BRB No. 98-1153 BLA

RALPH RUSSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
PARAMONT COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Ralph Russell, Wise, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order Denying Benefits (97-BLA-1957) of Administrative Law Judge Daniel F. Sutton 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 2, 1984. Director's Exhibit 1. In a Decision and Order issued on November 16, 1989, Administrative Law Judge John J. Forbes, Jr. found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), and 718.203(b). Director's Exhibit 49. Judge Forbes further determined, however, that the evidence of record did not support a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *Id*..

Accordingly, benefits were denied. *Id.*. Claimant filed an appeal with the Board which, in a Decision and Order dated July 29, 1992, affirmed the denial of benefits. *Russell v. Paramont Mining Co.*, BRB No. 89-5087 BLA (July 29, 1992)(unpub.); Director's Exhibit 53.

On October 14, 1992, claimant filed a second application for benefits which the district director treated as a request for modification under 20 C.F.R. §725.310(a). The district director denied the request for modification and the case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing. In a Decision and Order issued on June 2, 1995, Administrative Law Judge Edward J. Murty, Jr., determined that the evidence of record did not support a finding of total disability due to pneumoconiosis pursuant to Section 718.204. Director's Exhibit 72. Accordingly, benefits were denied. Claimant appealed to the Board which, in a Decision and Order dated September 9, 1996, affirmed the denial of benefits. *Russell v. Paramont Mining Co.*, BRB No. 95-1764 BLA (Sept. 9, 1996)(unpub.); Director's Exhibit 79. Claimant subsequently contacted the district director on April 9, 1997, and indicated that he wished to "appeal" the Board's decision and would provide supporting medical evidence. When this evidence was submitted, it was treated as another request for modification pursuant to Section 725.310. The district director issued a Proposed Decision and Order in which it was determined that claimant established a change in conditions and was entitled to benefits. Employer contested the district director's findings and case was transferred to the OALJ. Administrative Law Judge Daniel F. Sutton (the administrative law judge) issued an order requiring the parties to show cause why a hearing was necessary. Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), each responded, indicating that there was no objection to the case being decided based upon the record.

In his Decision and Order, the administrative law judge determined that the newly submitted pulmonary function study of record supported a finding of total disability under Section 718.204(c) and a change in conditions pursuant to Section 725.310. Based upon a consideration of all of the evidence of record, however, the administrative law judge found that claimant did not establish that he is totally disabled due to pneumoconiosis under Section 718.204(b). Accordingly, benefits were denied. Claimant contends on appeal that the administrative law judge erred in failing to determine that the evidence of record supports a finding of entitlement. Employer has responded and urges affirmance of the denial of benefits. The Director has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 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*).

We hereby affirm the administrative law judge's finding that claimant did not satisfy his burden of proving, pursuant to Section 718.204(b), that pneumoconiosis is a contributing cause of his total disability, as it is rational and supported by substantial evidence.[1] Decision and Order at 6; *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). With respect to the newly submitted evidence, the administrative law judge determined correctly that Dr. Sy's medical report did not assist claimant in meeting his burden under Section 718.204(b), as Dr. Sy did not identify the source of the disabling pulmonary impairment revealed on the pulmonary function study that he obtained from claimant. Decision and Order at 6; Director's Exhibit 84; *see Street*, *supra*. In addition, the administrative law judge acted rationally in reaching the same conclusion concerning Dr. Fino's newly submitted medical opinion, as Dr. Fino stated that claimant is not disabled as a result of pneumoconiosis. Decision and Order at 6; Director's Exhibit 89; *see Street*, *supra*.

Regarding the previously submitted evidence of record, the administrative law judge noted that the Board affirmed Judge Murty's determination that claimant did not establish total disability due to pneumoconiosis under Section 718.204(b) on the grounds that Judge Murty acted permissibly in finding Dr. Kanwal's 1984 report illegible and the record contained no other evidence of causation. Decision and Order at 6, *citing Russell v. Paramont Mining Co.*, BRB No. 95-1764 BLA (Sept. 9, 1996)(unpub.), *slip opinion at 3*. The administrative law judge then concluded that claimant failed to prove that his total disability is due to pneumoconiosis. Decision and Order at 7. Although the administrative law judge adopted the Board's and Judge Murty's holdings with respect to the previously submitted evidence, rather than engaging in the requisite *de novo* review, *see Kingery v.*

[1]The administrative law judge determined properly that the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 is not applicable in this case, as there is no evidence that claimant is suffering from complicated pneumoconiosis. Decision and Order at 4 n.5.

Hunt Branch Coal Co., 19 BLR 1-8 (1994), we decline to disturb the administrative law judge's finding that claimant did not prove that he is totally disabled due to pneumoconiosis under Section 718.204(b).

The administrative law judge indicated that his determination was based upon a "careful review of the entire record." Decision and Order at 6. Moreover, Dr. Kanwal's 1984 report, which was recorded on Department of Labor Form CM-988, appears to be insufficient, as a matter of law, to support a finding of total disability due to pneumoconiosis, as Dr. Kanwal's handwriting is virtually indecipherable.[2] Director's Exhibit 13. Even assuming that Dr. Kanwal's report contains a diagnosis of a totally disabling respiratory or pulmonary impairment, it is unclear whether, or to what extent, Dr. Kanwal attributed the impairment to pneumoconiosis or dust exposure in coal mine employment. *Id.*. Finally, there is no other evidence of record indicating that pneumoconiosis is a contributing cause of claimant's total disability. Thus, we affirm the administrative law judge's finding that claimant did not meet his burden of proving total disability due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement. We must, therefore, affirm the denial of benefits under 20 C.F.R. Part 718.[3] *See Trent*, *supra*; *Gee*, *supra*.

[2]Dr. Kanwal later submitted a typewritten report dated February 23, 1994. Director's Exhibit 66. Dr. Kanwal did not address the issue of disability causation in this report. *Id.*.

[3]In light of our affirmance of the denial of benefits on the merits under 20 C.F.R. Part 718, we decline to address the administrative law judge's findings under 20 C.F.R. §§718.204(c) and 725.310, as any error therein would be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge