judge