

BRB No. 97-0569 BLA

VIRGIL NAPIER)	
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, Virginia, 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-109) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge credited claimant with nineteen years and six months of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(c)(4) and to award benefits on the basis of the opinion of Dr. Clarke. The

Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand this case for further development of the evidence.¹

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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 of claimant 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).

¹ The Director has filed a Motion to Remand in this case to which claimant has not responded. The Board accepts the Director's Motion to Remand as his response brief and herein decides the case on its merits.

Claimant asserts that the administrative law judge erred in evaluating the medical opinions of record. In weighing the newly submitted medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish total disability by a preponderance of the evidence.² The administrative law judge permissibly did not credit the opinion of Dr. Clarke pursuant to Section 718.204(c)(4) since he found that his diagnosis was not supported by the objective evidence of record and the underlying documentation did not support the physician's conclusions. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6; Director's Exhibit 13. The Director argues remand because in considering Dr. Baker's opinion, that claimant's impairment was "minimal or mild," the administrative law judge found that total disability was not established. Decision and Order at 6; Director's Exhibit 5. Dr. Baker did not comment on whether claimant's minimal to mild impairment, would preclude performance of claimant's usual coal mine employment in light of the physical requirements of his duties. Thus, the Director argues for remand so that his statutory obligation to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act may be satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). The Director's Motion to Remand for further development of the evidence with respect to Dr. Baker's opinion is granted.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete pulmonary examination and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

² The administrative law judge's findings that the newly submitted evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

NANCY S. DOLDER
Administrative Appeals Judge