

BRB No. 03-0487 BLA

ANTHONY J. MELINCAVAGE)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 12/22/2003
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jennifer U. Toth (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-0589) of Administrative Law Judge Robert D. Kaplan denying benefits on a claim filed on March 17, 2001 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 6.75 years of coal mine employment, and found that the evidence supports the parties stipulation that claimant has pneumoconiosis, but denied benefits finding that claimant has failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability pursuant to 20 C.F.R. §§718.203(c) and 718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's findings under Sections 718.203(c) and

718.204(b)(2)(i) and (iv). The Director, Office of Workers' Compensation Programs responds, urging affirmance of the denial of benefits.¹

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'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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.² See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2001); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. Claimant's contention, that the administrative law judge erred in finding the March 20, 2002 pulmonary function study and Dr. Kraynak's opinion insufficient to establish a totally disabling respiratory impairment under Section 718.204(b)(2)(i) and (iv), is without merit. The administrative law judge permissibly found that Dr. Levinson's report, invalidating the March 20, 2002 qualifying pulmonary function study, was entitled to more weight based on the physician's superior qualifications as a Board-certified pulmonologist.³ See *Director, OWCP v. Siwiec*, 894

¹The administrative law judge's findings regarding the length of claimant's coal mine employment and pursuant to Section 718.204(b)(2)(ii)-(iii), are unchallenged on appeal and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

²The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

³A "qualifying" pulmonary function 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. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i). The

F.2d 635,13 BLR 2-259 (3d Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 7, 8; Director's Exhibit 23, 24. The administrative law judge also acted within his discretion in finding that Dr. Kraynak's medical opinion, in which he diagnosed total disability due to pneumoconiosis, was entitled to diminished weight because he relied on an invalidated pulmonary function study. Decision and Order at 9; Claimant's Exhibit 5, 6.

Moreover, the administrative law judge was not required to credit Dr. Kraynak's opinion based on his status as claimant's treating physician, since the administrative law judge rationally concluded that his opinion was not well-supported by the objective evidence of record. See *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogeny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. See *Trent*, 11 BLR 1-26. The administrative law judge's finding that the evidence of record as a whole is insufficient to establish that claimant is totally disabled pursuant to Section 718.204(b), an essential element of entitlement, is supported by substantial evidence. Claimant is therefore precluded from an award of benefits.⁴ See *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

record indicates that Dr. Kraynak is Board-eligible in family medicine. Claimant's Exhibit 5.

⁴ Because the administrative law judge rationally found the evidence insufficient to establish total disability under 20 C.F.R. §718.204(b), we need not address claimant's arguments under 20 C.F.R. §718.203(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge