

BRB No. 97-1644 BLA

DONALD SCARBERRY)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
SPENCER BRANCH COAL COMPANY)	DATE	ISSUED:
)		
and)		
)		
OLD REPUBLIC INSURANCE COMPANY)		
)		
Employer/Carrier- Respondents)		
)		
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of J. Michael O’Neill, Administrative Law Judge, United States Department of Labor.

Herbert Deskins, Jr., Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0135) of Administrative Law Judge J. Michael O’Neill 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 adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.

Although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c),¹ he found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge concluded that the evidence was insufficient to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310,² and thus, he denied benefits.³ On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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

¹The administrative law judge stated that he found that “[t]he ventilatory function and medical opinion evidence establishes that the claimant’s respiratory function has deteriorated in recent years, so a change in conditions is demonstrated.” Decision and Order at 4.

²Claimant filed his initial claim on April 15, 1985. Director’s Exhibit 60. This claim was denied by the Department of Labor (DOL) on September 26, 1985 and July 7, 1987. *Id.* Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on June 20, 1989. Director’s Exhibit 1. On June 15, 1993, the administrative law judge issued a Decision and Order denying benefits. Director’s Exhibit 39. The bases of the administrative law judge’s denial of benefits were claimant’s failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id.* The Board affirmed the administrative law judge’s denial of benefits. *Scarberry v. Spencer Branch Coal Co.*, BRB No. 93-2038 BLA (June 20, 1994)(unpub.). Claimant filed his most recent claim on March 20, 1995, which the DOL construed as a request for modification. Director’s Exhibits 46, 49.

³The administrative law judge stated that he found “no mistake in a determination of fact in [his] prior decision that would change the outcome of the case nor a relevant change in conditions which could establish entitlement to benefits.” Decision and Order at 4.

this 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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Specifically, claimant asserts that he has sustained his burden of establishing that pneumoconiosis caused his totally disabling respiratory impairment because pneumoconiosis is a progressive disease and a single medical opinion may be sufficient to establish invocation of the presumption of total disability. We disagree. Contrary to claimant’s assertion, the presumption of total disability due to pneumoconiosis that is provided by Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and implemented at Section 718.305, is inapplicable to claims, such as the case at bar, which are filed after January 1, 1982, 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(a), (e); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Hence, we reject claimant's assertion inasmuch as claimant filed the pending application for benefits on June 20, 1989. Director's Exhibit 1. Moreover, inasmuch as claimant has failed to allege any other specific error in the administrative law judge’s findings or legal conclusions at 20 C.F.R. §718.204(b), claimant fails to provide a basis upon which the Board may review the administrative law judge’s findings.⁴ See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge’s finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b).

Since claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), an essential element of entitlement, the administrative law judge properly denied benefits on the merits under 20 C.F.R. Part 718.⁵ See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

⁴The administrative law judge’s finding on the merits that the evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is furthermore supported by substantial evidence.

⁵In view of our disposition of the case on the merits at 20 C.F.R. §718.204(b), we need not address claimant’s contentions with regard to 20 C.F.R. §718.202(a)(1) and (a)(4).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge