

BRB No. 00-0153 BLA

GEORGE T. BROSKY)
)
 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Jennifer U. Toth (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, SMITH and McGRANERY, Administrative Appeals Judges.

Claimant appeals the Decision and Order Denying Benefits (99-BLA-685) of Administrative Law Judge Richard A. Morgan 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 noted that the Director conceded eleven years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 3. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record

¹ Claimant filed a prior claim for benefits on March 10, 1978, which was denied by the district director on April 22, 1980, because the evidence failed to establish any of the elements of entitlement. Director's Exhibit 24. The instant claim was filed on January 13, 1998. Director's Exhibit 1.

established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) an element previously adjudicated against claimant and thus, was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge then considered all the evidence of record and concluded that although the evidence was sufficient to establish the existence of pneumoconiosis which arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), it was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c).² Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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'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 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)(*en banc*).

² The administrative law judge's findings, that claimant established a material change in conditions pursuant to Section 725.309, that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), (4), 718.203(b), and that the evidence was insufficient to establish total disability at Section 718.204(c)(1)-(3), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4). The medical opinion evidence consists of the following: Dr. Schaaf found that claimant was totally disabled due to pneumoconiosis; Dr. Bizousky³ diagnosed mild interstitial lung disease without significant impairment; and Dr. Cander found no evidence of disabling lung disease. See Director's Exhibits 7, 15, 31; Claimant's Exhibit 8. In considering the evidence, the administrative law judge found that claimant's usual coal mine employment required heavy manual labor, that claimant testified that he could not perform the tasks of his usual coal mine employment, and that Dr. Schaaf found claimant totally disabled. In weighing this evidence along with the other evidence of record, however, the administrative law judge found that claimant's testimony alone could not establish total disability, and that although Dr. Schaaf was the best-qualified physician of record his opinion did not establish total disability because it was outweighed by the objective testing of record and the other two medical opinions of record which did not find a disabling lung disease. Decision and Order at 15. This was proper. Director's Exhibits 6, 7, 8, 15, 24, 31; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987); *Trent, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge, therefore, properly found that claimant failed to carry his burden of establishing a totally disabling respiratory impairment. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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).

³ As the Director points out, the administrative law judge mistakenly attributed Dr. Bizousky's diagnosis in his February 4, 1998 report to Edward Hollenbaugh, the technician, who conducted the underlying pulmonary function study. See Director's Exhibits 6, 7, 8.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge