

BRB No. 03-0494 BLA

MARLIN EUGENE NEY )  
 )  
 Claimant )  
 )  
 v. ) DATE ISSUED: 02/27/2004  
 )  
 READING ANTHRACITE COMPANY, )  
 INCORPORATED )  
 )  
 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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Frank L. Tamulonis, Jr. (Zimmerman, Liberman, Tamulonis & Crossen), Pottsville, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5429) of Administrative Law Judge Ralph A. Romano denying benefits on a claim filed on November 2, 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 thirteen years of coal mine employment, and found the evidence insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(b)(2). Accordingly, benefits were denied. On appeal, claimant accepts the administrative law judge's determination crediting claimant with thirteen years of coal mine employment, but challenges the findings under Sections

718.202(a)(1), (4) and 718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>1</sup>

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'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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.<sup>2</sup> See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *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 considering 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.<sup>3</sup> We reject claimant's contention that Dr. Kraynak's opinion is sufficient to establish total disability and is entitled to "additional weight" because of his status as claimant's treating physician. The administrative law judge properly found that of the medical opinions of record, Drs. Levinson and Fino agreed that claimant was not totally disabled, Dr. Mariglio opined that claimant had no respiratory disease and

---

<sup>1</sup>The administrative law judge's findings regarding the length of claimant's coal mine employment and pursuant to Sections 718.202(a)(2)-(3) are unchallenged on appeal, and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup> This 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.

<sup>3</sup> The administrative law judge's findings that the pulmonary function studies and the blood gas studies yielded non-qualifying results under the regulations, and that there is no evidence of cor pulmonale with right-sided congestive heart failure, are unchallenged on appeal and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

only Dr. Kraynak opined that claimant was totally disabled. Decision and Order at 11; Director's Exhibit 8; Claimant's Exhibit 5; Employer's Exhibits 11, 12.

The administrative law judge noted that in order to establish total disability, the medical opinion must be reasoned and based on medically acceptable clinical and laboratory diagnostic techniques. Decision and Order at 11. In light of the administrative law judge's finding that the objective evidence of record was non-qualifying, his finding that Dr. Kraynak's opinion is outweighed by the contrary opinions of Dr. Levinson and Fino is supported by substantial evidence. Further, contrary to claimant's contention, the administrative law judge is not required to give greater weight to the opinion of a treating physician.<sup>4</sup> 20 C.F.R. §718.204(b); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Based on the foregoing, we affirm the administrative law judge's finding that the medical evidence relevant to the question of total disability, weighed, like and unlike together, with claimant bearing the burden of establishing total disability by a preponderance of the evidence, does not support a finding that claimant is totally disabled pursuant to Section 718.204(b)(2)(i)-(iv). Decision and Order at 11. Consequently, because we affirm the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), we need not consider claimant's arguments on the existence of pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

---

<sup>4</sup> The record indicates that Dr. Kraynak treated claimant since January 2, 2002, that claimant visited Dr. Kraynak on four occasions and was last seen on December 3, 2002. Claimant's Exhibit 1.

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

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge