

BRB No. 93-2282 BLA

FREDDIE FULTZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
CLINCHFIELD COAL COMPANY)	
)	
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 of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Freddie Fultz, Norton, Virginia, pro se.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (93-BLA-0022) of Administrative Law Judge Robert J. Shea 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 credited claimant with twenty-three years of coal mine employment, and based on the filing date, August 6, 1991, considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203, and that claimant was totally disabled by a respiratory impairment under 20 C.F.R.

§718.204(c)(4). The administrative law judge, however, further found the evidence of record insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant now appeals this finding. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not

responded to this 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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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'Keefe 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 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).

In finding that claimant failed to establish his entitlement to benefits, the administrative law judge concluded that the evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis.¹ We agree. The administrative law judge found that the medical records established that claimant's total disability was due to his lung cancer. Decision and Order at 6. All of the medical opinions that discuss the cause of claimant's total disability attribute his impairment to the loss of lung capacity resulting from the left upper lobectomy done in treatment of his lung cancer. Director's Exhibits 12, 27, 31; Employer's Exhibits 4, 12, 13. Further, Drs. Tomashefski, Fino, Caffrey and Sargent opined that claimant's lung cancer was not caused by his pneumoconiosis or by exposure to coal dust. Employer's Exhibits 4, 13; Director's Exhibits 27, 13. Thus, the administrative law judge's finding that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to Section 718.204(b) is supported by substantial evidence and is affirmed. Moreover, as claimant has failed to establish that his total disability is due to pneumoconiosis under 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

¹ The administrative law judge's findings of twenty-three years of coal mine employment, the existence of pneumoconiosis arising from claimant's coal mine employment pursuant to Sections 718.202(a)(2) and 718.203, and total disability at Section 718.204(c)(4) are affirmed as they are unchallenged on appeal, favorable to claimant, and supported by substantial evidence. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge