

BRB No. 99-0841 BLA

JIMMIE SHEPHERD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
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.

Edmond Collett, Hyden, Kentucky, for claimant.

Jill M. Otte (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1359) of Administrative Law Judge Thomas F. Phalen, Jr. 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.* After crediting claimant with twenty-one years of coal mine employment, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the administrative law judge's

findings pursuant to Section 718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.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 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 under Part 718 in a living miner's claim, claimant must establish the existence of 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 to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), claimant argues that his age, education, work history, and the progressive nature of pneumoconiosis support a finding that he is totally disabled. Contrary to claimant's contention, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4), as the regulatory criteria require claimant to provide medical evidence that he suffers from a pulmonary disability. See 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In taking exception to the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4), claimant argues that the administrative law judge erred in failing to identify claimant's usual coal mine work or the physical requirements of that work. In order to establish entitlement to benefits, claimant must demonstrate the presence of a totally disabling respiratory impairment. *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'd* 16 BLR 1-11 (1991). In the instant case, neither Dr. Anderson nor Dr. Wicker, the only physicians of record to comment on claimant's respiratory status, diagnosed a respiratory impairment; rather, both physicians opined that claimant retains the respiratory functional capacity to

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

perform his usual coal mine employment. Director's Exhibits 12, 18; *Id.* Since claimant did not demonstrate the presence of any respiratory impairment, it was not necessary for the administrative law judge to make specific findings as to the exertional requirements of claimant's work, which then could be compared to a medical impairment assessment to determine if claimant has established a totally disabling respiratory impairment. *Id.*

Inasmuch as claimant raises no further specific assertions of error on the part of the administrative law judge in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(c)(4), that finding is affirmed. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Since claimant has failed to establish total disability, a necessary element of entitlement under Part 718, an award of benefits is precluded. *See Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge