BRB No. 98-1198 BLA

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| HENRY D. WILLIAMS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
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| LARRY DEAN EVERSOLE | ) | |
| | ) | |
| and | ) | |
| | ) | |
| E & L TRUCKING COMPANY | ) | |
| | ) | |
| Employers-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmund Collett, Hyden Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds Law Offices, P.S.C.), Prestonsburg, Kentucky, for E & L Trucking Company.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-1532) of Administrative Law Judge Robert L. Hillyard 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*. Claimant filed the instant duplicate claim on

December 22, 1995.[1] Director's Exhibit 1. The district director denied the claim on June 13, 1996. Director's Exhibit 12. Claimant requested a hearing with respect to this claim on August 29, 1996. Director's Exhibit 14. The district director treated claimant's request as a petition for modification and denied it on November 22, 1996 and April 11, 1997. Director's Exhibits 15, 38. The claim was forwarded to the Office of Administrative Law Judges and a hearing was held on December 9, 1997 in Corbin, Kentucky.

With respect to the identification of the responsible operator, the administrative law judge found that Larry Dean Eversole was the last employer for whom claimant had worked for at least one year. The administrative law judge credited claimant with seven years and nine months of coal mine employment and considered whether claimant demonstrated a change in conditions or a mistake in fact in the prior denial pursuant to 20 C.F.R. §725.310. The administrative law judge determined that the evidence was insufficient to establish either of the prerequisites for modification and denied benefits accordingly. Claimant appeals, generally challenging the administrative law judge's finding as to the length of his coal mine employment and the administrative law judge's weighing of the evidence under Sections 718.202(a)(1), 718.202(a)(4) and 718.204(c)(4). Neither Larry Dean Eversole nor the Director, Office of Workers' Compensation Programs, has responded to this appeal. E & L Trucking Company has responded and urges affirmance of the 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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30

[1]Claimant filed his initial claim for benefits on January 3, 1994. Director's Exhibit 39. This claim was denied by the district director on June 7, 1994, on the grounds that claimant did not establish any of the elements of entitlement. *Id*. Claimant took no further action until filing a second claim on December 22, 1995. Director's Exhibit 1.

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 under 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 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*).

Upon review of the administrative law judge's findings and the evidence of record, we hold that the administrative law judge acted properly in denying benefits, inasmuch as the record does not contain any evidence which can establish total disability under Section 718.204(c)(1)-(4).[2] Claimant did not prove that he is totally disabled under Section 718.204(c)(1) and (c)(2), as all of the pulmonary function studies and blood gas studies of record produced nonqualifying values. 20 C.F.R.§718.204(c)(1), (c)(2), Appendices B and C to 20 C.F.R. Part 718. With respect to Section 718.204(c)(3), there is no evidence indicating that claimant has cor pulmonale with right sided congestive heart failure. 20 C.F.R.§718.204(c)(3).

[2]The administrative law judge did not properly analyze the procedural posture of this case, inasmuch as the relevant issue before him was whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) since the denial of the initial claim for benefits. The administrative law judge was not required to consider claimant's petition for modification of the district director's denial of the duplicate claim. *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Pursuant to Section 718.204(c)(4), the administrative law judge acted rationally in declining to treat Dr. Baker's diagnosis of a possible mild impairment as sufficient to establish total disability. Director's Exhibits 7, 39; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee*, *supra*; *Perry, supra*. The administrative law judge stated correctly that Dr. Westerfield opined that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Decision and Order at 10; Director's Exhibit 34. Finally, the administrative law judge determined that treatment notes from Marymount Hospital included a diagnosis of moderate to severe pulmonary obstruction, but do not contain a determination as to the degree of impairment suffered by claimant. The administrative law judge rationally concluded, therefore, that this evidence does not support a finding of total disability under Section 718.204(c)(4).[3] Decision and order at 11; *see Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983). Thus, the administrative law judge properly concluded that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4).

Because claimant has failed to establish total disability, an essential element of entitlement, we must affirm the denial of benefits under Part 718. *See Trent, supra; Perry, supra.* We decline to address, therefore, the administrative law judge's findings with respect to the responsible operator, the length of coal mine employment, and the issue of the existence of pneumoconiosis under Section 718.202(a)(1)-(4), as error, if any, therein would be harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

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

SO ORDERED.

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[3]Contrary to claimant's assertion, inasmuch as the physicians of record either did not note any physical limitations or described claimant's impairment in terms that do not support a finding of total disability, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine work with any alleged functional limitations. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge