

BRB No. 04-0625 BLA

CHARLES TIPTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WOLFE CREEK COLLIERIES)	DATE ISSUED: 02/28/2005
)	
and)	
)	
ZEIGLER COAL HOLDING COMPANY)	
)	
Employer/Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Charles Tipton, Inez, Kentucky, *pro se*.

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision on Remand (2002-

¹ Susie Davis, President of the Kentucky Black Lung Coalminers & Widows Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order). The Board acknowledged the instant appeal on May 26, 2004, stating that the case would be reviewed under the general standard of review.

BLA-0166) of Administrative Law Judge Joseph E. Kane 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 has been before the Board previously. In the original decision, the administrative law judge found twenty and one-quarter years of coal mine employment. Decision and Order dated August 21, 2002. In considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310 (2000) as the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204 and there was no mistake of fact in the district director's denial of benefits. Accordingly, benefits were denied.

On appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §725.310 (2000) and remanded the case for the administrative law judge to conduct a *de novo* review of the record in accordance with *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992), as this case involves a request for modification of a prior denial of benefits by the district director. *Tipton v. Wolfe Creek Collieries*, BRB No. 02-0863 BLA (Jul. 25, 2003)(unpub.).

On remand, the administrative law judge found twenty and one-quarter years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² Decision on Remand at 3-5, 12. The administrative law judge, after considering all the evidence of record, concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision on Remand at 12-17. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

² Claimant filed his claim for benefits on January 20, 1998, which was denied by the district director on May 4, 1998. Director's Exhibits 1, 12. Claimant filed a modification request on April 27, 1999, which was denied by the district director on February 16, 2001. Director's Exhibits 13-16. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 20.

If the findings of fact and conclusions of law of the administrative law judge 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 in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge’s Decision on Remand and the evidence of record, we conclude that the Decision on Remand of the administrative law judge must be vacated in part and the case remanded for further consideration.³

In addressing the length of coal mine employment, the administrative law judge rationally concluded that claimant established twenty and one-quarter years of qualifying coal mine employment. Decision on Remand at 3-5. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge’s determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. The administrative law judge relied upon the Social Security Administration and employment records as well as claimant’s testimony in determining the length of qualifying coal mine employment. Decision on Remand at 4-5. We therefore affirm the administrative law judge’s finding of twenty and one-quarter years of coal mine employment as it is reasonable and supported by substantial

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 2.

evidence. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992).

With respect to the merits, the administrative law judge permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge properly noted that the record contained twenty-three interpretations of ten x-rays. Decision on Remand at 5-6, 13; Director's Exhibits 7-11, 18, 30-34, 36-43, 46, 47. The administrative law judge assessed the probative value of each x-ray reading and rationally concluded that the evidence was insufficient to establish the existence of pneumoconiosis as the preponderance of x-rays was negative and two of these x-rays were given additional weight in view of the superior qualifications of the readers. Director's Exhibits 7-11, 18, 30-34, 36-43, 46, 47; Decision on Remand at 13-14; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(3) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, 718.306 are not applicable to this claim.⁴ See 20 C.F.R. §§718.202(a)(2)-(3); Decision on Remand at 12; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the medical opinion evidence of record and considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision on Remand at 8-12, 15-17.

The administrative law judge rationally concluded that the opinions of Drs. Wells and Sundaram, diagnosing pneumoconiosis, were insufficient to meet claimant's burden of proof. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision on Remand at 15-16. The administrative law judge acted within his discretion, as fact-finder, in

⁴ The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. See 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

according less weight to these opinions because Dr. Wells did not offer any other explanation for his diagnosis of pneumoconiosis beyond his own x-ray interpretation, and because Dr. Sundaram based his diagnosis solely on claimant's work history. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Trumbo*, 17 BLR 1-85. Decision on Remand at 15-16; Director's Exhibits 7, 9. The administrative law judge next addressed the opinions of Drs. Hippensteel, Castle, and Jarboe, opining that claimant does not have pneumoconiosis. The administrative law judge rationally found that the opinions of Drs. Castle and Jarboe were entitled to weight because the physicians offered well-reasoned and documented opinions, while the opinion of Dr. Hippensteel was entitled to little weight because it was not well reasoned. *See Trumbo*, 17 BLR 1-85. Decision on Remand at 15-17; Director's Exhibits 34, 44, 45. Additionally, the administrative law judge permissibly accorded "greater probative weight" to the opinion of Dr. Dahhan, who opined that claimant did not suffer from pneumoconiosis, because Dr. Dahhan offered a well reasoned and documented opinion that was based upon his own examination and "extensive review of the medical records," and also because Dr. Dahhan possessed superior credentials.⁵ Decision and Order on Remand at 17; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149. Director's Exhibit 47.

In addressing Dr. Clark's opinion that claimant suffers from pneumoconiosis, the administrative law judge found that Dr. Clark's opinion was not well documented because Dr. Burki invalidated the pulmonary function study that Dr. Clark relied upon in reaching his diagnosis. Decision on Remand at 15. An administrative law judge must provide a rationale for preferring the opinion of a consulting physician regarding a study's validity over that of the administering physician. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Here, the administrative law judge did not provide a reason for according determinative weight to Dr. Burki's opinion that Dr. Clark's February 27, 1996 pulmonary function study is invalid. Thus, we vacate the administrative law judge's credibility determination with respect to Dr. Clark's opinion and remand the case to the administrative law judge for further consideration. *See Brinkley*, 14 BLR 1-147; *Siegel*, 8 BLR 1-156; *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

⁵ The record indicates that Dr. Dahhan is board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 47. Dr. Castle is board-certified in Internal Medicine with a subspecialty in Pulmonary Disease. Director's Exhibit 44. Dr. Jarboe is board-certified in Internal Medicine. Director's Exhibit 34. The credentials of Drs. Wells, Clark, Sundaram and Rasmussen are not in the record. Director's Exhibits 7-9, 39.

Furthermore, in finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge did not address the opinions of Drs. Burki and Rasmussen when he assessed the credibility of the medical evidence of record. Decision on Remand at 15-17; Director's Exhibits 39, 48. Although the administrative law judge set forth these medical opinions when he listed the evidence of record, he did not further discuss this relevant evidence. Decision on Remand at 8-12, 15-17; Director's Exhibits 39, 48. Additionally, the administrative law judge stated that the opinion of Dr. Rasmussen bolstered the opinions finding no pneumoconiosis. Decision on Remand at 17. Substantial evidence does not support the administrative law judge's finding: Dr. Rasmussen diagnosed pneumoconiosis and thus his opinion does not support the findings of the physicians who opined that claimant does not suffer from the disease. Director's Exhibit 39. Under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case, and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge's evidentiary analysis in this case does not coincide with the evidence of record, the basis for his credibility determinations cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We therefore vacate the administrative law judge's findings under Section 718.202(a)(4) and remand this case for him to specifically discuss all of the relevant medical opinion evidence of record.

Accordingly, the administrative law judge's Decision on Remand denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge