

BRB No. 97-0318 BLA

WILLIAM R. COLWELL)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Barry H. Joyner (J. Davitt McAteer, Acting 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.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-0547) of Administrative Law Judge Donald W. Mosser 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.* After crediting claimant with two years of coal mine employment, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Claimant appeals, generally challenging the administrative law judge's finding as to years of coal mine employment and his findings pursuant to Sections 718.202(a)(1) and (a)(4) and Section

718.204(c)(4). 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. 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 under Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), claimant argues that his age, education, work history, and the progressive nature of pneumoconiosis support a finding that he is totally disabled. Contrary to claimant's contention, those factors are not relevant to establishing total disability pursuant to Section 718.204(c)(4). See 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Claimant also cites Dr. Baker's 1994 medical opinion, suggesting that a single medical opinion is sufficient to invoke the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4).¹ Director's Exhibit 12. Based on the filing date of his claim, however, claimant is not entitled to 20 C.F.R. Part 727 consideration. See 20 C.F.R. §§727.203, 718.2. Inasmuch as claimant raises no further specific assertions of error on the part of the administrative law judge in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(c)(4), that finding is affirmed. See *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

¹Dr. Baker found in his 1994 opinion that claimant had a mild respiratory impairment. Director's Exhibit 12. The administrative law judge found that Dr. Baker's diagnosis of a mild respiratory impairment was not supported by the underlying objective studies. Decision and Order at 11.

Since claimant has failed to establish total disability, a necessary element of entitlement under Part 718, an award of benefits is precluded.² See *Trent, supra*; *Perry, supra*. Consequently, we decline to address claimant's allegation of error with regard to the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4) inasmuch as any errors therein would be harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Similarly, inasmuch as crediting claimant with additional years of coal mine employment would not assist him in establishing entitlement, we decline to address claimant's argument that the administrative law judge erred in crediting him with only two years of coal mine employment. *Id.*

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

²We affirm the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).