BRB No. 02-0222 BLA

EDWARD J. SMERLICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MALLARD CONTRACTING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

William E. Wyatt, Jr. (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0296) of Administrative Law Judge Robert D. Kaplan 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).[1] Based on the filing date of November 4, 1999, the administrative law

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with twenty-nine years of coal mine employment, found employer to be the responsible operator, found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but found it insufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding total disability established based on the pulmonary function study and medical opinion evidence of record pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), is not participating 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 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 in a living miner's claim pursuant to 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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm the administrative law judge's findings on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a), 718.203(b), and 718.204(b)(2)(ii), (iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After careful consideration of the administrative law judge's Decision and Order Denying Benefits, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Benefits is supported by substantial evidence, contains no reversible error, and must be affirmed. Contrary to claimant's arguments, the administrative law judge properly considered the pulmonary function study evidence of record and properly accorded greater weight to the non-qualifying pulmonary function study of June 15, 2000, over the qualifying pulmonary function studies of January 15, 2000, and February 2, 2000 because the administrative law judge found the qualifying pulmonary function studies were subsequently found invalid by physicians with credentials superior to those of the physicians who found them valid, and the opinions invalidating the studies were more complete than the opinions validating them. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985)(Brown, J. dissenting); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Claimant's Exhibits 15, 17, 20, 24, 26, 28; Director's Exhibit 10; Employer's Exhibits 11, 14. The administrative law judge, therefore, properly found that the pulmonary function studies did not establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i).

Likewise, contrary to claimant's argument, the administrative law judge properly found that the medical opinion evidence failed to establish total disability as the physicians who found claimant totally disabled, Drs. Raymond and Matthew Kraynak, were not as well-qualified as the physicians who found that claimant did not have a totally disabling respiratory impairment, *i.e.*, Drs. Michos and Levinson. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Additionally, the administrative law judge properly accorded greater weight to the opinions of Drs. Michos and Levinson as he found them better supported by the objective evidence of record. *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Claimant's Exhibits 24, 28; Director's Exhibits 12, 17, 22; Employer's Exhibits 12, 14. Further, contrary to claimant's argument, while the administrative law judge was aware that Drs. Raymond and Matthew Kraynak were claimant's treating physicians, Decision and Order at 9, he was not required to accord them greater weight based on that factor when he found their opinions unreasoned. *See Lango v. Director, OWCP*, 104 F.3d 572, 21 BLR 2-12 (3d Cir. 1997). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). As claimant has failed to establish total pulmonary or respiratory disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge