

BRB No. 99-1127 BLA

GUY HICKS	)	
(Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILBURN COLLIERY COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Don M. Stacy and Reginald D. Henry, Beckley, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand - Denying Benefits

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<sup>1</sup> Enclosed with Claimant's Response to Show Cause Order dated April 15, 1999, is a copy of a death certificate that indicates that the miner died due to cardiopulmonary arrest on September 28, 1996. Decision and Order on Remand at 2 n. 2.

(1986-BLA-2627) of Administrative Law Judge Clement J. Kichuk 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 is before the Board for the fourth time. Claimant filed his claim for benefits on May 28, 1981. In an initial Decision and Order dated February 21, 1989, Administrative Law Judge Frederick D. Neusner credited claimant with thirty-seven years of coal mine employment and considered the instant claim pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly benefits were denied.

Claimant appealed, employer cross-appealed, and in *Hicks v. Milburn Colliery Coal Co.*, BRB Nos. 89-0845 BLA and 89-0845 BLA-A (Mar. 19, 1993)(unpub.)(McGranery, J., concurring and dissenting), the Board affirmed the administrative law judge's findings pursuant to Sections 718.202, 718.203(b) and 718.204(c)(1)-(2), but vacated his findings pursuant to Section 718.204(b), (c)(4) and remanded the case for further consideration thereunder.

On remand, the administrative law judge found that the evidence was sufficient to establish total respiratory disability pursuant to Section 718.204. Accordingly, benefits were awarded commencing May 1981, but on reconsideration, the administrative law judge modified the date for commencement of benefits to October 1982.

Employer appealed and in *Hicks v. Milburn Colliery Coal Co.*, BRB No. 94-0545 BLA (Feb. 1, 1995)(unpub.), the Board affirmed the administrative law judge's findings pursuant to Section 718.204(c), but vacated his findings pursuant to Section 718.204(b) and remanded the case for further consideration thereunder.

On remand, the administrative law judge found that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, benefits were awarded.

Employer appealed and in *Hicks v. Milburn Colliery Co.*, BRB No. 96-0494 BLA (Sept. 12, 1996)(unpub.), the Board affirmed the administrative law judge's findings pursuant to Section 718.204(b), (c), and affirmed the award of benefits.

On appeal to the United States Court of Appeals for the Fourth Circuit, the court held that there were numerous errors in the weighing of the evidence under

Section 718.204 and an insufficient explanation under the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), for the crediting of certain evidence, compounded by the multiple remands necessitated herein. The court vacated the award of benefits and remanded for reassignment of the case to a new administrative law judge for expeditious review and a fresh look at the evidence, unprejudiced by the various prior decisions of the administrative law judge and the Board. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

On remand, the case was reassigned to Administrative Law Judge Kichuk who found that the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(2), (4), or total disability due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, benefits were denied. On appeal herein, claimant contends that the administrative law judge erred in failing to find the blood gas study and medical opinion evidence sufficient to establish total respiratory disability pursuant to Section 718.204(c)(2), (4). Claimant also contends that the administrative law judge erred in failing to find that claimant's total disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated he will not participate in this appeal unless requested to do so.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 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 one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The

administrative law judge noted that the record contains no qualifying pulmonary function study evidence and thus establishing total disability pursuant to Section 718.204(c)(1) is precluded.<sup>2</sup> Decision and Order on Remand at 3. In considering whether total disability was established under Section 718.204(c)(2), the administrative law judge noted that five earlier blood gas studies were qualifying and four later blood gas studies were nonqualifying, and he rationally gave greater weight to the most recent blood gas studies which were non-qualifying, in conjunction with the medical opinions interpreting the values of the studies, and rationally found that total disability was not established pursuant to Section 718.204(c)(2). *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order on Remand at 3-8; Director's Exhibits 8, 22; Claimant's Exhibit 1; Employer's Exhibit 2. In addition, the administrative law judge correctly found that as the record contains no evidence of cor pulmonale with right sided congestive heart failure, see 20 C.F.R. §718.204(c)(3), establishing total disability by this method is precluded. Decision and Order on Remand at 3.

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<sup>2</sup> A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (2).

In considering whether total disability was established by the recently submitted medical opinions of record under Section 718.204(c)(4), the administrative law judge permissibly found that Dr. Rasmussen's opinion of total disability was outweighed by the contrary opinions of Drs. Zaldivar, Fino and Sobieski, that claimant has no significant pulmonary impairment and is capable of doing his usual coal mine employment from a respiratory standpoint, based on their superior qualifications and because their opinions were well-reasoned, documented and based on objective tests.<sup>3</sup> *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 9-13; Employer's Exhibit 2. Moreover, the administrative law judge permissibly gave diminished weight to the opinions of Drs. Bembalkar and Subbaraya since they failed to provide a rationale for their conclusions.<sup>4</sup> *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 9; Claimant's Exhibits 3, 5. Consequently, as the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4), this finding is affirmed. Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. See 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm

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<sup>3</sup> Dr. Rasmussen is Board-certified in internal medicine. Claimant's Exhibit 1. Drs. Zaldivar and Fino are both Board-certified in internal medicine and pulmonary disease while Dr. Sobieski is Board-certified in internal medicine. Decision and Order on Remand at 5-6; Employer's Exhibits 1-2.

<sup>4</sup> In his April 18, 1988, letter, Dr. Bembalkar diagnosed pneumoconiosis and chronic bronchitis by x-ray and symptomatology and opined that claimant was totally disabled due these conditions. Claimant's Exhibit 5. In his report dated February 17, 1998, Dr. Subbaraya diagnosed pneumoconiosis and a pulmonary impairment and opined that claimant would not be capable of performing his usual coal mine employment. Claimant's Exhibit 3. The administrative law judge, as fact-finder, reasonably rejected these opinions since both physicians failed to provide a rationale for their opinions that claimant was totally disabled. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); Decision and Order on Remand at 9.

the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c). Claimant's failure to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *Anderson, supra, Trent, supra.*

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

SO ORDERED.

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge