

BRB No. 98-0948 BLA

WILLIAM RUFUS McCOY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED:
)	
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 Denying Benefits of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Donna Roark (Law Offices of Phillip Lewis), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (97-BLA-1869) of
Administrative Law Judge Thomas F. Phalen, Jr. 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 concluded that the evidence was insufficient to
establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was
insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20
C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied the claim.

¹ Claimant is William Rufus McCoy, the miner, who filed a living miner's claim with
the Department of Labor on September 25, 1996. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based upon the x-ray interpretation evidence of record. Claimant asserts that the administrative law judge failed to properly weigh the six positive interpretations of record. Further, claimant asserts that the administrative law judge did not provide adequate rationale for his findings. Claimant also challenges the administrative law judge's findings with respect to the medical opinions of record at Section 718.202(a)(4). Claimant argues that the administrative law judge erred in not crediting opinions of Dr. Marshall, which would be sufficient to establish the existence of pneumoconiosis. Employer, in response, asserts that claimant has failed to challenge the administrative law judge's findings with regard to Section 718.204(c), and asserts that as a result, affirmance is compelled. In the alternative, employer asserts that the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis and total respiratory disability are supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation has filed a letter indicating that he will not be filing a brief.

The Board's scope of review is defined by statute. 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 in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate 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 one 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).

Claimant initially challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant, in his brief, however, fails to challenge the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c), and he is represented by counsel. The Board has held that where a party represented by counsel fails to challenge an administrative law judge's finding with specificity, that finding will be affirmed on appeal. Moreover, the failure to challenge an administrative law judge's adverse determination with respect to a necessary element of entitlement requires the Board to affirm the decision below. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g sub nom. Cox v. Director, OWCP*, 7 BLR 1-610 (1984) ; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Coen v. Director,*

OWCP, 7 BLR 1-30 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Claimant's brief only addresses the administrative law judge's findings with regard to the existence of pneumoconiosis at Section 718.202(a), without addressing the administrative law judge's finding at Section 718.204(c).

We affirm, therefore, the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4), as it has not been challenged. As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.²

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

² We need not address claimant's contentions with respect to the existence of pneumoconiosis at Section 718.202(a), as they are rendered moot by our disposition of the case. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984).