

BRB No. 01-0385 BLA

DAVID H. FETTEROLF, SR.)	
)	
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-Denial of Benefits On Remand From The Benefits Review Board of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits On Remand From The Benefits Review Board (98-BLA-01349) of Administrative Law Judge Ralph A. Romano 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).¹ This case is before the Board for a second time. Initially, the administrative law judge found that claimant

¹ 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established a coal mine employment history of over twenty-four years and that the Director, Office of Workers' Compensation Programs (the Director), conceded that the existence of pneumoconiosis was established. The administrative law judge further determined that claimant's pneumoconiosis arose out of coal mine employment and that the medical opinions established total disability due to pneumoconiosis. Accordingly, benefits were awarded. Subsequent to an appeal by the Director, the Board vacated the award of benefits. *Fetterolf v. Director, OWCP*, BRB No. 99-0959 BLA (Jun. 9, 2000)(unpublished). The Board held that the administrative law judge's consideration of the medical opinion evidence did not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Fetterolf*, slip op. at 2-4. Accordingly, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.204(b), (c)(2000) and remanded the claim for further consideration of the medical opinions relevant to those sections, *Fetterolf*, slip op. at 4.² On remand, the administrative law judge concluded that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment by the medical opinion evidence. Decision and Order on Remand at 2-5. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the presence of a totally disabling respiratory impairment due to pneumoconiosis. The Director responds urging 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

² The Board affirmed, as unchallenged, the administrative law judge's length of coal mine employment determination, as well as the findings that claimant's pneumoconiosis arose out of coal mine employment and that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment through pulmonary function study evidence, blood gas study evidence or a showing of cor pulmonale with right-sided congestive heart failure. *Fetterolf*, slip op. at 2 n.1.

disturbed. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in crediting the medical opinion of Dr. Mariglio, that claimant suffered no impairment and demonstrated normal cardiopulmonary function, Director’s Exhibit 11, over the opinion of Dr. Kraynak, that claimant was totally and permanently disabled due to pneumoconiosis arising out of coal mine employment, Claimant’s Exhibit 2. Claimant asserts that Dr. Mariglio’s opinion is flawed because the physician failed to diagnose the presence of pneumoconiosis and presented his opinion in a cursory manner which provides little basis for his medical conclusion. On the other hand, claimant asserts that, Dr. Kraynak’s medical opinion diagnosed the presence of pneumoconiosis and is based on a thorough review of all relevant evidence. Claimant thus argues that Dr. Kraynak’s opinion is entitled to greater weight and that the opinion demonstrates total disability due to pneumoconiosis.

In finding that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to medical opinion evidence, the administrative law judge concluded that the opinion of Dr. Mariglio was entitled to greater weight than the opinion of Dr. Kraynak. Decision and Order on Remand at 3. In a permissible exercise of his discretion, the administrative law judge accorded greater weight to the opinion of Dr. Mariglio based on his superior credentials as a pulmonary specialist. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Likewise, the administrative law judge permissibly determined that Dr. Mariglio’s opinion was best-supported by the underlying objective studies, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, the administrative law judge properly found that the medical opinion evidence did not establish a totally disabling respiratory impairment, 20 C.F.R. §718.204(b)(2)(iv). Because claimant has failed to establish the presence of a totally disabling respiratory impairment, a requisite element of entitlement pursuant to Part 718, *see Trent, supra; Perry, supra*, the administrative law judge’s denial of benefits must be affirmed.

Accordingly the administrative law judge's Decision and Order - Denial of Benefits
On Remand From The Benefits Review Board is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge