BRB No. 98-1220 BLA

WILLIE BOGGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE DIAMOND COAL COMPANY INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 6/25/99
	)	
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.

Edmond Collett, Hyden, Kentucky, for claimant.

Deron L. Johnson (Boehl Stopher & Graves), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0956) 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). Claimant filed his initial application for benefits on October 20, 1992. Director's Exhibit 1. The district director denied benefits on April 13, 1993, on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 46. In a Decision and Order issued on August 28, 1995, the administrative law judge credited claimant with at least thirty-three years of coal mine employment as agreed by the parties, and found that the evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, the Board affirmed the finding regarding the number of years of coal mine employment, the finding of no total disability at Section 718.204(c), and the denial of benefits. *Boggs v. Blue Diamond Coal Co.,* BRB No. 95-2147 BLA (June 27, 1996)(unpub.).

Claimant filed the present petition for modification on September 23, 1996. Director's Exhibit 80. In a Decision and Order issued on June 8, 1998, the administrative law judge again found that claimant had not established the presence of pneumoconiosis pursuant to Section 718.202(a), or the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c), and therefore also failed to establish a change in condition pursuant to 20 C.F.R. §725.310. The administrative law judge further determined that claimant had not demonstrated a mistake in fact in the prior determinations that the evidence is insufficient to establish the existence of pneumoconiosis or total disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in his consideration of the x-ray readings and the medical reports of record at Section 718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding under Section 718.204(c)(4). Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 applicable 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).

To be entitled to benefits under Part 718, claimant must establish total

respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

In challenging the administrative law judge's determination that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4), claimant argues that the administrative law judge substituted his opinion for that of Dr. Bushey. Claimant further asserts that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine employment in conjunction with the medical reports of record, or claimant's age, education and work experience in determining claimant's ability to perform comparable and gainful work.

The relevant medical opinion evidence of record as a whole is as follows: In his most recent report, rendered in November 1996, Dr. Bushey stated that claimant was totally and permanently disabled on the basis "of his lungs." Director's Exhibit 80. In his original 1991 report, Dr. Bushey diagnosed pneumoconiosis but did not address the issue of impairment. Director's Exhibit 62. Drs. Anderson and Wright diagnosed pneumoconiosis but stated that claimant could perform his former mine work. Director's Exhibits 17, 62. Drs. Lane, Dineen, Dahhan and Broudy found no evidence of pneumoconiosis or a respiratory impairment, and Dr. Baker diagnosed mild coal workers' pneumoconiosis. Director's Exhibits 18-22, 45.

We reject claimant's contention that the administrative law judge substituted his opinion for that of Dr. Bushey by rejecting this opinion merely because it was based on non-qualifying objective tests. The administrative law judge considered Dr. Bushey's newly submitted report, but rationally found that it was not entitled to determinative weight as Dr. Bushey failed to indicate how the documentation supported the conclusion. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en* banc). Decision and Order at 7; Director's Exhibit 80. We further reject claimant's contention that the administrative law judge was required to consider the requirements of claimant's usual coal mine employment in conjunction with the medical reports of record, since none of the medical opinions provided specific limitations which could be compared to claimant's work requirements. *See Turner v. Director, OWCP,* 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.,* 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.,* 6 BLR 1-1146 (1984). We also hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are not relevant to establishing total disability under Section 718.204(c)(4). *See* 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). We

therefore affirm the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish total disability under Section 718.204(c)(4).

Inasmuch as we affirm the administrative law judge's finding that the evidence of record as a whole is insufficient to establish total disability pursuant to 718.204(c), a requisite element of entitlement, we must also affirm the administrative law judge's denial of benefits on the merits.[1] *See Perry, supra*. We therefore decline to address claimant's assertions of error with regard to the administrative law judge's findings under Section 718.202(a)(1) and (a)(4) and his finding that claimant failed to establish a change in condition under Section 725.310 as any errors therein would be harmless.[2] See *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984); *Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[1]We affirm the administrative law judge's findings that the evidence of record is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

[2]We note that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that a claimant must be afforded a hearing upon modification, if requested. *See also Robbins v. Cyprus Cumberland Coal Co.,* 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.,* 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998). Although claimant initially requested a hearing in connection with his request for modification, claimant subsequently notified the administrative law judge that he did not object to the case being decided on the record and that a hearing on modification was not necessary. Consequently, the decisions in *Robbins* and *Cunningham* do not require that we remand the instant case for a hearing. *Id.*

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge