BRB No. 98-1385 BLA

JOSEPH VANOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 7/23/99
	)	
DOUBLE M 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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1201) of Administrative Law Judge Stuart A. Levin 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). In this duplicate claim, the

administrative law judge found that claimant's prior claim[1] was finally denied on

[1]Claimant filed his initial claim on March 6, 1980. Director's Exhibit 33. The district director denied the claim on June 4, 1981, June 30, 1981, and again on March 8, 1982 because claimant was still working, because the record contained no evidence of complicated pneumoconiosis, and because claimant failed to present evidence which showed that his pneumoconiosis arose out of coal mine employment or that he was totally disabled by his pneumoconiosis. *Id.* Claimant timely requested a hearing. *Id.* Before a hearing was held and while his case was still pending, claimant filed a second claim on December 18, 1983. *Id.* Based on the evidence submitted, the district director issued a Notice of Initial Finding of Entitlement. *Id.* Employer controverted the finding. *Id.* Following a hearing on the merits, Administrative Law Judge John J. Forbes, Jr. issued a Decision and Order on January 17, 1989. *Id.* Judge Forbes credited claimant with seventeen and one-quarter years of coal mine employment and found employer to be the responsible operator. *Id.* Judge Forbes found that the evidence of record was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. Part 718. *Id.* Accordingly, he denied benefits. On reconsideration, Judge Forbes found the evidence of record insufficient to invoke the interim presumption at 20 C.F.R. Part 727 or to establish entitlement at 20 C.F.R. §410.490. *Id.* Claimant appealed the denial of beneits to the Board. *Id.* While on appeal, claimant filed a request for modification. By Order dated April 30, 1990, the Board remanded this case to the district director for processing of the request for modification. *Vanover v. Double M Coal Co.,* BRB No. 89-3937 BLA (Apr. 30, 1990)(unpub.).

On remand, the district director denied claimant's request for modification on the grounds that the newly submitted evidence failed to establish a change in condition and that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See* Director's Exhibit 33. Claimant timely requested a hearing which was held on May 4, 1992. *Id.* Administrative Law Judge Michael P. Lesniak issued a Decision and Order on September 2, 1992. *Id.* Judge Lesniak found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), and a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). *Id*. Claimant again appealed the denial of benfits to the Board, and again, while on appeal, requested modification. *Id.* By Order dated February 5, 1993, the Board dismissed claimant's appeal and remanded this case to the district director to consider the issue of modification. *Id*. *Vanover v. Double M Coal Co*., BRB No. 92-2653 BLA (Feb. 5, 1993)(unpub.). On remand, the district director again denied claimant's request for modification. *Id.* Claimant took no further action until he filed the present claim on August 27, 1996. *Id.*; Director's Exhibit 1.

September 2, 1992 because claimant did not demonstrate the presence of a totally disabling respiratory impairment.[2] Applying the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), the administrative law judge considered the newly submitted evidence and found that claimant had demonstrated the presence of a totally disabling respiratory impairment, and thus, a material change in conditions at 20 C.F.R. §725.309. On the merits, the administrative law judge found the evidence of record sufficient to establish the presence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.202(a)(2) and a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). He, however, found the evidence of record insufficient to demonstrate that claimant's pneumoconiosis was a contributing cause of his respiratory impairment at 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge at Section 718.204(b). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.[3]

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 this Board and may not be disturbed. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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,

[2]The administrative law judge correctly concluded that claimant's prior claim had been finally denied. However, the date of the final denial is August 25, 1993, the date when the district director denied the claim following the February 5, 1993 Order of Remand by the Board. *See* Director's Exhibit 33.

[3]We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(2), 718.203(b), and 718.204(c)(1)-(4), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 denying benefits is supported by substantial evidence. At Section 718.204(b), claimant bears the burden of proving that his pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Jewell Smokeless Coal Company v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). In the instant case, the administrative law judge properly concluded that the evidence of record was insufficient to meet claimant's burden of proof. In his report, Dr. Paranthaman diagnosed anthracosilicosis, which he related to claimant's coal mine employment, and pulmonary emphysema, which he related to claimant's coal mine employment and smoking history. *See* Director's Exhibit 11. Although Dr. Paranthaman stated that claimant's impairment evaluation was incomplete because he could not perform a pulmonary function study, he found claimant totally disabled from his usual coal mine employment because the results of his blood gas study met the Black Lung disability standards. *Id.* In response to the question on how much the diagnosed conditions (anthracosilicosis and pulmonary emphysema related to smoking and coal mine employment) contributed to claimant's impairment, Dr. Paranthaman replied "N/A." *Id.* As Dr. Paranthaman failed to discuss the cause of claimant's totally disabling respiratory impairment, his report is insufficient to meet claimant's burden of proof at Section 718.204(b).[4] *See* 20 C.F.R. §718.204(b);

[4]The administrative law judge stated that Dr. Paranthaman found claimant totally disabled from pulmonary emphysema secondary to a combination of smoking and coal mine employment. Decision and Order at 15. Dr. Paranthaman found claimant totally disabled from his coal mine employment because the results of his blood gas study met the Black Lung disability standards. *See* Director's Exhibit 11. However, Dr. Paranthaman made no other findings regarding claimant's respiratory disability. *Id.* Even assuming that the administrative law judge properly characterized the findings of Dr. Paranthaman, he permissibly accorded less weight to his medical opinion on the grounds that Dr. Paranthaman considered a reduced smoking history because, contrary to claimant's assertion, the record reflects that claimant's smoking history was much more significant than he told Dr. Paranthaman. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1994); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Director's Exhibit 33.

Ballard, supra; *Street, supra*; *Robinson, supra*. Since claimant raises no challenge to the administrative law judge's treatment of the medical opinions of Drs. Sargent, Michos, and Castle, we affirm those findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, the record contains no credible evidence which supports claimant's burden of proof at Section 718.204(b). We, therefore, affirm the finding of the administrative law judge that claimant failed to establish that his pneumoconiosis was a contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge