BRB No. 99-0537 BLA

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

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Alvis L. Smith, Phelps, Kentucky, *pro se*.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikesville, Kentucky, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel[2], appeals the Decision and Order on

[1]Claimant is Alvis L. Smith, the miner, who filed his first application for benefits with the Social Security Administration on June 7, 1973. Director's Exhibit 34. This claim was finally denied on September 27, 1973. *Id.* Claimant filed a claim for benefits with the Department of Labor on August 18, 1987, which Administrative Law Judge Bernard J. Gilday denied in a Decision and Order dated November 20, 1990. The Board affirmed the denial on October 23, 1991. *Smith v. Kentland Elkhorn Coal Co.*, BRB No. 91-0585 BLA (Oct. 23, 1991)(unpub.). Claimant subsequently submitted additional evidence, which the

Remand (1995-BLA-1157) of Administrative Law Judge Paul H. Teitler 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). In the initial Decision and Order, the administrative law judge considered the newly submitted evidence and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against him and, consequently, a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered all of the evidence of record and found that claimant established that his pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (4). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 725.309, 718.202(a)(4) and 718.204(b), (c)(1). *Smith v. Kentland Elkhorn Coal Corp.*, BRB No. 97-0439 BLA (Dec. 5, 1997)(unpub.). On reconsideration, however, the Board vacated the administrative law judge's finding pursuant to Section 718.204(b) and remanded the case for the administrative law judge to determine whether claimant affirmatively established that pneumoconiosis is a contributing cause "of some discernible consequence to his totally disabling respiratory impairment" pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-203 (6th Cir. 1997). *Smith v. Kentland Elkhorn Coal Corp.*, BRB No. 97-0439 BLA (Sep. 3, 1998)(unpub.).

Department of Labor considered on May 19, 1992 and found insufficient to establish entitlement. Director's Exhibit 34. Claimant did not challenge this denial. Claimant filed the instant claim for benefits on February 14, 1994. Director's Exhibit 1.

[2]Susie Davis, a benefits counselor with the Kentucky Black Lung Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

In his Decision and Order on remand, the administrative law judge considered the medical opinion evidence and found that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.

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 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 into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any one of these requisite elements compels a denial of benefits. *See Anderson, supra*; *Baumgartner, supra*. Additionally, all elements of entitlement must be established by a preponderance of the evidence. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Further, the Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order for claimant to establish that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(b), claimant must affirmatively establish that his pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-203 (6th Cir. 1997).

In his previous Decision and Order, the administrative law judge acknowledged that the record contains the medical opinions of Drs. Fino, Broudy, Mettu, Sundaram, Branscomb, Jackson, Wright, Anderson, Myers, Dahhan and Lane, but stated that the reports submitted with the duplicate claim are the most recent and most probative of the miner's current condition. Decision and Order at 14. The administrative law judge adopted his previous findings, except as vacated by the Board, and considered the opinions of Drs. Sundaram and Mettu, the only opinions of record which support a finding of total disability due to pneumoconiosis, as well as the opinions of Drs. Broudy, Branscomb and Fino.[3]

[3] Drs. Broudy, Branscomb and Fino opined that claimant has a respiratory condition but

Decision and Order on Remand at 3-7.

Dr. Sundaram, whose credentials are not in the record, opined that claimant has coal workers' pneumoconiosis due to prolonged exposure to coal dust and that claimant has a "Class III" impairment under the "AMA guidelines." Director's Exhibit 9. Dr. Sundaram offered no further explanation of his opinion. *Id.* The administrative law judge acted within his discretion in assigning this opinion little weight because it "appears" that Dr. Sundaram based his opinion that claimant has pneumoconiosis solely on a positive x-ray when the administrative law judge found the x-ray evidence to be negative for the existence of pneumoconiosis and because his opinion regarding the degree of claimant's impairment is based on a pulmonary function study which was invalidated by Dr. Kraman, who is Board-certified in internal medicine and pulmonary disease. Decision and Order on Remand at 6; Director's Exhibits 7, 9; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Lafferty, supra; Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Dr. Mettu opined that claimant has chronic bronchitis, is disabled due to a respiratory impairment and that he has "pneumoconiosis which is caused by a pulmonary impairment, however, if there is complaint related to the cigarette smoking it is very difficult to defferniate [*sic*]." Director's Exhibits 10, 11. In his deposition, Dr. Mettu stated that he can not differentiate between the portion of claimant's pulmonary function impairment attributable to his smoking history and that which is attributable to his coal mine dust exposure. Director's Exhibit 31 at 22. Dr. Mettu further stated that either the smoking or the coal dust exposure could be the dominating factor with the other playing a minuscule part in causing claimant's impairment. Director's Exhibit 31 at 23. The administrative law judge rationally found that while Dr. Mettu's opinion is well-documented, his "statements regarding the causation of claimant's respiratory impairment are not specific enough to 'affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to [claimant's] totally disabling respiratory impairment'." Decision and Order on Remand at 6; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-203 (6th Cir. 1997); *Lafferty, supra; Clark, supra; Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988);

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does not suffer from pneumoconiosis and does not suffer from an occupationally acquired pulmonary impairment. Director's Exhibit 31; Employer's Exhibits 3, 4, 7. The administrative law judge assigned less weight to the opinions of Drs. Broudy, Branscomb and Fino, on causation, because their underlying premise, that the miner does not have pneumoconiosis, is not correct. Decision and Order on Remand at 6. Any error in the administrative law judge's weighing of the opinions of Drs. Broudy, Branscomb and Fino is harmless, however, because these opinions do not support a finding that claimant is totally disabled due to pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Campbell v. Director, OWCP, 11 BLR 1-16 (1987); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) and the denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge