BRB No. 05-0221 BLA

RALPH E. HANKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROYAL COAL COMPANY	)	DATE ISSUED: 09/20/2005
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Decision and Order – Awarding Benefits (03-BLA-5777) of Administrative Law Judge Daniel L. Leland with respect to 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). Claimant filed his subsequent claim

on March 23, 2001.[1] Director's Exhibit 2. The administrative law judge initially determined that claimant established the existence of coal workers' pneumoconiosis, which was one of the elements of entitlement that was previously adjudicated against claimant in his prior claim. The administrative law judge thus found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further determined that the weight of the record evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded 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, and in accordance with applicable law. 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).

Carrier's sole argument on appeal is that the administrative law judge improperly credited the opinions of Drs. Rasmussen and Mullins in finding that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief.

[1] Claimant first filed a claim for benefits on April 13, 1990, which was denied by the district director on September 28, 1990. Director's Exhibit 1.

[2] The administrative law judge found that claimant worked at least ten years in coal mine employment. Decision and Order at 7. On the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis based on the preponderance of the positive x-ray evidence and credible medical opinions of Drs. Rasmussen and Mullins. Decision and Order at 6-7. In addressing the issue of total disability, the administrative law judge found that all of the pulmonary function study evidence was qualifying for total disability, and that claimant established his total respiratory impairment based on the opinions of Drs. Rasmussen and Zaldivar, who were in agreement that claimant did not retain the respiratory capacity to perform heavy manual labor as required by claimant's last coal mine job. Decision and Order at 7-8. The administrative law judge's finding as to length of coal mine employment and his findings at 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), and 725.309 are affirmed as those findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

After consideration of the administrative law judge's Decision and Order, and the issues and arguments raised by the parties on appeal, we affirm as supported by substantial evidence the administrative law judge's award of benefits. We specifically reject employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Mullins in finding that claimant is totally disabled due to pneumoconiosis.

Carrier maintains that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that coal dust exposure significantly contributed to claimant's totally disabling respiratory impairment, because Dr. Rasmussen did not specifically discuss, in his report, whether claimant was also totally disabled by a back injury. Carrier's Brief at 3. Carrier's argument is without merit. The United States Court of Appeals for the Fourth Circuit has specifically stated that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis."[3] *Jewell v. Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). The proper issue at 20 C.F.R. §718.204(c) concerns the etiology of claimant's respiratory or pulmonary disability and not the extent of his disability due to a non-respiratory condition such as a back injury. *See Id*; 20 C.F.R. §718.204(a).

In this case, the administrative law judge weighed four medical opinions relevant to whether claimant established his total respiratory or pulmonary disability due to pneumoconiosis. Citing to *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002), the administrative law judge found the opinions of Drs. Daniel and Zaldivar to be of little probative value on the issue of disability causation because Dr. Daniel's examination was dated 1990 and addressed claimant's disability for work only in that year, and (against the findings of the administrative law judge) "Dr. Zaldivar's more recent examination did not result in a diagnosis of pneumoconiosis." Decision and Order at 8; *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Director's Exhibits 1, 21. In contrast, the administrative law judge considered Dr. Rasmussen's opinion to be

[3] Because claimant's last coal mine employment occurred in West Virginia, this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

probative evidence, as he found that Dr. Rasmussen provided a reasoned and documented opinion that claimant was totally disabled due in significant part to coal dust exposure. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Claimant's Exhibit 8; Decision and Order at 8-9. The administrative law judge further noted that Dr. Rasmussen's opinion was corroborated by Dr. Mullins' diagnosis that half of claimant's disability was due to pneumoconiosis.[4] Director's Exhibit 8; Decision and Order at 8-9. Because substantial evidence supports the administrative law judge's determination that claimant's respiratory disability is due to pneumoconiosis, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). We therefore affirm the administrative law judge's finding that claimant established his entitlement to benefits.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[4] Carrier does not challenge the weight the administrative law judge accorded the medical opinions of Drs. Zaldivar and Daniel at 20 C.F.R. §718.204(c). Although carrier maintains that Dr. Mullins' opinion is not reasoned with respect to disability causation, any error committed by the administrative law judge in weighing Dr. Mullins' opinion at Section 718.204(c) is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since Dr. Rasmussen's opinion standing alone constitutes substantial evidence for the administrative law judge's finding that claimant established total disability due to pneumoconiosis.