BRB No. 97-0486 BLA

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| ANTHONY LIPARULO | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Sarah M. Hurley (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (93-BLA-904) of Administrative Law Judge C. Richard Avery 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 credited claimant with eighteen years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R.

§718.204(c)(4) and to award benefits on the basis of the opinion of Dr. Milani. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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 contains no reversible error therein. In weighing the newly submitted medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish total disability by a preponderance of the evidence.[1] In considering the medical opinions pursuant to Section 718.204(c)(4), the administrative law judge permissibly found that the opinions of Drs. Levinson and DeSai, that claimant did not have a significant pulmonary impairment, failed to establish total disability. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984); Decision and Order at 3; Director's Exhibits 12, 22. Moreover, the administrative law judge rationally did not credit the opinion of Dr. Milani since he permissibly found that the physician's diagnoses was not supported by the objective evidence of record and the underlying documentation did not support his conclusions. *Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); Decision and Order at 3; Director's Exhibit 16. Consequently, the administrative law judge properly found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability

[1] The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Inasmuch as the administrative law judge properly considered the newly submitted medical evidence and rationally concluded that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence and in accordance with law. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge