

BRB No. 88-1297 BLA

LAWRENCE D. SIRK                    ) )  
  ) )  
                                  Claimant-Petitioner    ) )  
  ) )  
  ) )  
                                  v.                            ) )  
  ) )  
EASTERN ASSOCIATED COAL        ) )    DATE ISSUED:  
CORPORATION                        ) )  
  ) )  
                                  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 of Melvin Warshaw, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick (Manchin, Aloi & Carrick), Fairmont, West Virginia, for claimant.

Virginia M. Lum (Arter & Hadden), Washington, D.C., for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and MARCELLINO, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order (85-BLA-3398) of Administrative Law Judge Melvin Warshaw denying benefits 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). The administrative law judge determined that claimant's original Part B claim had been finally denied, since the

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

evidence of record established that an election card was mailed to claimant but was not returned, and the administrative law judge was not persuaded by claimant's testimony that he never received the election card. Consequently, the administrative law judge reviewed claimant's second claim, filed on April 12, 1984, pursuant to the provisions at 20 C.F.R. Part 718, and credited claimant with forty-two years of qualifying coal mine employment, but found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to apply the provisions at 20 C.F.R. Part 727. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.<sup>1</sup>

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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

On appeal, claimant generally maintains that the evidence of record is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a), and insufficient to establish rebuttal of that presumption. Contrary to claimant's arguments, however, the provisions at 20 C.F.R. Part 727 are not applicable, as the administrative law judge determined that claimant's original claim was not viable, and properly adjudicated the merits of the instant claim pursuant to the provisions at 20 C.F.R. Part 718. See Muncy v. Wolfe Creek Collieries Coal Co., 3 BLR 1-627 (1981); see also Lukman v. Director, OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); Dotson v. Director, OWCP, 14 BLR 1-10 (1990)(en banc). As claimant has failed to identify any substantive error of law or fact in the administrative law judge's findings pursuant to Section 718.204(c), he has provided the Board with no basis upon which to review the administrative law judge's finding

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<sup>1</sup> The administrative law judge's findings with regard to claimant's original Part B claim, and the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

that the evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment thereunder, and we must affirm that finding. 20 C.F.R. §802.211. See Cox v. Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); Etzweiler v. Cleveland Brothers Equipment Co., 16 BLR 1-38 (1992); Sarf v. Director, OWCP, 10 BLR 1-119 (1987); Fish v. Director, OWCP, 6 BLR 1-107 (1983). Inasmuch as claimant has failed to establish a requisite element of entitlement pursuant to Part 718, i.e., total disability, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

FRANK J. MARCELLINO  
Administrative Law Judge