BRB No. 97-1220 BLA

WALTER H. WOZNIAK	)	
	)	
Claimant-	)	
Petitioner	)	
	)	DATE ISSUED:
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER
Respondent		

Appeal of the Decision and Order - Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Cathryn Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-BLA-1156) of Administrative Law Judge Robert D. Kaplan with respect to 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 procedural history of this case is as follows: Claimant submitted an application for benefits on September 1, 1978, which was denied by Administrative Law Judge Aaron Silverman in a Decision and Order

issued on December 7, 1981.[1] Director's Exhibit 37. Claimant filed an appeal with the Board. Inasmuch as claimant submitted evidence that was not part of the record before the administrative law judge, the Board informed claimant that he may wish to request modification of the prior denial pursuant to 20 C.F.R. §725.310(a). Claimant filed such a request and the case was remanded. *Id.*. On October 12, 1982, Judge Silverman issued a Decision and Order Denying Request for Modification. *Id.*. Claimant appealed once again to the Board, which affirmed the denial of benefits in a Decision and Order dated May 29, 1985. *Wozniak v. Director, OWCP*, BRB No. 82-0132 BLA (May 29, 1985)(unpublished).

Claimant filed a second claim for benefits on September 27, 1988. Director's Exhibit 37. The district director rejected this claim in a letter issued on January 17, 1989, on the ground that claimant failed to establish any of the elements of entitlement. *Id.*. The district director subsequently issued a Proposed Decision and Order in June of 1989 in which he found that claimant had not established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Id.*. Accordingly, benefits were denied. The district director also denied claimant's request for a hearing, citing as authority the Board's decision in *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988), which was the law at the time, and informed claimant that if he wished to challenge the denial of benefits, he must appeal directly to the Board. *Id.*. The Board's decision in *Lukman* was subsequently reversed by the United States Court of Appeals for the Tenth Circuit. *See Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990). Claimant took no further action until filing a third application for benefits on July 25, 1994. Director's Exhibit 1.

[1]Judge Silverman credited claimant with less than ten years of coal mine employment and considered entitlement under 20 C.F.R. Part 410, Subpart D. He found that claimant failed to establish both the existence of pneumoconiosis and that he was totally disabled due to pneumoconiosis arising out of coal mine employment. The administrative law judge denied benefits accordingly.

After the district director denied benefits on this claim, the case was assigned to Administrative Law Judge Robert D. Kaplan (the administrative law judge) for a hearing at claimant's request. In his Decision and Order - Denying Benefits, the administrative law judge credited claimant with ten years of coal mine employment and considered whether claimant established a material change in conditions under Section 725.309(d) in accordance with the decision of the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[2] The administrative law judge determined that claimant demonstrated a material change in conditions, inasmuch as the newly submitted x-ray evidence supported a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment and that the record contained no evidence sufficient to rebut the presumption.

The administrative law judge then considered whether claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c), based upon a weighing of all of the evidence of record. The administrative law judge found that although the medical opinions of record supported a finding of total disability under Section 718.204(c), claimant did not prove that pneumoconiosis is a substantial contributor to his total disability under Section 718.204(b). *See Bonessa v. United States Steel Corp.*, 884 F.2d 756, 13 BLR 2-23 (3d Cir. 1989). The administrative law judge denied benefits accordingly. Claimant argues on appeal that the administrative law judge erred in failing to find total disability established under Section 718.204(c)(1). Claimant further contends that the administrative law judge erred in determining that the evidence was insufficient to support a finding of total disability due to pneumoconiosis pursuant to Section 718.204(b). The Director, Office of Workers' Compensation Programs, has responded and urges affirmance of the denial of benefits.[3]

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's qualifying coal mine employment occurred in Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The Third Circuit held in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that a claimant must establish at least one of the elements of entitlement previously adjudicated against him in order to demonstrate a material change in conditions pursuant to 20 C.F.R. §725.309.

[3]We affirm the administrative law judge's findings under 20 C.F.R. §718.204(c)(2)-(4), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act 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 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to Section 718.204(c)(1), claimant maintains that the administrative law judge erred in finding that the valid, qualifying pulmonary function studies obtained on February 4, 1994 and April 7, 1995, were outweighed by the study that claimant performed on July 1, 1996, which produced substantially higher, nonqualifying values. Decision and Order - Denying Benefits at 11; Director's Exhibits 5, 22, 47. Claimant maintains that because his effort on this study was only fair, it was improper for the administrative law judge to use the results to effectively invalidate the qualifying results of the earlier studies. We decline to consider claimant's allegation of error. In light of the fact that the administrative law judge resolved the issue of total disability in claimant's favor by determining that the opinion of Dr. Ryan establishes that claimant is suffering from a totally disabling pulmonary impairment, a finding which we have affirmed as unchallenged on appeal, *see n.3, supra*, error, if any, in the administrative law judge's finding under Section 718.204(c)(1), is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Under Section 718.204(b), the administrative law judge found that inasmuch as Dr. Ryan did not link claimant's totally disabling chronic obstructive pulmonary disease to pneumoconiosis, his opinion could not support a finding that pneumoconiosis is a substantial contributor to claimant's total disability. Decision and Order - Denying Benefits at 8, 15; Director's Exhibits 12, 46. The administrative law judge further determined that because the remaining medical opinions of record did not contain a reasoned, documented diagnosis of total disability due to pneumoconiosis, claimant failed to establish this element of entitlement.[4] Decision and Order - Denying Benefits

[4]The administrative law judge determined that the medical reports of Drs.

at 15. Claimant argues that Dr. Ryan's diagnosis of total disability due to chronic obstructive pulmonary disease established that pneumoconiosis, as defined in 20 C.F.R. §718.201, is a contributing cause of claimant's total disability. In support of this contention, claimant notes that he has established the existence of pneumoconiosis arising out of coal mine employment and that the record demonstrates that he has a minimal smoking history with no occupational dust exposure other than his coal mine employment. Claimant also maintains that the administrative law judge should have credited Dr. Ryan's opinion under Section 718.204(b) despite the doctor's failure to specifically diagnose pneumoconiosis, inasmuch as Dr. Ryan relied on his own negative reading of the x-ray obtained during his examination of claimant on July 1, 1996, and did not have access to the subsequent positive readings performed by three physicians who are Board-certified radiologists and B readers.

These contentions are without merit. Contrary to claimant's argument, Dr. Ryan's diagnosis of total disability due to chronic obstructive pulmonary disease, which Dr. Ryan suggested was caused by cigarette smoking or asthma, *see* Director's Exhibits 12, 46, does not meet the definition of pneumoconiosis set forth in Section 718.201. Without a physician's reasoned and documented attribution of this condition to dust exposure in coal mine employment, chronic obstructive pulmonary disease does not constitute pneumoconiosis under the Act or the regulations. *See* 20 C.F.R. §718.201; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Gee*, *supra*.

We also hold that claimant's argument that Dr. Ryan's opinion is sufficient to establish total disability due to pneumoconiosis despite his failure to attribute claimant's obstructive disease to coal mine employment is not persuasive. The administrative law judge properly found that Dr. Ryan's opinion did not satisfy claimant's burden under Section 718.204(b), inasmuch as Dr. Ryan did not identify pneumoconiosis, as defined in Section 718.201, as a substantial contributor to claimant's total disability. Decision and Order - Denying Benefits at 15; *see Bonessa*, *supra*; *Tucker*, *supra*. Accordingly, the administrative law judge concluded that the record does not contain any reasoned and documented medical report which connects claimant's total disability to either clinical or statutory pneumoconiosis. Decision and Order - Denying Benefits at 15.

Aquilina, Grace, and Lehman were not entitled to any weight on the grounds that they are not reasoned or documented. Decision and Order - Denying Benefits at 13-15; Director's Exhibits 32, 33, 37. Inasmuch as these findings have not been challenged on appeal, they are affirmed. *See Skrack*, *supra*.

Thus, we affirm the administrative law judge's determination that the evidence of record is insufficient to support a finding that pneumoconiosis is a substantial contributor to claimant's total disability pursuant to Section 718.204(b), an essential element of entitlement. *See Bonessa*, *supra*. We must also affirm, therefore, the denial of benefits under Part 718.[5] *See Trent*, *supra*; *Gee*, *supra*.

[5]We decline to consider the arguments raised by the Director, Office of Workers' Compensation Programs, in his response brief regarding the administrative law judge's calculation of the length of claimant's coal mine employment and the administrative law judge's weighing of the newly submitted x-ray evidence under 20 C.F.R. §718.202(a)(1). Inasmuch as we have affirmed the denial of benefits on the merits under 20 C.F.R. Part 718, error, if any, in the administrative law judge's findings with respect to these issues is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge