

BRB No. 97-0696 BLA

GERTRUDE MALCOLM)	
(Widow of IRVIN H. MALCOLM))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
GRAFTON COAL COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas R. Michael (Michael & Kupec), Clarksburg, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-173) of Administrative Law Judge Gerald M. Tierney awarding 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). This case is on appeal to the Board for the fourth time. In the original Decision and Order, Administrative Law Judge Charles P. Rippey adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but failed to establish total disability pursuant to 20 C.F.R. §718.204 (c)(1)-(4). Accordingly, benefits were denied. Claimant appealed and in *Malcolm v. Grafton Coal Co.*, BRB No. 87-1005 BLA (Oct. 25, 1988) (unpub.), the Board affirmed the administrative law judge's denial of benefits. On appeal to the United States Court of Appeals for the Fourth Circuit, the court reversed the Board's decision affirming the administrative law judge's denial of benefits and remanded the claim for further development of the medical evidence on the issue of total disability. *Malcolm v. Grafton Coal Co.*, No. 88-2980 (4th Cir. July 14, 1989)(unpub.). On remand to the Board, the Board issued an Order remanding the case "for further proceedings consistent with the opinion of the United States Court of Appeals for the Fourth Circuit." *Malcolm v. Grafton Coal Co.*, BRB NO. 87-1005 BLA (Aug. 28, 1989)(unpub. Order).

On remand, the administrative law judge provided the parties with an opportunity to submit additional medical evidence, but the parties declined and the administrative law judge re-affirmed his prior determination that the miner was not entitled to benefits. Claimant appealed and in *Malcolm v. Grafton Coal Co.*, BRB No. 89-3861 BLA (Mar. 24, 1993) (unpub.), the Board vacated the administrative law judge's denial of benefits and remanded the case to the district director for further development of the evidence on disability.

On remand to the district director, no new evidence was submitted and, the case was forwarded to the Office of Administrative Law Judges. Upon consideration by the administrative law judge, the administrative law judge reinstated his decision denying benefits. Claimant appealed and in *Malcolm v. Grafton Coal Co.*, the Board vacated the denial and remanded the case to the district director with instructions to have a physician perform a consultative review of all of the medical evidence in this case and to render an opinion regarding the miner's pulmonary and/or respirator condition prior to his death, noting that any consultative opinion should include a statement regarding the cause of any possible pulmonary impairment.

On remand, the district director obtained a consultative review of the medical evidence by Dr. Gaziano and employer's counsel took Dr. Gaziano's deposition, at which claimant's counsel participated. The case was forwarded to the Office of Administrative Law Judges and assigned to Administrative Law Judge Gerald. M. Tierney due to Administrative Law Judge Rippey's unavailability. Another hearing was held on August 13, 1996, at which all of the parties were represented and in his subsequent Decision and Order on Remand, the administrative law judge considered the testimony of the miner and his co-workers as well as the medical opinions of Drs. Petsonk and Gaziano and concluded that the evidence established that the miner was disabled from a respiratory impairment. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in failing to consider the deposition testimony of Dr. Gaziano.

Claimant responds, asserting that the administrative law judge did consider Dr. Gaziano's testimony. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

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'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 20 C.F.R. 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 of claimant 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Contrary to employer's contention that the administrative law judge erred in failing to consider the deposition testimony of Dr. Gaziano, a transcript of which was admitted into evidence at the hearing as Employer's Exhibit 1, Hearing Transcript at 8-9, the administrative law judge apparently did consider the deposition testimony since he refers to the "testimony and medical reports of Drs. Petsonk and Gaziano" in his Decision and Order on Remand. See Decision and Order on Remand at 2. The administrative law judge thus weighed all of the relevant probative evidence as required and permissibly concluded that the evidence of record established total disability. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Consequently, the administrative law judge properly found that the medical opinions of record established total disability pursuant to Section 718.204(c)(4). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was sufficient to establish total disability in accordance with the provisions of Section 718.204(c). Moreover, the administrative law judge adhered to the remand instructions of the United States Court of Appeals for the Fourth Circuit and, upon finding that the existence of a totally disabling respiratory impairment had been established, permissibly awarded benefits.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge