BRB No. 89-3412 BLA

BENJAMIN WITMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARREN CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	
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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (87-BLA-00991) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge properly reviewed this claim, filed on October 5, 1984, pursuant to the provisions at 20 C.F.R. Part 718, *see Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981), and credited claimant with nineteen years of qualifying coal mine employment, as stipulated by the parties and supported by the record. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Consequently, the administrative law judge awarded benefits, finding that claimant established a change in conditions following the district director's denial of the claim, which was sufficient to support modification pursuant to 20 C.F.R. §725.310. On appeal, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204, and in finding modification appropriate pursuant to Section 725.310. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[1] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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 Decision and Order of the administrative law judge is supported by substantial evidence, consistent with applicable law, and must be affirmed. Employer asserts that the administrative law judge, in finding the evidence sufficient to establish total disability at Section 718.204(c), failed to adequately assess and weigh the contrary probative evidence and separately determine whether total disability was due to pneumoconiosis at Section 718.204(b). Contrary to employer's arguments, however, the administrative law judge accurately reviewed the pulmonary function studies of record, properly accorded no weight to the studies which had been invalidated, and permissibly relied on a numerical preponderance of qualifying studies which had not been found invalid to find total disability established pursuant to Section 718.204(c)(1).[2] Decision and Order at 6; *see generally Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987), *reh'g denied*, 108 S.Ct. 787 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). The administrative law judge properly found that the blood gas studies of record were non-qualifying, and that there was no evidence of cor pulmonale with right-sided congestive heart failure, thus the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(2) and (3). Decision and Order at 7. In evaluating the medical opinions of record, the administrative law judge reviewed the qualifications of the physicians and the underlying bases for their conclusions, and acted within his discretion as trier-of-fact in finding that the weight of the opinions established total disability at Section 718.204(c)(4). Decision and Order at 7, 8; *see generally Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Although the administrative law judge inaccurately determined that Dr. Kruk possessed superior qualifications,[3] this error is harmless, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), inasmuch as the administrative law judge permissibly credited Dr. Kruk's opinion that claimant was totally disabled due to pneumoconiosis over the contrary opinion of Dr. Dittman, who diagnosed no pneumoconiosis or any disability due to pneumoconiosis, as Dr. Kruk's opinion was supported by the qualifying pulmonary function studies of record and the opinions of Drs. Kraynak and

[2] 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 and C, respectively. A "non-qualifying" study yields values that exceed those values.

[3] The record reflects that both Dr. Kruk and Dr. Dittman are Board-certified in internal medicine. Claimant's Exhibit 9; Employer's Exhibits 3, 6. Contrary to the administrative law judge's findings, however, Dr. Kruk is not additionally Board-certified in pulmonary diseases. Decision and Order at 7; Claimant's Exhibit 9.

Mariglio.[4] Decision and Order at 7, 8; *see generally Anderson, supra*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986). Consequently, we affirm the administrative law judge's findings pursuant to Section 718.204, as supported by substantial evidence.

Finally, contrary to employer's arguments, the administrative law judge was not required to make a preliminary determination regarding whether claimant had established a basis for modification of the district director's denial of his claim, as such a determination is subsumed into the decision on the merits. *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Since the administrative law judge permissibly found that the evidence of record was sufficient to support an award of benefits, we affirm his finding that modification pursuant to Section 725.310 was appropriate.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4] Dr. Mariglio diagnosed coal workers' pneumoconiosis, and Dr. Kraynak, claimant's treating physician, concluded that claimant was totally disabled due to pneumoconiosis. Decision and Order at 7; Director's Exhibit 15; Claimant's Exhibits 1, 20.

REGINA C. McGRANERY
Administrative Appeals Judge