

BRB No. 98-1570 BLA

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

Appeal of the Decision and Order Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert D. Whitfield, Chicago, Illinois, for claimant.

Rita Roppolo (Henry L. Solano, 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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1637) of Administrative Law Judge Gerald M. Tierney 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 found that claimant established almost thirty-seven 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> Decision and Order at 3. This case is a duplicate

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<sup>1</sup> Claimant filed three previous claims for benefits, which were denied by the district director, and never appealed. This instant claim was filed February 15, 1996. Director's Exhibit 1.

claim. The administrative law judge considered all the evidence of record and concluded that the evidence was insufficient to establish total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. Part 718, and thus 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 evidence of record is sufficient to establish total disability due pneumoconiosis arising out of coal mine employment pursuant to Part 718 and a material change in conditions pursuant to 20 C.F.R. §725.309(d). The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand for further development of the medical evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

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 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).

Claimant contends that Dr. Clements diagnosis of impairment caused by chronic bronchitis due to smoking and dust exposure, meets the legal definition of pneumoconiosis and thus, is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Although Dr. Clements's diagnosis apparently meets the legal definition of pneumoconiosis, *see* 20 C.F.R. §718.201, the administrative law judge permissibly discredited the opinion as the physician failed to explain his diagnosis and found it unsupported by the objective evidence of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).<sup>2</sup> We therefore affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a) as supported by substantial evidence.

Claimant contends that Dr. Clements's opinion is sufficient to establish total disability

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<sup>2</sup> Claimant's contention that his testimony is sufficient to establish total disability lacks merit. *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

pursuant to Section 718.204(c)(4).<sup>3</sup> We disagree. The administrative law judge permissibly discredited Dr. Clements opinion as insufficiently explained and unsupported by the objective evidence of record. The administrative law judge further found that Dr. Clements only diagnosed a mild impairment.<sup>4</sup> *Clark, supra; Fields, supra; King, supra; Sabett, supra.* Further, the administrative law judge noted that Drs. Goldstein and Risman found no impairment and Dr. Russakoff did not address total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). The administrative law judge's finding that claimant failed to establish total disability under Section 718.204(c) based on the evidence of record is therefore affirmed, as is his finding that a material change in conditions was not established at 20 C.F.R. §725.309.

However, as the Director concedes, based on the evidence of record, claimant has not been provided a complete, credible pulmonary evaluation as he is entitled to under the Act pursuant 20 C.F.R. §§718.101, 718.401; *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). We, therefore grant the Director's request to remand this case and vacate the administrative law judge's denial of benefits. The case is remanded, therefore, to the district director for further development of the medical evidence.

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<sup>3</sup>The administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Sections 718.202(a)(1)-(a)(3) is affirmed as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup>The administrative law judge's findings pursuant to Sections 718.204(c)(1)-(c)(3) are affirmed as unchallenged on appeal. *Skrack, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge