BRB No. 03-0296 BLA

JUANITA I. McMURRY (Widow of RUPERT H. McMURRY	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 09/29/2003
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

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

I. John Rossi, West Des Moines, Iowa, for claimant.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2001-BLA-134) of Administrative Law Judge Gerald M. Tierney denying benefits on claims filed by the miner and the survivor 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).[1] The administrative law judge found seven and one-half years of qualifying coal mine employment, and based on the

[1]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.

date of filing, considered entitlement in both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718.[2] After determining that the miner's claim was a duplicate claim, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) as the evidence was insufficient to establish the existence of pneumoconiosis and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(c).[3] Decision and Order at 2-7. The administrative law judge further found with respect to the survivor's claim that because claimant failed to establish the existence of pneumoconiosis, entitlement thereunder was precluded. Decision and Order at 7. Accordingly, benefits were denied in both the miner's and survivor's claims. On appeal, claimant contends that the administrative law judge erred in failing to properly review all the evidence of record which would establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), erred in his length of coal mine employment determination and erred in failing to find the miner's total disability and death due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, conceding that claimant has established eight years of coal mine employment but urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[4]

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[2]Claimant is Juanita I. McMurry, the miner's widow. The miner, Rupert H. McMurry, filed his initial claim for benefits on December 12, 1979, which was denied on June 13, 1980. Director's Exhibit 22. The miner took no further action until he filed a second claim on June 29, 1992, which was denied by the district director on November 3, 1992. Director's Exhibit 23. The miner filed his third claim on July 19, 1995. Director's Exhibit 1. In a Decision and Order issued on December 31, 1998, Administrative Law Judge George P. Morin credited the miner with seven years of coal mine employment and found that the evidence was insufficient to establish either the existence of pneumoconiosis or disability causation, and thus a material change in conditions was not established. Director's Exhibit 29. On appeal, the Board vacated the denial of benefits and remanded the case to the district director for further evidentiary development pursuant to the request of the Director, Office of Workers' Compensation Programs (the Director), that the miner be provided with a complete pulmonary evaluation as required by the Act. Director's Exhibit 36. The miner died on April 22, 1999, and claimant filed a survivor=s claim on February 18, 2000, which was denied on July 18, 2000. Director's Exhibits 43, 50. Claimant subsequently requested a hearing on both claims. Director's Exhibit 51.

[3]The record indicates that the Director conceded that the evidence establishes the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Hearing Transcript at 6; Director=s Brief at 6; Director's Exhibit 24.

[4]The administrative law judge=s findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and the Director's concession that the miner is totally disabled pursuant to 20 C.F.R. ' 718.204(b)

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any one of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death.[5] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Peabody Coal Co. v. Director, OWCP, [Ricker]*, 182 F.3d 637, 21 BLR 2-664 (8th Cir. 1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Considering the newly submitted evidence, the

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are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Eighth Circuit as the miner was employed in the coal mine industry in the State of Iowa. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 23.

administrative law judge found that claimant failed to establish a material change in conditions at Section 725.309 (2000). Decision and Order at 7. The administrative law judge correctly noted that the initial claim for benefits was denied because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibits 22, 23; Decision and Order at 2, 7. The United States Court of Appeals for the Eighth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997).

Claimant initially argues that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant's Brief at 6-8. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In the present case, the administrative law judge rationally found that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). This evidence consisted of opinions by Drs. Jewett and Balkissoon. Dr. Jewett, in an opinion dated August 4, 1995, diagnosed status post lung resection for cancer, myocardial infarction and chronic bronchitis. In discussing the cause of the miner's chronic bronchitis, the physician opined that "most likely [the miner's] chronic exposure to cigarette smoke far supersedes his exposure to coal dust" and that the pneumonectomy "accounts for probably 20% of his respiratory impairment; his chronic bronchitis for 80%, and his previous MI doesn't seem to be a factor at this point." Director's Exhibits 12, 47. Dr. Jewett subsequently filed two letters in an attempt to clarify his opinion. The first, dated May 30, 2000, stated that the miner's seven years of coal mining experience "adversely has had no effect on his lungs" based on another review of the miner's history, physical examination findings, pulmonary function study and chest x-ray. Director's Exhibit 38. The second letter, dated June 9, 2000, opined that the miner's coal dust exposure accounts for 20% of his respiratory impairment, with 80% cause by smoking. Director's Exhibit 40. Dr. Balkissoon, in a report dated July 10, 2000, opined that the medical evidence did not establish pneumoconiosis, as while it was "possible that coal dust exposure may have contributed to some minor extent with regard to [the miner's] chronic obstructive lung disease, there is no

compelling evidence to support this," and therefore the lung disease was most consistent with the miner's smoking history.[6] Director's Exhibit 49.

In finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly concluded that Dr. Jewett's revised opinion, that coal dust exposure accounts for 20% of the miner's respiratory impairment, was insufficient to meet claimant's burden of proof as the physician did not provide an adequate foundation to support his conclusion. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Lafferty v. Cannelton Industries*, Inc., 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6; Director's Exhibits 12, 38, 40, 47. Additionally, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion by Dr. Balkissoon was equivocal and insufficient to establish that the miner's lung disease was significantly related to or substantially aggravated by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2)(b); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 6; Director's Exhibit 49. Moreover, a diagnosis of chronic obstructive pulmonary disease does not automatically result in the conclusion that the disease is pneumoconiosis pursuant to Section 718.202(a)(4), as a physician must relate the condition to the miner's coal mine employment. *See* 20 C.F.R. §718.201; *Trumbo*, 17 BLR 1-85; *Boyd*, 11 BLR 1-39; *Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984). As claimant makes no other specific challenge to the administrative law judge's findings with respect to the weighing of the medical opinion evidence, we affirm the administrative law judge's finding that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis, and thus insufficient to establish a material change in conditions, as it is supported by substantial evidence and is in accordance with law.[7] *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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[6]The administrative law judge also noted that the death certificate, signed by Dr. Hoch, attributed the cause of death to acute respiratory failure due to chronic obstructive pulmonary disease, but it did not provide the requisite causal nexus between the miner's respiratory disease and coal mine employment. Decision and Order at 6; Director's Exhibit 45.

[7]The administrative law judge properly concluded that as claimant failed to establish the existence of pneumoconiosis, claimant could not establish that the miner=s total disability

With respect to the survivor's claim, claimant contends that the administrative law judge erred in failing to find that the miner's death was due to pneumoconiosis. Claimant's Brief at 9-10. We disagree. As previously discussed, the administrative law judge rationally determined that the opinions of Drs. Jewett and Balkissoon were insufficient to establish the existence of pneumoconiosis. Although the record additionally contains the earlier opinions of Drs. Rasmussen[8] and McConville,[9] which were not addressed by the administrative law judge, any error is harmless as these reports are consistent with the other opinions of record. *See* Director's Exhibits 22, 23. Dr. Rasmussen, in a report dated March 12, 1980, diagnosed mild obstructive pulmonary disease and opined that the condition was not related to coal dust exposure, Director's Exhibit 22, thus the opinion is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.201; *Trumbo*, 17 BLR 1-85; *Boyd*, 11 BLR 1-39; *Jarrell*, 9 BLR 1-52; *Knizner*, 8 BLR 1-5; *Sweet*, 7 BLR 1-659; *Webb*, 6 BLR 1-1120. Dr. McConville, in a report dated July 21, 1992, diagnosed chronic obstructive and chronic restrictive pulmonary disease, and stated in a follow-up letter dated November 2, 1992, that the miner's "coal mine work might possibly have contributed to his problem," Director's Exhibit 23, which is clearly equivocal and thus insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(4). *Justice*, 11 BLR 1-91; *Campbell*, 11 BLR 1-16; *Snorton*, 9 BLR 1-106; *Carpeta*, 7 BLR 1-145; *Stanley*, 6 BLR 1-1157. Consequently, we

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was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); Decision and Order at 7.

[8]Dr. Rasmussen, in a report dated March 12, 1980, diagnosed mild obstructive pulmonary disease and opined that the condition was not related to coal dust exposure, Director's Exhibit 22.

[9]Dr. McConville, in a report dated July 21, 1992, diagnosed chronic obstructive and chronic restrictive pulmonary disease, and stated in a follow-up letter dated November 2, 1992 that:

> [the miner's] coal mine work might possibly have contributed to his problem, but obviously most of his dyspnea would relate to having chronic obstructive and chronic restrictive lung disease and with only one lung remaining. I guess it would be your job to determine as to how much the years of coal mining work would contribute to that problem, so consequently my opinion remains unchanged in looking at his x-rays and pulmonary function studies.

Director's Exhibit 23.

affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis, and that entitlement in the survivor's claim is precluded. *Trumbo,* 17 BLR 1-85; *Boyd,* 11 BLR 1-39; Decision and Order at 7.

Finally, claimant contends that the Director failed to develop evidence which meets the requirements of Section 718.205. Claimant's Brief at 10. Contrary to claimant's contention, the Director does not have an affirmative burden to prove the elements of entitlement. Rather, claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See* 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the evidence of record is insufficient to establish the existence of pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in the miner's and the survivor's claims pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Harvey*, 109 F.3d 445*; Trumbo*, 17 BLR 1-85; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell*, 11 BLR 1-16. Consequently, we affirm the administrative law judge's denial of benefits in both claims, and need not address claimant's arguments regarding the administrative law judge's length of coal mine employment determination.[10]

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

SO ORDERED.

ROY P. SMITH

[10]Contrary to claimant=s contention, the criteria at 20 C.F.R. §718.203 are not used to presume that any condition the miner suffers is pneumoconiosis. Rather, once pneumoconiosis is proven, the relevant criteria are used to establish that the pneumoconiosis arose out of coal mine employment. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge