

BRB No. 05-0627 BLA

STALLARD T. ROWE)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 01/31/2006
 LONG TRUCKING COMPANY)
)
 and)
)
 EMPLOYERS INSURANCE OF WAUSAU)
)
 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Stallard T. Rowe, Elkhorn City, Kentucky, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (03-BLA-6266) of Administrative Law Judge Thomas F. Phalen, Jr. 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 over seventeen years of coal mine employment¹ and that employer was the responsible operator. Decision and Order at 3-5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision and Order at 9-10. The administrative law judge found that although claimant established that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis or that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), §718.204(c). Decision and Order at 11-15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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 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*).

As noted by the administrative law judge, claimant alleged between thirteen and nineteen years of coal mine employment. Decision and Order at 3-4; Director's Exhibits

¹ The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibits 3, 7. 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*).

² Claimant filed his claim for benefits on September 28, 2001, which was denied by the district director on April 7, 2003. Director's Exhibits 2, 19. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 21.

2, 5; Hearing Tr. at 30. Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003)(McGranery, J., concurring and dissenting). In the case at bar, the administrative law judge relied upon claimant's testimony and his Social Security earnings records to find that the length of claimant's coal mine employment was 17.99 years. Decision and Order at 3-5. The administrative law judge's analysis was reasonable and substantial evidence supports his finding. *See Clark*, 22 BLR at 1-280-81; Director's Exhibits 2, 5, 7; Hearing Tr. at 14-20, 30-37. It is therefore affirmed.

On the merits of entitlement pursuant to Section 718.202(a)(1), the administrative law judge accurately noted that there were no positive x-ray readings for the existence of pneumoconiosis. Decision and Order at 11; Director's Exhibit 11; Employer's Exhibit 4. We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by x-ray evidence pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), the administrative law judge correctly observed that the record contains no biopsy evidence, and pursuant to Section 718.202(a)(3), properly concluded that the presumptions listed at subsection (a)(3) are not applicable to this claim.³ We therefore affirm his finding that the existence of pneumoconiosis was not established pursuant to Sections 718.202(a)(2) or (a)(3).

Pursuant to Section 718.202(a)(4), the administrative law judge found that since neither medical opinion of record diagnosed claimant with pneumoconiosis, the existence of pneumoconiosis was not established by medical opinion evidence. Substantial evidence supports the administrative law judge's finding. Dr. Hussain diagnosed claimant with emphysema due to tobacco abuse and opined that he has a moderate impairment that is unrelated to his coal mine employment. Director's Exhibit 11; *cf.* 20 C.F.R. §718.201(b)(requiring that a chronic respiratory or pulmonary impairment be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" to be considered pneumoconiosis). Similarly, Dr. Rosenberg concluded that claimant does not have pneumoconiosis and suffers from chronic obstructive

³ The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 2. Lastly, this claim is not a survivor's claim filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is inapplicable.

pulmonary disease unrelated to coal mine employment. Employer's Exhibit 4. Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Because claimant failed to establish the existence of pneumoconiosis, a necessary element of entitlement in a miner's claim under Part 718, we need not address the administrative law judge's additional findings pursuant to Section 718.204(c), and we affirm the denial of benefits. *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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge