

BRB No. 06-0696 BLA

LAURA W. HELVEY, obo)
HASKELL VARNEY, Deceased Claimant)
)
Claimant-Petitioner)
)
v.)
)
EASTERN COAL CORPORATION) DATE ISSUED: 04/27/2007
)
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5914) of Administrative Law Judge Linda S. Chapman 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). The administrative law judge found that the parties stipulated to twenty-four years and five months of qualifying coal mine employment, that the employer was the responsible operator, and that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 3; Hearing Transcript at 15-17. Based on the date of filing, the administrative law judge adjudicated

the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 9. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 11-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and in failing to find total disability causation established pursuant to 20 C.F.R. §718.204(c). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this claim.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish 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, 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

¹ The miner filed his claim for benefits on November 2, 2001, which was denied by the district director on May 30, 2003. Director's Exhibits 2, 37. The miner died on June 7, 2003. Director's Exhibit 45. Claimant, the miner's daughter, subsequently requested, as the miner's representative, a hearing on the miner's claim before the Office of Administrative Law Judges. Director's Exhibit 45.

² The administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

contains no reversible error.³ Contrary to claimant's general argument, the administrative law judge rationally found that the evidence of record was insufficient to establish that the miner's total disability was due to pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge noted that the parties stipulated that the miner was totally disabled and that all of the reporting physicians agreed that the miner's pulmonary condition was severe. Decision and Order at 15. The administrative law judge, therefore, considered the relevant medical opinions with respect to disability causation, noting that Dr. Baker opined that the miner's disabling respiratory impairment was due to coal dust exposure, but that Dr. Hussain did not provide any etiology for the miner's disabling respiratory impairment, and that Drs. Rosenberg and Broudy opined that the miner's disabling respiratory impairment was not due to pneumoconiosis or coal dust exposure. Decision and Order at 15; Director's Exhibits 8, 9; Employer's Exhibits 1, 4-6. The administrative law judge properly concluded, therefore, that the opinion of Dr. Baker on disability causation was outweighed by the opinions of Drs. Rosenberg and Broudy, as their opinions were well reasoned and supported by the objective evidence of record.⁴ *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry*, 9 BLR at 1-2-3; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Additionally, claimant's assertion that he is entitled to a presumption that the total disability is due to coal dust exposure lacks merit. Claimant's Brief at 6. Claimant is not entitled to a presumption of disability causation as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R.

³ The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibits 3, 5, 6. Accordingly, 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 (1989)(*en banc*).

⁴ Dr. Rosenberg, a pulmonary and occupational medicine specialist, opined, on the basis of examination, history, x-ray, pulmonary function study, and blood gas study, that claimant's total respiratory disability was due to sleep apnea and thymoma with pleural effusion. Employer's Exhibit 4. Dr. Broudy, who was Board-certified in internal and pulmonary medicine reviewed the miner's records, concluding that the miner's total respiratory disability was due to smoking induced chronic obstructive airway disease, malignant tumor, and radiation therapy, not coal dust exposure. Employer's Exhibit 6.

§§718.304, 718.305(e); Director's Exhibit 2; *see* Decision and Order at 2, 9, 11; *Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *See Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

Finally, we reject claimant's assertion that pneumoconiosis is a progressive and irreversible disease and thus his ability to perform his usual or comparable and gainful work is adversely affected. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-7 n.8 (2004). Consequently, as claimant makes no other specific challenge to the administrative law judge's credibility determinations with respect to the medical opinion evidence pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and is in accordance with law. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *White*, 23 BLR at 1-7; *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish total disability due to pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded, and we need not address claimant's contentions with respect to the administrative law judge's additional findings pursuant to 20 C.F.R. §718.202(a). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge