

BRB No. 97-0957 BLA

HERMAN R. McKINNEY, SR. )

Claimant-Petitioner )

v. )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge,  
United States Department of Labor.

Herman R. McKinney, Sr., Stephenson, West Virginia, *pro se*.

J. Matthew McCracken (Marvin Krislov, Deputy Solicitor for National Operations;  
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, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-1587)  
of Administrative Law Judge Stuart A. Levin 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 administrative law judge found seventeen to nineteen years of coal mine  
employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup>  
The administrative law judge concluded that the evidence of record was insufficient to establish total

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<sup>1</sup> Claimant filed his first claim for benefits on December 15, 1975 which was subsequently  
denied. The instant claim was filed on May 25, 1988. Director's Exhibit 1.

disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 are 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 pursuant to 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 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 that there is no reversible error contained therein. The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge permissibly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values<sup>2</sup> and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Director's Exhibits 7, 8, 34, 36, 43; Decision and Order at 3; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge properly considered the entirety of the medical opinion evidence of record and properly found that total disability was not established pursuant to Section 718.204(c)(4) as no physician of record found that claimant was totally disabled.<sup>3</sup> Director's Exhibits 7, 24, 35; Decision and Order at 3; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-104 (1986). The administrative law judge is empowered to weigh the medical evidence and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*,

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<sup>2</sup> A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

<sup>3</sup> Dr. Roberts states that the miner has coal workers' pneumoconiosis but does not address the degree of the miner's respiratory impairment. Director's Exhibit 44. Dr. Rasmussen opined that the miner had a mild to moderate respiratory impairment but concluded that it would not prevent the miner from performing his coal mine employment. Director's Exhibits 24, 35.

7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to Part 718, entitlement thereunder is precluded.<sup>4</sup>

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>4</sup> Inasmuch as we affirm the denial of benefits based on the administrative law judge's consideration of the merits, we need not address the duplicate claims issue in this case. 20 C.F.R. 725.309; *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir.1995); *Dotson v. Director, OWCP*, 14 BLR 1-10 (1990).