BRB No. 97-0576 BLA

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

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa (Cometa & Cappellini), Kingston, Pennsylvania, for claimant.

Edward Waldman (J. Davitt McAteer, 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-00793) of Administrative Law Judge Robert D. Kaplan denying benefits 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). The administrative law judge found, and the parties stipulated to, eight years of coal mine employment, and based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. Although the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis, thus establishing a material change in conditions

[1] Claimant filed claims on July 12, 1974 and May 17, 1993, which were denied on May 12, 1980 and January 13, 1994. Director's Exhibits 11, 12. This instant claim was filed on January 26, 1995, and denied on May 31, 1995. Director's Exhibits 1, 7.

pursuant to 20 C.F.R. §725.309, the administrative law judge concluded that the evidence of record is insufficient to establish that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the evidence of record is sufficient to establish a totally disabling respiratory impairment arising out of coal mine employment pursuant to 20 C.F.R. §§718.203 and 718.204(c)(4). The Director responds, urging affirmance of the denial of benefits.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[2] As the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1) - (3) are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-610 (1983).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge considered the entirety of the medical opinion evidence of record and rationally found the evidence insufficient to establish total disability pursuant to 718.204(c)(4). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge found that Dr. Potorski did not state an opinion regarding the seriousness of claimant's pulmonary impairment or provide statements from which it could be inferred. Decision at Order at 5; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). The administrative law judge also permissibly found Dr. Aquilina's opinion, that claimant was totally disabled due to pneumoconiosis, outweighed by Dr. Talati's opinion which the administrative law judge determined indicated that claimant was not totally disabled based on Dr. Talati's superior qualifications.[3] Director's Exhibits 11, 12, 18; Claimant's Exhibits 3, 6; Decision and Order at 5, 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-104 (1986). The administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) as it is supported by substantial evidence and is in accordance with law.

Inasmuch a claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded.[4]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3] The administrative law judge found that Dr. Talati is Board-certified in internal medicine and pulmonary disease, while Dr. Aquilina is Board-certified in anesthesiology. Decision and Order at 5.

[4] As we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), we need not address claimant's contentions pursuant to 20 C.F.R. §718.203.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge