BRB No. 99-0172 BLA

JERRY A. FRITZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACK MOUNTAIN COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Melissa Amos Young (Gentry, Locke, Rakes, & Moore), Roanoke, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (98-BLA-0165) of

[1] Claimant, Jerry A. Fritz, filed his application for benefits on March 27, 1997. Director's Exhibit 1.

Administrative Law Judge Lawrence P. Donnelly 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.* (the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-three years of qualifying coal mine employment and 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), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred by failing to find total respiratory disability pursuant to Section 718.204(c)(2), total disability due to pneumoconiosis pursuant to Section 718.204(b), and the existence of complicated pneumoconiosis pursuant to Section 718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he will not participate in this appeal.[2]

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 the 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).

[2] We affirm the administrative law judge's findings with respect to the length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c)(1), (3), (4), 718.305, and 718.306 inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-8.

Pursuant to Section 718.304, claimant contends that the administrative law judge erroneously found that there is no evidence of complicated pneumoconiosis because there are two x-ray interpretations, Claimant's Exhibits 4 and 5, indicating the presence of this advanced disease process. Contrary to claimant's argument, neither reading[3] nor any other x-ray interpretation of record, contains a finding of large opacities, massive lesions, or a diagnosis demonstrating the presence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); Director's Exhibits 19, 20; Claimant's Exhibits 3-5; Employer's Exhibits 1, 2. We, therefore, affirm the administrative law judge's determination that the record is devoid of evidence that would support any of the presumptions set forth in Section 718.202(a)(3). *See* 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306; Decision and Order at 3 n.2.

[3] Claimant's Exhibit 4 is Dr. Deponte's reading of an x-ray film dated December 12, 1997, in which she diagnosed "1/0, s/t" pneumoconiosis. Claimant's Exhibit 5 is Dr. Ahmed's reading of a film dated January 26, 1998, wherein he found "1/1, p/p" pneumoconiosis. Both physicians checked "O" in the box indicating the absence of large opacities. Claimant's Exhibits 4, 5.

With respect to Section 718.204(b), claimant argues that the administrative law judge impermissibly found that his disability was not due to pneumoconiosis because Dr. Paranthaman opined that claimant's respiratory problems were due to coal dust exposure. Claimant argues further that, because the district director failed to conduct a follow-up blood gas study as Dr. Paranthaman had recommended, Dr. Paranthaman was unable to render a supplemental opinion. Dr. Paranthaman diagnosed chronic bronchitis due to the combined effects of cigarette smoking and coal dust exposure, but deferred his opinion on the presence of a totally disabling respiratory impairment and its etiology until further testing could be completed.[4] Director's Exhibits 14, 16. We reject claimant's arguments inasmuch as claimant has the burden of establishing entitlement to benefits and cannot rely on the Director to gather evidence; the Act, regulations, and case precedent all provide that the claimant, not the Department of Labor, bears the burden of establishing initial entitlement to benefits. *See White v. Director, OWCP*, 6 BLR 1-368 (1983); *see also U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, BLR (4th Cir. 1999); *Barnes v. ICO Corp.*, 31 F.3d 678, 18 BLR 2-319 (8th Cir. 1994) ("It was up to Barnes and his attorney, not the Director, to obtain medical evidence, including satisfactory pulmonary function studies, to indicate his eligibility."). Inasmuch as the administrative law judge rationally found that there is no medical opinion of record demonstrating either that claimant is totally disabled or that his industrial bronchitis contributed to a totally disabling respiratory impairment, we affirm the administrative law judge's determination under Section 718.204(b).[5] *See Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather and Co.*, 914

[4] A review of the record indicates that when the case was at the district director level, Dr. Paranthaman was asked to clarify his initial opinion, contained in a report dated April 24, 1997, with respect to the existence of pneumoconiosis, total disability, and total disability causation. Director's Exhibits 14, 15. Responding on June 5, 1997, Dr. Paranthaman opined that claimant has moderate hypoxemia based on the qualifying blood gas study, but stated, "hypoxemia persists over a period of time before attributing [it] to pneumoconiosis since several pulmonary and non-pulmonary causes can cause temporary decreases in pO_2. Therefore, I would like to defer my opinion on the ability of the miner to perform his last coal mine job as a superintendent until the chronicity of hypoxemia is established." Director's Exhibit 16.

[5] There are three physicians' opinions of record. Dr. Paranthaman deferred his opinion on total disability and its etiology until further testing could be administered, Dr. Smiddy did not render an opinion on disability, and Dr. Fino found that claimant is neither partially nor totally disabled. Director's Exhibits 14, 16; Claimant's Exhibit 1; Employer's Exhibit 1, respectively.

F.2d 35, 14 BLR 2-68 (4th Cir. 1990); Decision and Order at 9.[6]

Because claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), a requisite element of entitlement under Part 718, we affirm the administrative law judge's Decision and Order denying benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[6] Claimant also argues that the administrative law judge mischaracterized the only blood gas study of record under Section 718.204(c)(2) by finding that it yielded values "closely approaching the value qualifying for presumptive disability," whereas this study rendered qualifying values, and moreover, was validated. Claimant's contention has merit. There is only one blood gas study of record dated March 12, 1997, and this test is qualifying and was validated by Dr. Michos. *See* 20 C.F.R. Part 718, App. C; Director's Exhibits 17, 18. Notwithstanding the administrative law judge's error, however, the administrative law judge properly found that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), a requisite element of entitlement in this Part 718 case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Hence, an award of benefits is precluded in this case.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge