

BRB No. 98-1370 BLA

MATTHEW J. POTOSKY)	
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Susan Foster Blank, Eighty Four, Pennsylvania, for claimant.

Helen H. Cox (Henry L. Solano, 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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1520) of Administrative Law Judge Richard A. Morgan 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 at least ten years and ten months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found that claimant failed to establish total

¹ Claimant filed his initial claim for benefits on June 26, 1973, which was finally denied on January 29, 1980. Decision and Order at 2; Director’s Exhibit 29. Claimant filed a second claim for benefits on July 8, 1985, which was finally denied on May 6, 1992. Decision and Order at 2; Director’s Exhibit 29. The instant claim was filed on August 1, 1996. Decision and Order at 2; Director’s Exhibit 1.

disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and, in light of the decision of the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), concluded that claimant failed to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(b). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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, 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 that there is no reversible error contained therein. The administrative law judge, in the instant case, considered the newly submitted medical opinion evidence and acted within his discretion in concluding that claimant's total disability was not due to pneumoconiosis pursuant to Section 718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In so finding, the administrative law judge noted the standard enunciated in *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), that claimant must establish that pneumoconiosis is a substantial contributor to any respiratory or pulmonary disability diagnosed. Claimant's assertions that the administrative law judge applied an erroneous standard and that he erred in his evaluation of the opinions of Dr. Rasheed are without merit. The administrative law judge considered the medical report of Dr. Rasheed, who diagnosed chronic obstructive pulmonary disease, pulmonary hypertension, congestive heart failure, coronary artery disease and morbid obesity. Decision and Order at 6-7, 13; Director's Exhibits 11, 13, 32; Claimant's Exhibit 2. The administrative law judge thus permissibly concluded that total disability due to pneumoconiosis under the court's standard was not established since the physician concluded that claimant was disabled due to multiple problems and did not specifically diagnose a disabling pulmonary impairment arising out of coal mine

employment. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 13. Consequently, the administrative law judge acted within his discretion as fact-finder in concluding that the newly submitted medical opinions of record failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b). *Bonessa, supra*; Decision and Order at 13-14. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge rationally determined that the opinion of Dr. Rasheed failed to demonstrate a substantial nexus between pneumoconiosis and claimant's total disability and since neither the remaining hospital records nor Dr. Weinberg's report support claimant's burden of proof, we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b).² Consequently, the administrative law judge acted within his discretion as fact-finder in concluding that the newly submitted medical opinions of record failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) and this finding is affirmed. Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits. *Swarrow, supra*.

² The administrative law judge permissibly concluded that Dr. Weinberg's opinion was equivocal and did not meet claimant's burden of proof as he did not relate claimant's chronic obstructive pulmonary disease to coal mine employment or conclude that it was a substantial contributor to claimant's total disability. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge