

BRB No. 99-0812 BLA

WALDON ASHER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DINGO COAL COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
KENTUCKY CENTRAL 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 Denying Benefits of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri, Fogle & Picklesimer), Lexington, Kentucky, for
employer.

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 (98-BLA-985) of
Administrative Law Judge Thomas F. Phelan, 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 Act). The administrative law judge found that claimant established three and one-half years of coal mine employment, and based on the filing date of the claim, applied the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability.¹ Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

Claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish total disability at Section 718.204(c)(4). We disagree. None of the medical opinions of record term claimant totally disabled or make a sufficient physical assessment from which the administrative law judge can infer total disability. Director's Exhibits 8, 24, 26; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Further, we reject claimant's contention that merely because pneumoconiosis is a progressive disease it can be presumed that claimant is totally disabled. *See Gee, supra*. Nor, as claimant contends, does the inadvisability of returning to coal dust exposure establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Additionally, contrary to claimant's argument, the administrative law judge is not required to consider age, education and work history in determining whether claimant is totally disabled from his usual coal mine employment inasmuch as these factors are not relevant to establishing total disability pursuant to 20 C.F.R. §718.204(c). *See Taylor v.*

¹ We affirm the administrative law judge's finding of three and one half years of coal mine employment as unchallenged on appeal. In addition, we also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) and failed to establish total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Evans & Gambrel Co., Inc., 12 BLR 1-83 (1988); *Gee, supra*. Therefore, we affirm the administrative law judge's weighing of the medical reports at Section 718.204(c)(4), and his finding that claimant has not established total disability. *Gee, supra*.

As claimant failed to establish total disability, an essential element of entitlement, we affirm the administrative law judge's denial of benefits, and we need not address claimant's remaining contentions at Section 718.202(a)(4). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Gee, supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge