BRB No. 99-0838 BLA

ELISHA PENNINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Sarah M. Hurley (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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1322) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits in 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). Based on the parties' stipulation, the administrative law judge credited claimant with at least seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The parties also stipulated that claimant suffers from pneumoconiosis arising out of coal mine employment. Hearing Transcript at 6. The administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied

benefits. On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.[1]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4), the administrative law judge considered the opinions of Drs. Anderson, Chaney, Myers and Wicker. The administrative law judge stated that "Drs. Anderson and Myers agreed that [claimant] retains the pulmonary capacity to perform his last coal mining job." Decision and Order at 7; Director's Exhibits 11, 12. Further, the administrative law judge stated that "Dr. Wicker felt [that claimant's] respiratory capacity appeared adequate to perform his previous coal mine employment." Decision and Order at 7; Director's Exhibit 13. Lastly, the administrative law judge stated that "Dr. Chaney provided no opinion on the issue of disability." Decision and Order at 7; Director's Exhibit 24.

Claimant asserts that the administrative law judge erred in failing to consider the "complaints of shortness of breath worsened with exertion" contained in Dr. Chaney's medical report. Specifically, claimant asserts that Dr. Chaney's medical report indicates a disabling pulmonary or respiratory impairment. Contrary to claimant's assertion, a physician's recitation of a miner's symptom of shortness of breath is not a diagnosis of a pulmonary or respiratory impairment. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Heaton v. Director, OWCP*, 6 BLR 1-222 (1984); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). In a report dated March

[1]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

27, 1998, Dr. Chaney noted that claimant "has chronic shortness of breath." Director's Exhibit 24. Dr. Chaney also noted that "[i]t is worse with exertion and [claimant] can walk approximately 1 flight of stairs before the shortness of breath over takes him." *Id*. Thus, inasmuch as neither Dr. Chaney nor any other physician of record opined that claimant suffers from a disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(c), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *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.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge