BRB No. 99-1194 BLA

NEAL BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
		DIRECTOR, OFFICE OF WORKERS'
		)
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in -Interest	)	DECISION and ORDER

Appeal of the Corrected Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Corrected Decision and Order Denying Benefits (98-BLA-1011) of Administrative Law Judge Richard A. Morgan on a request for modification of a

[1]Claimant, Neal Blankenship, the miner, filed his original claim with the Department of Labor (DOL) on August 10, 1992, which was denied by the deputy director on October 27, 1992. Director's Exhibit 28. Claimant filed a second claim on June 28, 1995, which

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.* This case is before the Board for the second time. The administrative law judge found that although a review of the record established a mistake in a determination of fact, the administrative law judge found the newly submitted evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and total respiratory disability due to pneumoconiosis at Section 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the medical opinions pursuant to Sections 718.202(a)(4) and 718.204(c), (b). Employer, in response, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in the instant appeal.[2]

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was denied by Administrative Law Judge Jeffrey Tureck in a Decision and Order dated September 24, 1996. Director's Exhibits 1, 56. Following claimant's appeal, the Board affirmed the administrative law judge's denial. *Blankenship v. Island Creek Coal Co.*, BRB No. 97-0241 BLA (Oct. 9, 1997)(unpub.). Director's Exhibit 61. Claimant then filed the instant request for modification on March 2, 1998. Director's Exhibit 68.

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence establishes 27.817 years of coal mine employment, that employer is the putative responsible operator, that claimant has one dependent for purposes of augmentation, and that the newly submitted evidence establishes a mistake in a determination of fact at Section 725.310(a), and that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3). *See Skrack v.*

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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 in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3; 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and is in accordance with law. Contrary to claimant's contention, the administrative law judge found Drs. Forehand, Smiddy, Modi and Jackson diagnosed pneumoconiosis in their reports. However, the administrative law judge rationally accorded more weight to the opinions of Drs. Hippensteel, Castle, Jarboe and Fino, concluding that the claimant did not have pneumoconiosis, because they were qualified specialists in pulmonary diseases and therefore, better qualified than all of the physicians who voiced the contrary opinion. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 22-23. The administrative law judge also rationally discounted the opinions of Drs. Jackson, Smiddy and Modi, despite his finding that Dr. Modi was claimant's treating physician, because he permissibly found that they did not adequately explain their conclusions. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 17, n. 11 and 23. We affirm, therefore, the administrative law judge's finding that claimant failed to meet his burden of proof to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Island Creek Coal Co., 6 BLR 1-710 (1983).

We also affirm, the administrative law judge's determination that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a). 20 C.F.R. §§725.309, 725.310. As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra;* we need not discuss whether claimant was able to establish a material change in conditions pursuant to 20 C.F.R. §725.309, *see Perry, supra*, and we affirm the denial of benefits.[3] *See Lisa Lee Mines v. Director, OWCP, [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied, 519 U.*S. 1090 (1997); *see also Hess v. Director, OWCP*, 21 BLR 1-142 (1998).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]We need not address claimant's contentions regarding 20 C.F.R. § 718.204(b), (c) as they are rendered moot by our disposition of the case. In addition, we will not address claimant's contentions with regard to issues raised in his closing argument, which claimant purports to incorporate by reference in his brief, inasmuch as he Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity in his brief to the Board and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. See 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986). Claimant's closing argument was not attached to Claimant's Petition and Brief submitted to the Board and is not in the record. Moreover, because the closing argument was prepared prior to issuance of the administrative law judge's Decision and Order, it obviously could not allege with specificity any errors in the administrative law judge's decision, thus, consideration of the closing argument would require the Board to exceed its scope of review. Furthermore, although claimant asserts that the administrative law judge issued his decision prior to reviewing his closing argument, he does not explain how he was prejudiced by this circumstance, not even that he was told that the record would be held open for submission of closing argument.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge