BRB No. 06-0271 BLA

WILLIE CRUSENBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABM COAL COMPANY	)	
	)	DATE ISSUED: 11/24/2006
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Willie Crusenberry, Pennington Gap, Virginia, *pro se*.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-6580) of Administrative Law Judge Daniel F. Solomon on 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). The administrative law judge noted that the parties stipulated that the miner had proven 13.13 years of coal mine employment. Decision and Order at 3, n. 2. Based on the date of

filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1]

[1] Claimant filed his initial claim for benefits on December 16, 1993, which was denied by the district director on May 27, 1994, because claimant failed to establish any element of entitlement. Director's Exhibits 49-1, 13. After an informal conference call, the district director determined that claimant was totally disabled, but denied the claim because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 49-28. Claimant requested a formal hearing on October 11, 1994, which was held before Administrative Law Judge Edward J. Murty, Jr. on May 5, 1995. Director's Exhibits 49-29, 33. On June 16, 1995, Judge Murty issued a Decision and Order finding that claimant had a totally disabling respiratory disability, but Judge Murty denied the claim based on claimant's failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 49-34. The Benefits Review Board affirmed Judge Murty's denial of benefits on January 31, 1996, based on claimant's failure to establish the existence of pneumoconiosis. *Crusenberry v. ABM Coal Co.*, BRB No. 95-1849 BLA (Jan. 31, 1996) (unpublished); Director's Exhibit 49-45.

Claimant filed a duplicate claim on March 18, 1997, which was denied by the district director on September 3, 1997, because claimant failed to establish any element of entitlement, and thus a material change in conditions. Director's Exhibit 1 at Director's Exhibits 1, 17. Claimant requested a formal hearing on September 25, 1997. *Id.* at Director's Exhibit 18. On July 6, 1998, the district director awarded benefits in a Proposed Decision and Order Memorandum of Conference. Director's Exhibit 38. Employer requested a formal hearing on October 6, 1998, and the case was transferred to the Office of Administrative Law Judges on November 23, 1998. *Id.* at Director's Exhibit 46. A formal hearing was held before Administrative Law Judge Pamela Lakes Wood on April 28, 1999, and on May 11, 2000, Judge Wood issued a Decision and Order denying benefits. Judge Wood found that a material change in conditions had been established as the newly submitted evidence established the existence of pneumoconiosis. Director's Exhibit 1. After review of the merits, Judge Wood found that although claimant had established the existence of pneumoconiosis arising out of coal mine employment and total disability due to a pulmonary or respiratory condition, claimant failed to establish total disability due to pneumoconiosis. *Id.* Claimant filed an appeal with the Benefits Review Board on June 5, 2000. *Id.* The Board affirmed the denial of benefits by Judge Wood in a Decision and Order on June 29, 2001. *Crusenberry v. ABM Coal Co.*, BRB No. 00-0907 BLA (June 29, 2001) (unpublished).

On May 10, 2002, claimant filed a motion to withdraw his claim. *Id.* The district director granted claimant's motion by Proposed Decision and Order dated May 15, 2002. *Id.* The employer was advised that the claim was administratively closed on May 6, 2002. *Id.*

In considering this subsequent claim, the administrative law judge concluded that the newly submitted evidence was insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), the sole element of entitlement previously adjudicated against claimant. The administrative law judge therefore determined that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

Employer responds to claimant's *pro se* appeal, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in finding Dr. Baker's opinion insufficient, as a matter of law, to establish disability causation, and urges the Board to vacate and remand the case for further review.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The regulation at 20 C.F.R. §725.309(d) provides in pertinent part:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be

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Claimant filed the current claim for benefits on June 5, 2003. Director's Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits on April 12, 2004. Director's Exhibit 31. Employer requested a formal hearing on April 23, 2004. Director's Exhibit 34. A formal hearing was held on April 5, 2005.

> considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final.

20 C.F.R. §725.309(d). The prior denial in this case was based on claimant's failure to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant must, therefore, establish total disability due to pneumoconiosis based on the new evidence in order to have the instant subsequent claim considered on the merits. *See Id.* The administrative law judge found that the new evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and, thus, claimant did not meet his burden at 20 C.F.R. §725.309(d).

The report by Dr. Baker is the only new medical opinion of record that is relevant to the issue of disability causation at Section 718.204(c).[2] In his report dated July 15, 2003, Dr. Baker diagnosed 1) coal workers' pneumoconiosis, category 1/0 based on abnormal chest x-ray and coal dust exposure due to coal dust exposure, 2) chronic bronchitis based on history of cough, sputum production, and wheezing due to coal dust exposure/cigarette smoking, 3) chronic obstructive pulmonary disease with severe obstructive defect based on pulmonary function testing due to coal dust exposure/cigarette smoking, 4) hypoxemia based on blood gas study due to coal dust exposure/cigarette smoking, and 5) ? ischemic heart disease based on history due to ? arteriosclerotic heart disease. Director's Exhibit 10. Dr. Baker opined that claimant's impairment was severe with decreased FEV1, decreased PO2, chronic bronchitis and coal workers' pneumoconiosis, category 1/0. *Id.* He found that each diagnosis contributed fully to claimant's impairment. *Id.* Dr. Baker found that claimant did not have the

[2] While the administrative law judge also considered the new opinions and treatment notes of Dr. Cooperstein, and the treatment notes of Dr. Smiddy and Karen Stallard, R.N.C.S., F.N.P., these opinions and notes document diagnoses of, and treatment for lung disease, but do not contain evidence relevant to disability causation. Thus, the administrative law judge erred in confusing the issues and evidence of disease causation at Section 718.203 with disability causation at Section 718.204(c).

The administrative law judge excluded the new medical opinions of Drs. Castle and Dahhan as the physicians improperly relied on evidence that was not admitted into the record. 20 C.F.R. §§725.414(a)(3)(i), 725.456(d).

respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust–free environment based on his FEV1 of 28%. *Id.*

The administrative law judge found that Dr. Baker's opinion was insufficient to establish causation at Section 718.204(c). Decision and Order at 14. The administrative law judge stated that, "When asked if the claimant's pulmonary impairment was related to pneumoconiosis or if it had another etiology, Dr. Baker responded with 'cigarette smoking' and 'coal dust exposure,' in that order. He did not offer any percentage as to which was the more substantial cause, and I am unable to make this determination." *Id.* The Director contends that the administrative law judge erred in finding that Dr. Baker's determination that claimant's totally disabling impairment was due to both cigarette smoking and coal dust exposure is insufficient to establish disability causation pursuant to Section 718.204(c).[3] The Director specifically contends that the administrative law judge erred in finding Dr. Baker's opinion unclear as to "whether smoking or pneumoconiosis was the 'substantial contributor'" in claimant's disability, and thus, insufficient to establish causation. Director's Brief at 2.

In *Adams v. Director, OWCP,* 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the United States Court of Appeals for the Sixth Circuit[4] held that claimant must affirmatively establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis. As the Director notes,

> In *Cross Mountain v. Ward,* 93 F.3d 211, 218 (6th Cir. 1996), the Sixth Circuit Court of Appeals considered a Dr. Baker opinion identical to the one in the instant case: the court observed that the doctor "indicated that

[3] 20 C.F.R. §718.204(c)(1)(i), (ii) provides, in relevant part, that "a miner shall be considered totally disabled due to pneumoconiosis, if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

[4] The Board has held that, in order to establish consistency in determining the applicable law in cases before the Board, it will apply the law of the United States Court of Appeals for the circuit in which the miner most recently performed coal mine employment. Because claimant's most recent coal mine employment took place in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit in this case. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

> claimant's 'impairment [was] due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history.'" The court concluded the opinion satisfied the Act's "due to" requirement because the criterion was met as long as the condition was "at least in part" due to pneumoconiosis. Another Sixth Circuit case, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), is also on point. There, the doctors reported that the miner's breathing defect could be due to either smoking or coal mine work. The judge found the opinions to be legally insufficient to establish the requisite connection but the court disagreed:
>
> > Under the circumstances, [the doctors' diagnoses] can be viewed as tantamount to a finding that both coal dust exposure and smoking were operative factors and that it was impossible to allocate blame between them. However, under the statutory definition of pneumoconiosis [- a dust disease "arising out of coal mine employment" -], [the miner] was not required to demonstrate that coal dust was the *only* cause of his current respiratory problems. He needed only to show that he has a chronic respiratory and pulmonary impairment "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R.§718.201. It is sufficient that [the miner's] exposure to [c]oal mine employment contributed "at least in part" to his pneumoconiosis.
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> *Cornett*, 227 F.3d at 576. Accordingly, the court remanded for further consideration of the doctors' opinions.

Director's Brief at 2. (footnote omitted).

Dr. Baker's finding that claimant's totally disabling respiratory impairment was due to both cigarette smoking and coal dust exposure establishes that part of claimant's impairment was due to coal dust exposure. Thus, as the Director contends, Dr. Baker's opinion may be sufficient to satisfy the regulatory requirement at Section 718.204(c), as it establishes that claimant's impairment was caused "at least in part", by coal dust exposure arising out of coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-10 (6th Cir. 2000); *Cross Mountain, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). Moreover, the standard enunciated in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-80 (6th Cir. 1997), that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability, may also be satisfied because, as noted by the Director, Dr. Baker gave no indication that the connection [between disability and pneumoconiosis] was de minimus.

Based on the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(c) and remand the case for a reweighing of the relevant medical evidence. On remand, the administrative law judge must determine whether the new medical opinion evidence of record establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and therefore establishes a change in the sole applicable condition of entitlement. If so, the administrative law judge must then consider all the evidence of record pursuant to 20 C.F.R. Part 718 on the merits of the instant subsequent claim. *See* 20 C.F.R. §725.309(d).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

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