

BRB No. 98-0116 BLA

WADE BURKE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BIZZACK, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
LEEMIKE COAL COMPANY)	
)	
Employers-Respondents)	
)	
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 Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Donna Roark Stewart (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for Leemike Coal Company.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-0348) of Administrative Law Judge Alfred Lindeman 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). Claimant filed a claim in October, 1995. Director's Exhibit 1. The administrative law judge accepted a stipulation that claimant has at least seventeen years of coal mine employment. The administrative law judge also determined that Bizzack, Inc. is the responsible operator. Further, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(1)-(4), and that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Leemike Coal Company has filed a response brief, supporting the administrative law judge's determination of responsible operator, and advocating affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal unless specifically requested to do so by the Board.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'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*).

Claimant argues that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). However, claimant makes no specific allegation of error regarding the administrative law judge's findings that the evidence was insufficient to establish total disability under Section 718.204(c)(1)-(4). Therefore, we affirm the administrative law judge's findings at Section 718.204(c). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Since we affirm the administrative law judge's findings that total disability was not established at Section 718.204(c), an essential element of entitlement, we affirm the denial of benefits and decline to address claimant's arguments pertaining to the existence of pneumoconiosis. See *Perry, supra*.

¹ We affirm the administrative law judge's decision to credit claimant with at least seventeen years of coal mine employment and his designation of Bizzack, Inc. as the responsible operator, inasmuch as these findings are not contested on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge