

BRB No. 99-1198 BLA

CHARLES W. LEMUNYON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CYPRUS CUMBERLAND RESOURCES	)	
	)	
Employer-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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

James W. Creenan (Cohen & Grigsby, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1137) of Administrative Law Judge Michael P. Lesniak awarding 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 found, and employer stipulated to, seventeen years and one month of coal mine employment and that employer was the responsible operator. Decision and Order at 2-3, 7; Hearing Transcript at 6-8. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 2-3. The administrative law judge determined that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

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<sup>1</sup>Claimant filed his application for benefits on September 29, 1995. Director's Exhibit 1.

§718.202(a)(4), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, that claimant was totally disabled by a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(c) and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 6-7. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in failing to properly analyze the evidence in finding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.<sup>2</sup>

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 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 to establish any 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*).

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<sup>2</sup>The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.203 and 718.204(c) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends, on appeal, that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and disability causation established pursuant to Section 718.204(b) as he failed to specifically address the credibility of the medical opinions of record. We agree. The administrative law judge, in the instant case, determined that the medical opinion evidence of record was sufficient to establish pneumoconiosis and that claimant's total disability was due to pneumoconiosis based on the opinions of Drs. Cho and Weinberg as they were "most consistent with Claimant's longstanding history of shortness of breath which continued long after the Claimant stopped smoking; the lack of reversibility despite multiple treatment efforts; the abnormal results on the pulmonary function studies; the progressive and irreversible nature of pneumoconiosis; and Claimant's history of more than seventeen years of coal mine employment." Decision and Order at 6-7. The administrative law judge also noted that Dr. Weinberg was claimant's treating physician. Decision and Order at 7. These factors are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first determine if the opinions of record are reasoned and documented and therefore credible.<sup>3</sup> See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). 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. Although the administrative law judge is empowered to weigh the evidence, he has provided no specific basis for finding the medical opinions of record credible in this particular case. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). In the instant case, the administrative law judge only compared the physicians findings on physical examination. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining

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<sup>3</sup>Dr. Dixon, by letter dated October 18, 1994, noted that claimant's x-ray showed deformities consistent with old fractured ribs and the pulmonary function studies are in alliance with claimant's history of asthma. Director's Exhibit 14. Dr. Cho examined claimant on January 11, 1996 and diagnosed COPD and bronchial asthma and opined that claimant is totally disabled due to the COPD which is due to a combination of coal dust, cigarettes and asthma. Director's Exhibit 15. Dr. Weinberg, claimant's treating physician, opined that claimant suffers from a totally disabling respiratory or pulmonary impairment and that this pulmonary disability is caused by industrial bronchitis and coal workers' pneumoconiosis. Director's Exhibit 39; Claimant's Exhibit 1. Dr. Fino examined claimant on October 2, 1992, and opined that claimant does not suffer from coal workers' pneumoconiosis or any other occupationally acquired pulmonary condition and that his totally disabling respiratory impairment is due to smoking. Director's Exhibit 35; Employer's Exhibit 1.

the credibility of the opinions. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). We therefore vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(b) and remand this case to the administrative law judge to specifically set forth the basis for finding the opinions reasoned and documented and to specifically discuss the credibility of each opinion.

Employer further contends, with respect to Section 718.202(a), that the administrative law judge failed to weigh all the contrary evidence. Employer's contention has merit. Initially, we note that 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)-(3). The administrative law judge rationally found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) as all of the x-rays were read as negative. Director's Exhibits 14, 17-19, 35, 39-40; Claimant's Exhibit 1; Decision and Order at 4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corporation*, 8 BLR 1-211 (1985). The administrative law judge also properly found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3) as there is no biopsy evidence or evidence of complicated pneumoconiosis in the record in this living miner's claim filed after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2), (3); Decision and Order at 6; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3).

Employer correctly asserts that the administrative law judge failed to weigh this evidence against the medical opinion evidence supportive of a finding of pneumoconiosis. The United States Court of Appeals for the Third Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease.<sup>4</sup> *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), then the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams, supra*.

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge