

BRB Nos. 89-0323 BLA
and 89-0323 BLA-A

LAWSON DEEL)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 FOX TEN COAL CORPORATION) DATE ISSUED:
)
 Employer-Respondent)
 Cross-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of John Allan Gray, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe and Farmer), Norton, Virginia, for claimant.

William E. Berlin (Arter & Hadden), Washington, D.C., for employer.

Richard A. Seid (Marshall J. Breger, 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: BROWN and DOLDER, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (87-BLA-3828) of Administrative Law Judge John Allan Gray 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 twenty and one-half years of qualifying coal mine employment, determined that employer was properly designated the responsible operator herein, and adjudicated this duplicate claim on its merits after denying employer's

motion to dismiss the claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge found that claimant had established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but further found that claimant had failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.204(c)(4). Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's denial of benefits. In a cross-appeal, employer contests its designation as responsible operator, and further contends that the administrative law judge erred in failing to dismiss the claim pursuant to Section 725.309(d). The Director agrees with employer that if a remand on the merits of the claim is appropriate, the Board should instruct the administrative law judge to render further factual findings on the issue of whether employer was properly designated as the responsible operator herein.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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 pursuant to 20 C.F.R. Part 718, claimant must establish, 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 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Contrary to claimant's arguments, the administrative law judge, in evaluating the medical opinions of record pursuant to Section 718.204(c)(4), did not rely on consultative opinions alone in order to defeat entitlement. Rather, the administrative law judge properly reviewed all of the medical opinions of record and the documentation underlying each report, and determined that out of five opinions, only Dr. Floresca, an examining physician, concluded that claimant was totally disabled due to pneumoconiosis. Decision and Order at 9-13; Director's

¹ The administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.203(b), his finding that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1) - (c)(3), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Exhibit 5. The administrative law judge found that Dr. Daniel, another examining physician, diagnosed that claimant suffered from no significant respiratory impairment and stated that he could perform the usual activities of a coal miner from a respiratory standpoint; Drs. Dahhan and Stewart, reviewing physicians, opined that claimant had no pulmonary impairment, thereby corroborating Dr. Daniel's conclusions; and Dr. Modi, whose objective tests were interpreted as normal, rendered no opinion on the issue. Decision and Order at 9-13; Director's Exhibits 15, 22; Employer's Exhibit 2. The administrative law judge noted that although the opinions of non-examining physician may not carry as much weight as those of examining physicians, they are entitled to equal consideration. See Chancey v. Consolidation Coal Co., 7 BLR 1-240 (1984). The administrative law judge, therefore, acted within his discretion as trier-of-fact in finding that the weight of the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4). Decision and Order at 13; see Anderson, supra; Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). The administrative law judge's findings pursuant to Section 718.204(c) are supported by substantial evidence and are hereby affirmed. Inasmuch as claimant has failed to establish a requisite element of entitlement pursuant to Part 718, i.e., total disability, we affirm the administrative law judge's finding that claimant is not entitled to benefits. See Trent, supra. Consequently, we need not address the remaining issues of whether the administrative law judge properly designated employer as the responsible operator herein and properly denied employer's motion to dismiss the claim pursuant to Section 725.309(d).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge