

BRB No. 97-0810 BLA

CECIL R. MARCUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: _____
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order -- Denying Benefits of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Cecil R. Marcum, Oakwood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order -- Denying Benefits (96-BLA-1169) of Administrative Law Judge Robert G. Mahony 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 credited claimant with thirty-one years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge noted that employer had not contested the issue of the existence of pneumoconiosis and determined that a finding of the existence of the disease is supported by the x-ray evidence under 20 C.F.R. §718.202(a)(1) and the medical opinion evidence under Section 718.202(a)(4). The administrative law judge also found that the evidence established the requisite etiology under 20 C.F.R. §718.203(b), but failed to establish claimant's entitlement to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. The administrative law judge further determined that the evidence was insufficient to establish total disability

pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Employer responds to claimant's appeal, and requests affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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 Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 718.304, the administrative law judge must consider all the evidence relevant to the presence or absence of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993), citing *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Under Section 718.304, claimant may establish the existence of complicated pneumoconiosis by showing that the miner is suffering from a dust disease of the lung which:

(a) When diagnosed by chest x-ray... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304(a)-(c).

In the instant case, the administrative law judge found that Dr. Fisher's sole finding of large opacities on the x-ray dated March 17, 1994, which he read as positive for

pneumoconiosis 2/3 qq with Category A large opacities, is outweighed by a preponderance of the other x-ray readings of record which establish the presence of simple pneumoconiosis but which also find no large opacities. Specifically, the administrative law judge noted the rereadings of the March 17, 1994 x-ray rendered by Drs. Wheeler, Scott and Wiot who, the administrative law judge found, have qualifications equal to those of Dr. Fisher. Drs. Wheeler, Scott and Wiot read this x-ray as positive for simple pneumoconiosis and found no large opacities, Employer's Exhibits 1, 2, 10. Similarly, the administrative law judge noted that Dr. Fino, a pulmonary specialist and B-reader, also read the March 17, 1994 x-ray as positive for pneumoconiosis but found no large opacities. Further, the administrative law judge found that none of the nine highly qualified physicians who read the four more recent x-rays as positive for simple pneumoconiosis, found large opacities. Further, the record contains no other evidence supportive of a finding of complicated pneumoconiosis under Section 718.304. Inasmuch as the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis at Section 718.304 is supported by substantial evidence and is in accord with law, it is affirmed. See *Lester, supra*; *Melnick, supra*.

The administrative law judge also properly found that the evidence is insufficient to establish claimant's total disability under Section 718.204(c)(1) - (4). Specifically, the administrative law judge properly found that the evidence fails to establish total disability under Section 718.204(c)(1) and (c)(2) because both pulmonary function studies and both blood gas studies of record resulted in non-qualifying values, Director's Exhibits 10, 13, 27.<sup>1</sup> He further correctly noted that there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3).

Considering the medical opinion evidence under Section 718.204(c)(4), the administrative law judge properly found that the physicians who discussed claimant's respiratory capacity agreed that he has no pulmonary or respiratory impairment or disability. Specifically, after examining claimant, Drs. Forehand and Castle found radiographic evidence of simple coal workers' pneumoconiosis with no related respiratory impairment or disability. Director's Exhibits 12, 27. As the administrative law judge further found, Dr. Scott's clinical notes regarding his treatment of claimant's shoulder and back problems, do not contain an assessment of claimant's pulmonary condition, Director's Exhibit 26. Inasmuch as the administrative law judge's finding that the evidence is insufficient to establish total disability under Section 718.204(c)(4) is rational and supported

---

<sup>1</sup>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, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

by substantial evidence, it is affirmed.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(4), an essential element of entitlement, we further affirm the administrative law judge's denial of benefits in the instant case as a finding of entitlement is precluded. *Trent, supra; Perry, supra; see also Director, OWCP v. Greenwich Collieries, [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

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

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

NANCY S. DOLDER  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge