

BRB No. 98-1469 BLA

JOHN H. COMBS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of J. Michael O' Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Cathryn Celeste Helm (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-0413) of Administrative Law Judge J. Michael O' Neill 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). Claimant filed his claim in February 1993. Director's Exhibit 1. The administrative law judge, in a Decision and Order issued in October 1996, accepted a stipulation of eighteen years of coal mine employment. Further, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis arising from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). Moreover, the administrative law judge found that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 29. Claimant appealed, and the Board, in a Decision and Order issued in April 1997, affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.203(b) and 718.204(c)(1)-(4).

Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Combs v. Director, OWCP*, BRB No. 97-0343 BLA (Apr. 29, 1997)(unpublished); Director's Exhibit 36. In August 1997 claimant filed a timely request for modification.¹ Director's Exhibit 37. In August 1998, the administrative law judge issued a Decision and Order denying modification.² The administrative law judge found that no mistake of fact or change in condition was established. Moreover, the administrative law judge found that claimant does not have a totally disabling pulmonary impairment. Accordingly, claimant's petition for modification was denied, and his request for benefits was denied. Claimant appeals, arguing that the alj erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a response brief advocating affirmance of the alj's denial of benefits.

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 the 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

¹ Along with his request for modification, claimant submitted a medical report by Dr. Myers, a 1/1 x-ray reading for pneumoconiosis, a non-qualifying pulmonary function study, and a non-qualifying blood gas study. Director's Exhibit 37. A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

² Because the parties waived their right to a hearing, the administrative law judge permissibly decided the modification issue without holding a hearing. *See Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998).

disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

On appeal, claimant contends that the administrative law judge erred in not mentioning claimant's usual coal mine work in conjunction with Dr. Myers's opinion of disability. In his 1997 opinion, Dr. Myers noted that claimant's pulmonary function study showed "mild restrictive defect in ventilation, Class II under AMA guidelines." Director's Exhibit 37. Dr. Myers also stated that claimant "would not meet the criteria for disability under Federal Black Lung Regulation 718, Appendix B or C. He falls into Class II under the AMA Guidelines. His disease appears to have progressed slightly since last examined by me in 1992."³ Director's Exhibit 37. Since Dr. Myers indicated a knowledge of the miner's work history, but concluded that claimant was not totally disabled, the administrative law judge was not required to make his own comparison of Dr. Myers's finding of Class II limitations against the exertional requirements of claimant's usual coal mine employment.⁴ See *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Next, claimant argues that the administrative law judge erred by not mentioning claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled, citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). Claimant's Brief at 5. This argument has no merit. As the Director argues, *Bentley* applies to 20 C.F.R. Part 410, Subpart D, not to 20 C.F.R. Part 718. See *Bentley, supra*. Further, as the Director argues, age and work experience are relevant only to the administrative law judge's assessment of whether claimant can perform comparable and gainful work. See generally 20 C.F.R. §410.412. Since the administrative law judge did not find claimant totally disabled, it was unnecessary for him to make this inquiry. See *Bentley, supra*.

Finally, claimant contends that the progressive nature of pneumoconiosis supports a finding that he is totally disabled. Claimant's Brief at 6. We reject this contention since it is not a specific allegation of error by the administrative law judge. See *Crum v. Wolf Creek Collieries*, 18 BLR 1-80 (1994). Inasmuch as claimant makes no further argument in this case, we affirm the administrative law judge's denial of benefits on the ground that claimant failed to establish total disability, a requisite element of entitlement on the merits.⁵

³ In his 1992 opinion, Dr. Myers opined that claimant was able to resume his former coal mine employment from a pulmonary standpoint. Director's Exhibit 19.

⁴ In his 1996 Decision and Order, the administrative law judge noted that claimant last worked as a roof bolter. 1996 Decision and Order at 3. Claimant indicated, *inter alia*, that this position involved carrying 30-35 pounds for ten to twelve feet on multiple occasions during the work day. Director's Exhibit 5.

⁵ We affirm the administrative law judge's findings under Section 718.204(c)(1)-(3) as

See *Crum, supra*; *Perry, supra*.

unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge ' s Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge