BRB No. 06-0356 BLA

JOHN NED SUTTON AND VERONICA JOLENE CONFER, Executors of Estate and o/b/o NED M. SUTTON	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 09/28/2006
KENNETH L. POLLOCK, INCORPORATED	)	
and	)	
ROCKWOOD INSURANCE COMPANY, Insolvent company, through	)	
COMMONWEALTH OF PENNSYLVANIA SECURITY FUND and INSERVCO INSURANCE SERVICES	)	
Employer/Carrier-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Amending Caption of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits and Amending Caption (04-BLA-6206) of Administrative Law Judge Janice K. Bullard rendered on a subsequent claim[2] 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). Based on claimant's July 15, 2003 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the miner with 7.4 years of coal mine employment, based on the parties' stipulation. Decision and Order at 5; Hearing Transcript at 14. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant established the existence of pneumoconiosis. 20 C.F.R. §718.202(a); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Consequently, the administrative law judge found that claimant demonstrated one of the elements of entitlement previously adjudicated against him and, therefore, considered all of the evidence of record to determine entitlement to benefits. Considering the record as a whole, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and also that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). However, she found the evidence failed to establish that claimant's pneumoconiosis was due to his coal mine employment pursuant to 20 C.F.R. §718.203(c) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in denying benefits, stating that he submitted evidence sufficient to establish that his pneumoconiosis arose out of coal mine employment and that his total disability was due to pneumoconiosis. Employer has not responded to claimant's appeal. The Director, Office

[1] Claimant, the miner, died on March 9, 2005, subsequent to the formal hearing. By Order dated July 12, 2005, the Executors of claimant's estate were substituted for claimant in this claim.

[2] The miner's initial claim for benefits was filed on November 8, 1996, which was denied by the district director on December 12, 1996, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. No further action was taken on this claim. The miner filed a second application for benefits on February 18, 1998, which was denied by Administrative Law Judge Ainsworth H. Brown in a Decision and Order issued on March 9, 2000. Director's Exhibit 1. In denying benefits, Judge Brown found that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *Id*. No appeal of this decision was taken.

of Workers' Compensation Programs, has indicated that he will not file a substantive response to claimant's appeal.[3]

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).

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; *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.203(c), a living miner with fewer than ten years of coal mine employment must prove, by competent evidence, that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c); *Wisniewski v. Director, OWCP*, 929 F. 2d 952, 957, 15 BLR 2-57, 2-67 (3d Cir. 1991); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). An inference that claimant's pneumoconiosis is related to his coal mine employment may be made only in the absence of other exposures. *Wisniewski*, 929 F.2d at 959; 15 BLR at 2-70; *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(Decision and Order on Reconsideration)(*en banc*).

Herein, the administrative law judge found that, in addition to the miner's coal mine employment, the record reflects that the miner worked in a job that exposed him to asbestos. Decision and Order at 16. Addressing the medical opinion evidence, the administrative law judge found that the medical opinions of Drs. Cali, Levinson, and Talati are insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment. Decision and Order at 16. Specifically, the administrative law judge found that Dr. Cali opined that claimant's anthrasilicosis was due to "his history of

[3] The parties do not challenge the administrative law judge's crediting of 7.4 years of coal mine employment, that claimant established one of the elements previously adjudicated against him pursuant to 20 C.F.R. §725.309(d), or her findings that claimant established the existence of pneumoconiosis, 20 C.F.R. §718.202(a), and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2). We, therefore, affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

exposure to dust in his previous occupations." Decision and Order at 16; Claimant's Exhibit 7 at 19. Because Dr. Cali, in addition to noting a 7.5 year history of coal mine employment, also stated that the miner was exposed to asbestos, Claimant's Exhibits 3, 7 at 8, 30, the administrative law judge found that Dr. Cali's additional statement that the miner's x-ray was indicative of the type of pneumoconiosis related to coal dust exposure, was entitled to little weight. Decision and Order at 16. Likewise, the administrative law judge found the opinions of Dr. Levinson entitled to little weight because the physician did not diagnose the existence of pneumoconiosis, and Dr. Talati entitled to little weight because he based his opinion on a coal mine employment history greater than that credited by the administrative law judge. *Id*; Director's Exhibit 7; Employer's Exhibits 1, 2. Consequently, the administrative law judge found that the record is not "sufficiently competent to demonstrate that Claimant has established that his pneumoconiosis arose out of his coal mine employment." Decision and Order at 16.

In challenging the administrative law judge's finding, claimant contends generally that he submitted evidence sufficient to establish that his pneumoconiosis was due to his coal mine employment. Claimant's Brief at 7-8. In particular, claimant sets forth the physical findings that he alleges are necessary to diagnose asbestosis and argues that Dr. Cali did not find any of these physical findings and, therefore, his opinion should be considered sufficient to establish that the miner's pneumoconiosis arose out his coal mine employment. Claimant's Brief at 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Claimant, in challenging the administrative law judge's Section 718.203(c) finding states that the administrative law judge is essentially requiring claimant to prove that his asbestos exposure was not the cause of his pneumoconiosis. Claimant's Brief at 7. Claimant states that because Dr. Cali did not discuss the miner's exposure to asbestos, he did not believe that this exposure was a significant or even negligible aspect of the miner's pneumoconiosis and, therefore, this opinion is sufficient to establish the causal relationship between the miner's pneumoconiosis and coal mine employment. Claimant's Brief at 8. However, Section 718.203(c) requires that claimant prove, by competent evidence, the relationship between his pneumoconiosis and coal mine employment, especially in light of other possible exposures. §718.203(c); *Wisniewski*, 929 F.2d at 959; 15 BLR at 2-70. In light of her finding of claimant's additional occupational exposure to asbestos, the administrative law judge reasonably exercised her discretion in finding that the medical opinion of Dr. Cali, stating that the miner's

anthrasilicosis was due to his "history of exposure to dust in his previous occupations," is insufficient to establish claimant's burden at Section 718.203(c). *Id*. The administrative law judge noted that Dr. Cali explained that claimant's chest x-ray showed opacities of a type indicative of pneumoconiosis related to coal dust exposure but reasonably accorded Dr. Cali's opinion little weight because he was not a radiologolist and the record indicates claimant was also exposed to asbestos dust. *Id*.

In addition, because claimant does not challenge the administrative law judge's finding that the opinions of Drs. Levinson and Talati are insufficient to establish the causal relationship pursuant to Section 718.203(c), we affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's finding that claimant has failed to affirmatively establish the causal relationship between his pneumoconiosis and coal mine employment. 20 C.F.R. §718.203(c).

Since claimant failed to establish causal relationship between his coal mine employment and pneumoconiosis pursuant to Section 718.203(c), a necessary element of entitlement pursuant to Part 718, an award of benefits is precluded and, therefore, we need not address claimant's contentions regarding the administrative law judge's weighing of the evidence under Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Amending Caption 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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BETTY JEAN HALL
Administrative Appeals Judge