

BRB No. 99-1179 BLA

NORMAN PURDY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Norman Purdy, Madisonville, Kentucky, *pro se*.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order On Remand - Denying Benefits (97-BLA-0359) of Administrative Law Judge Thomas F. Phalen, Jr., 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 second time. In his initial Decision and Order, the administrative law judge found that claimant established at least forty-five years of coal mine employment, and based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge further found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or total disability at 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed, and in *Purdy v. Peabody Coal Co.*, BRB No. 98-0774 BLA (Mar. 3, 1999)(unpub.), the Board affirmed the administrative law judge's findings at Sections 718.202(a)(1)-(3) and 718.204(c)(1)-(3),

vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4), and remanded this case for reconsideration of the medical opinion evidence thereunder. On remand, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4) or total disability at Section 718.204(c)(4) and denied benefits. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 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 under 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. Failure to prove any one of these elements precludes entitlement. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to the Board's instructions on remand, the administrative law judge reconsidered the medical opinions of Drs. Gallo and Simpao at Section 718.202(a)(4).¹ Dr. Simpao found the existence of coal workers' pneumoconiosis, while Dr. Gallo did not. Employer's Exhibit 3; Director's Exhibit 10. The administrative law judge permissibly found "that Dr. Gallo's opinion is more persuasive, as the medical data better substantiates his conclusion discounting the existence of pneumoconiosis." Decision and Order on Remand at 3. Furthermore, the administrative law judge permissibly accorded greater weight to Dr. Gallo's opinion as he was "Board certified in internal medicine with a specialty in pulmonary diseases." Decision and Order on Remand at 3; *Adams, supra*; *Church v. Eastern*

¹ The Board affirmed the administrative law judge's finding that the opinions of Dr. Jones, merely diagnosing chronic obstructive pulmonary disease, and Dr. Kaye, finding symptoms of pulmonary disease, did not establish the existence of pneumoconiosis as they were not documented, and did not meet the definition of pneumoconiosis as defined by the Act. 20 C.F.R. §718.202(a). Board's slip op. at 3.

Associated Coal Corp., 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). On the other hand, the administrative law judge permissibly found that although Dr. Simpao's opinion was documented, it was not well reasoned as he failed to explain the basis for his conclusion. He also noted that Dr. Simpao did not possess any special qualifications. See *Church, supra*; *Worhach v. Director, OWCP*, 19 BLR 1-105 (1993); *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1983); *Peskie v. U.S. Steel Corp.*, 8 BLR 1-126 (1985). Decision and Order on Remand at 3-4. We, therefore, affirm the administrative law judge's determination that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).

Pursuant to the Board's remand instructions, the administrative law judge next considered the medical reports at Section 718.204(c)(4), and found that they were insufficient to establish total disability. The administrative law judge found that Dr. Simpao did not explain how his finding of moderate to total disability was supported by underlying documentation, and that Dr. Simpao had no clinical or laboratory diagnostic techniques to support his conclusion. The administrative law judge therefore permissibly accorded greater weight to the opinion of Dr. Gallo as it was better supported by the objective medical data, and because Dr. Gallo was better qualified. *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Clark, supra*; *Lucostic, supra*; *Peskie, supra*. The administrative law judge therefore properly found that claimant failed to establish total disability at Section 718.204(c)(4).

As claimant failed to establish the existence of pneumoconiosis or total disability, essential elements of entitlement, the administrative law judge properly denied benefits. See *Adams, supra*; *Trent, supra*; *Gee, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge