

BRB No. 89-3284 BLA

ANTHONY BLANKENSHIP)
)
 Claimant-Petitioner)
)
 v.)
)
C & S COAL COMPANY)
)
 and)
)
ROCKWOOD INSURANCE COMPANY,)
)
 Employer/Carrier)
 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 Robert L. Cox, Administrative Law Judge,
United States Department of Labor.

Anthony Blankenship, Hurley, Virginia, pro se.

H. Ashby Dickerson (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for
employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and CLARKE,
Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without legal representation, the Decision and Order (88-BLA-2193) of Administrative Law Judge Robert L. Cox denying benefits on a claim filed pursuant to the provisions of

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

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 reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with at least twenty-eight years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4) and 718.203(b), but further found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. Claimant appeals, contending that the evidence establishes entitlement under Part 718. Employer responds, urging affirmance. The Director, Office of Workers' Compensation

Programs, has not participated in this appeal.¹

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. 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 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 under 20 C.F.R. Part 718, claimant must establish, 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 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).

¹ The administrative law judge's findings under Sections 718.202(a)(4) and 718.203(b), and with regard to length of coal mine employment, which are not adverse to claimant, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Turning to the issue of total disability, the administrative law judge properly found that all of the pulmonary function study and blood gas study results of record were non-qualifying,² and that there was no evidence of cor pulmonale with right-sided congestive heart failure, thus claimant failed to establish total disability under Section 718.204(c)(1), (c)(2) or (c)(3). In evaluating the medical opinions of record under Section 718.204(c)(4), the administrative law judge noted that Dr. Abernathy diagnosed coal workers' pneumoconiosis and exercise-induced asthma which "may remotely be associated with exposure to coal dust", but the physician made no assessment of disability. Decision and Order at 7, 12; Director's Exhibit 10. The administrative law judge reasonably determined that the physical limitations listed in Dr. Abernathy's report merely reflected claimant's subjective complaints rather than Dr. Abernathy's medical conclusions, and thus found the report insufficient to support a finding that claimant was unable to perform his usual coal mine employment or similar work under Section 718.204.³ See generally Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986); Parsons v. Director, OWCP, 6 BLR 1-272 (1983). Further, the administrative law judge permissibly found that the opinion of

² 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

³ Dr. Abernathy recorded physical limitations under the "Medical Assessment" section of his report, and noted that claimant had requested and been assigned different duties because of dyspnea. Director's Exhibit 10.

Dr. Endres-Bercher, who stated that claimant retains the pulmonary capacity to carry out his previous coal mine duties or similar arduous labor, was supported by its underlying documentation. Decision and Order at 7, 12; Employer's Exhibits 1, 16; see Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). We therefore affirm the administrative law judge's findings under Section 718.204(c)(4), as they are rational and based on substantial evidence. Inasmuch as claimant has failed to establish a requisite element of entitlement under Part 718, i.e., total disability, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge