

BRB No. 95-1764 BLA

RALPH RUSSELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
PARAMONT MINING COMPANY)	
)	
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 Edward J. Murty, Jr.,
Administrative Law Judge, United States Department of Labor.

Ralph Russell, Wise, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is Ralph Russell, the miner, whose initial application for benefits filed on April 2, 1984 was denied in a Decision and Order issued on November 16, 1989, which was affirmed by the Board on July 29, 1992. Director's Exhibits 1, 48, 53. Less than one year later, claimant filed a second application for benefits which was treated as a request for modification pursuant to 20 C.F.R. §725.310. Director's Exhibits 54, 57. Rob Cassell, a benefits counselor with Stone Mountain Health

(94-BLA-1989) of Administrative Law Judge Edward J. Murty, Jr. denying benefits 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). This case is before the Board for the second time. Initially, Administrative Law Judge John J. Forbes, Jr. credited claimant with eleven years of coal mine employment and found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(2), but concluded that the evidence failed to establish total disability due to pneumoconiosis pursuant to Section 718.204 and, accordingly, denied benefits.

On appeal, the Board affirmed the denial of benefits based on the administrative law judge's permissible weighing of the evidence pursuant to Section 718.204(b). *Russell v. Paramount Mining Company*, BRB No. 89-5087 BLA (Jul. 29, 1992)(unpub.). Claimant subsequently filed a second application for benefits which, because it was filed within one year of the denial of benefits, was treated as a request for modification pursuant to Section 725.310.

On modification, Judge Murty found the existence of pneumoconiosis established pursuant to Section 718.202(a)(2) but found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204 and, accordingly, denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.²

Services of Castlewood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² We affirm as unchallenged on appeal the administrative law judge's finding pursuant to Section 718.202(a)(2). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, we do not

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate 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 one 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).

The administrative law judge concluded that the evidence of record failed to establish total disability due to pneumoconiosis pursuant to Section 718.204. The only evidence of causation is Dr. Kanwal's 1984 opinion, which Judge Forbes discounted because the physician failed to discuss what role, if any, claimant's smoking history played in his respiratory health. [1989] Decision and Order at 9; Director's Exhibit 13. Judge Murty noted Judge Forbes' weighing of Dr. Kanwal's opinion, found that the report was so illegible that he could not rely on it, and discussed Dr. Naeye's opinion that claimant's simple pneumoconiosis was too mild to have prevented a return to manual labor. Employer's Exhibit 84. He concluded that claimant failed to establish that he was "totally disabled by his pneumoconiosis." Decision and Order at 3.

review his finding pursuant to Section 718.202(a)(1).

Inasmuch as the administrative law judge permissibly found Dr. Kanwal's 1984 report illegible, see *Cooper v. Director, OWCP*, 11 BLR 1-95, 1-98 (1988), and the record contains no other evidence of causation,³ we affirm his finding pursuant to Section 718.204.

Because claimant has failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, we affirm the denial of benefits. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order denying modification is affirmed. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge

³ Dr. Kanwal's February 23, 1994 report submitted on modification does not address disability causation. Director's Exhibit 66.