BRB No. 98-1659 BLA

BERNARD PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROARING CREEK COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 11/3/99
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Bernard Phillips, Belington, West Virginia, *pro se*.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order - Denying Benefits (96-BLA-1822) of Administrative Law Judge Michael P. Lesniak 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 administrative law judge credited claimant with thirteen years of coal mine employment and noted that the record contained a claim filed on March 14, 1973, which was finally denied by the Department of Labor on January 2, 1980, on the ground that claimant did not prove any of the elements of entitlement, and a duplicate claim filed on

November 27, 1995. Director's Exhibits 1, 24. The administrative law judge initially considered, therefore, whether claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard adopted by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[1]

The administrative law judge weighed the newly submitted evidence and found that it was sufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded that claimant demonstrated a material change in conditions pursuant to Section 725.309 and turned to a consideration of entitlement on the merits. Based upon a review of all of the evidence of record, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) and that his totally disabling impairment is due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant asserts that the denial of benefits is in error and that the x-ray readings

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last year of coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the court held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

focused upon his cardiac condition, rather than pneumoconiosis.[2] Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in the present appeal.[3]

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*).

Upon review of the administrative law judge's findings and the evidence of record, we affirm the administrative law judge's determination, on the merits, that

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[2]Claimant also indicates that he is in the process of obtaining new evidence. This evidence cannot be considered in conjunction with his appeal of the administrative law judge's Decision and Order. *See Bozick v. Consolidation Coal Co.*, 732 F.2d 64, 6 BLR 2-23, *remanded for recon.*, 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984). It may, however, form the basis of a request for modification under the terms of 20 C.F.R. §725.310.

[3]We affirm the administrative law judge's findings under 20 C.F.R. §§718.204(c)(1)-(4) and 725.309, as they are not adverse to claimant and are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

claimant has not demonstrated that pneumoconiosis is at least a contributing cause of his total disability pursuant to Section 718.204(b), as it is rational and supported by substantial evidence. *See Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *see also Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996). The record contains the medical opinions of Drs. Piccirillo, Scattaregia, Gaziano, Renn, and Fino. Drs. Piccirillo's opinion was submitted with the 1973 claim and contains only a diagnosis of hypertension unrelated to dust exposure in coal mine employment. Director's Exhibit 24. Dr. Gaziano reviewed an x-ray dated January 16, 1996, and stated that it revealed pneumoconiosis which, in light of claimant's ten year history of coal mine work, was caused by coal dust exposure. Director's Exhibits 11, 12. Dr. Gaziano did not, however, offer any opinion as to the issues of disability or disability causation. Dr. Scattaregia examined claimant at the request of the Department of Labor in conjunction with the 1995 claim. Director's Exhibit 6. Dr. Scattaregia diagnosed possible pleural plaques and determined that claimant does not have a respiratory impairment. *Id.*. Dr. Renn examined claimant on April 15, 1997 and also conducted a review of the record. Employer's Exhibit 1. Dr. Renn stated that claimant does not have pneumoconiosis and that his mild ventilatory insufficiency is attributable to cardiac failure, cardiomyopathy, and massive abdominal ascites. Employer's Exhibits 1, 4. Dr. Fino performed a record review and concurred with Dr. Renn's conclusions. Employer's Exhibit 2.

Inasmuch as none of the physicians of record concluded that pneumoconiosis is at least a contributing cause of claimant's total disability, the administrative law judge rationally determined that claimant did not establish total disability due to pneumoconiosis under Section 718.204(b). *See Roberts, supra*; *Robinson*, *supra*. In light of the administrative law judge's appropriate finding that claimant did not demonstrate an essential element of entitlement, we must affirm the denial of benefits under 20 C.F.R. Part 718.[4] *See Trent*, *supra*; *Perry*, *supra*; *Gee*, *supra*.

[4]Because the administrative law judge's determination on the merits pursuant to 20 C.F.R. §718.204(b) can be affirmed, we decline to address the administrative law judge's findings under 20 C.F.R. §718.202(a)(1)-(4), including any matter related to the x-ray evidence of record, as error, if any, therein 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 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