BRB No. 02-0367 BLA

BILLY E. TIBBS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Billy E. Tibbs, Oakwood, Virginia, *pro se*.

Ashley M. Harman (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (01-BLA-0495) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a claim[2] filed pursuant to the provisions of Title IV

[1]Ron Carson, Black Lung Program Director, of Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. By letter dated February 21, 2002, the Board indicated that it would consider claimant to be representing himself on appeal. *Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order).

[2]Contrary to the administrative law judge's indication, *see* Decision and Order at 3, 4, 19, this case does not involve a duplicate claim. Claimant filed the instant claim

of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[3] The administrative law judge noted the parties' stipulation to twenty-seven years of coal mine employment. The administrative law judge, considering all the evidence of record on the merits of the claim, found that the evidence fails to establish the existence of pneumoconiosis under 20 C.F.R.

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on November 17, 1998. Director's Exhibit 1. The district director denied the claim on March 11, 1999, and on October 29, 1999 subsequent to a conference held on July 29, 1999. Director's Exhibits 18, 19, 34. On October 19, 2000, claimant timely requested modification of the district director's denial and submitted additional evidence. Director's Exhibit 36. The district director denied claimant's request for modification on November 30, 2000, and transferred the case to the Office of Administrative Law Judges pursuant to claimant's December 4, 2000 request for a hearing. Director's Exhibits 42, 44, 46. A hearing was held before the administrative law judge on July 24, 2001. The administrative law judge's ensuing Decision and Order dated January 25, 2002 is the subject of the instant appeal.

[3]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

§718.202(a)(1)-(4). The administrative law judge also found that the record evidence fails to establish that claimant is totally disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(c).[4] The administrative law judge further determined that any respiratory disability that claimant may have is not due to pneumoconiosis but to "his other abnormalities, i.e. his musculoskeletal disease, particularly in his low back." Decision and Order at 19. Accordingly, benefits were denied. Employer, in response to claimant's appeal, urges the Board to affirm the administrative law judge's denial of benefits on the merits of the claim. Employer contends that the administrative law judge properly found that the evidence of record fails to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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. *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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We affirm the administrative law judge's denial of benefits on the merits of the claim as substantial evidence supports his finding that even if claimant had established the existence of pneumoconiosis, the evidence fails to establish that claimant is totally disabled by it. *See* Decision and Order at 18. Under the revised regulation at 20 C.F.R. §718.204(c)(1), claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). The administrative law judge considered the evidence under the former regulation at 20 C.F.R. §718.204(b) (2000) and pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

BLR 2-225 (4th Cir. l990)(claimant must establish that his pneumoconiosis is a contributing cause of his totally disabling respiratory or pulmonary impairment). The administrative law judge properly accorded less weight to Dr. Sutherland's report, the only medical opinion to support claimant's burden on disability causation at 20 C.F.R. §718.204(c). *See* discussion, *infra*. Accordingly, a remand of the case to the administrative law judge for application of the revised regulation at 20 C.F.R. §718.204(c) is not mandated.

Drs. Forehand, McSharry, Hippensteel, Castle and Jarboe opined that claimant is not totally disabled due to pneumoconiosis and that claimant's respiratory impairment, if any, is due to his orthopaedic, skeletal or musculoskeletal abnormalities. Director's Exhibits 14, 28, 43, Employer's Exhibits 3, 4, 8. The administrative law judge correctly noted that only Dr. Sutherland concluded that claimant has a respiratory impairment caused by his exposure to coal mine dust. *See* Director's Exhibit 36. Dr. Sutherland, in his report dated October 4, 2000, stated:

> In my opinion, the patient's multiple years of exposure to coal dust with exposure to dusty environments has produced symptoms on physical examination and radiographic evaluation that indicates the patient has chronic obstructive pulmonary disease which is both restrictive and obstructive as a direct result of pneumoconiosis. This pneumoconiosis has been caused by direct exposure to coal dust.
>
> The patient has disability associated with chronic emphysema. Any further exposure to dusty environments or dampness will cause further and irreversible changes to the patient's pulmonary status.

Director's Exhibit 36.

By letter dated November 15, 2000, the district director asked Dr. Sutherland to clarify his opinion. The district director stated, in pertinent part:

> In your letter dated 10/4/00 you stated that the patient has disability associated with chronic emphysema. Is Mr. Tibbs['s] disability based on coal workers' pneumoconiosis?
>
> []
>
> We are requesting your reasoned medical opinion with rational[e], given the negative reread of the 8/7/00 x-ray and the unacceptable PFS dated 10/17/00, as to whether your diagnosis meets the definition of pneumoconiosis which is defined by law as "any chronic dust disease of the lung and its sequelae,

> including respiratory and pulmonary impairments arising out of coal mine employment"?

Director's Exhibit 40.

Dr. Sutherland responded, in a letter dated November 22, 2000, that his office notes of August 3, 2000 and August 7, 2000 "were related to a diagnosis of chronic bronchitis and emphysema." Director's Exhibit 41. He also indicated that claimant's chest x-ray was not normal and that the only rational cause of the changes seen on x-ray "would be [claimant's] multiple years exposure to fine dust products associated with multiple years in the coal mines." *Id.* Dr. Sutherland added:

> It would be difficult to confirm the patient having pneumoconiosis without a lung biopsy. On physical examination, the patient has severe wheezing and shortness of breath. The patient's lung sounds indicate restrictive motion of the lungs that would be indicated as a direct result of his exposure to coal dust.
>
> My opinion [is] that there is [sic] abnormal findings on the chest x-ray. The only cause and effect of the changes would be the patient's multiple years exposure to dusty environment. The patient on physical examination does have obvious lung sounds indicative of chronic obstructive pulmonary disease.

Id.

The administrative law judge noted the fact that only Dr. Sutherland opined that claimant has a respiratory impairment caused by his exposure to coal dust, and found that as such, "there is an astute reason to impeach Dr. Sutherland's medical opinion." Decision and Order at 19. The administrative law judge also found that Dr. Sutherland, when questioned, offered no medical findings to justify the "causal relationship,"[5] and had lesser credentials than the five physicians who rendered contrary opinions, namely Drs. Forehand, McSharry, Hippensteel, Castle and Jarboe. *Id.* The administrative law judge thereby properly accorded less weight to Dr. Sutherland's opinion because he found that it lacks persuasive explanation, *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985), and is outweighed by the contrary opinions rendered by the other, better qualified physicians of record, *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).[6]

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[5]In a footnote, the administrative law judge stated that Dr. Sutherland, in his November 22, 2000 report "deduces that Claimant's lung sounds indicate restrictive motion of the lungs that would be indicated as a direct result of his exposure to coal dust (DX 41)." Decision and Order at 19 n.20.

[6]The administrative law judge noted that Dr. Sutherland is neither a B reader nor a

Based on the foregoing, we hold that the administrative law judge's finding that the evidence of record fails to establish total disability due to pneumoconiosis is rational, supported by substantial evidence and in accordance with law, and we affirm it. Because claimant has not met his burden to establish total disability due to pneumoconiosis, an essential element of entitlement, *see* 20 C.F.R. §718.204(b), we affirm the administrative law judge's denial of benefits on the merits of the instant claim as a finding of entitlement is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We, therefore, need not consider the administrative law judge's additional findings.

Board-certified radiologist and that his *curriculum vitae* is not part of the record. Decision and Order at 14, 16. The record shows that Drs. McSharry and Hippensteel are Board-certified in internal medicine, with subspecialties in pulmonary medicine and critical care medicine, and that Dr. Hippensteel is a B-reader; that Dr. Jarboe is Board-certified in internal medicine with a subspecialty in pulmonary disease and is a B-reader; that Dr. Forehand is Board-certified in pediatrics and allergy and immunology and Board-eligible in pediatric pulmonary medicine and is a B reader, and that Dr. Castle is Board-certified in internal medicine and pulmonary disease and is a B reader. Employer's Exhibit 6.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge