

BRB No. 07-0460 BLA

E. B.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL COMPANY)	DATE ISSUED: 02/29/2008
)	
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 Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6232) of Administrative Law Judge Paul H. Teitler on a claim¹ filed pursuant to the provisions of

¹ Claimant filed an application for benefits on May 15, 2003. Director's Exhibit 2.

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 initially credited claimant with thirty-five years of qualifying coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and total respiratory disability established by medical opinion evidence under Section 718.204(b)(2)(iv). Claimant additionally contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to provide claimant with a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b), because the administrative law judge discredited the medical opinion, on pneumoconiosis, of Dr. Simpao, the physician who examined him at the behest of the Department of Labor. Employer responds, urging affirmance of the denial of benefits. The Director responds, arguing that he has satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation, on pneumoconiosis, as required by the Act. The Director further responds that whether the administrative law judge credited Dr. Simpao's opinion is irrelevant because he found pneumoconiosis established at Section 718.202(a)(4) based on Dr. Rosenberg's opinion. The Director also contends that, even if Dr. Simpao's opinion could establish total disability, the administrative law judge properly found his opinion outweighed by the better reasoned opinions of Drs. Dahhan and Rosenberg, who found that claimant was not totally disabled.

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 the applicable law,² they are binding upon this 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, we decline to address claimant's argument that the administrative law judge erred in finding that the x-ray evidence did not establish pneumoconiosis. Section 718.202(a) provides alternative methods for establishing pneumoconiosis. *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985); *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, 17 BLR 2-166 (6th Cir. 2000). In this case, the administrative law judge

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

found pneumoconiosis established by medical opinion evidence at Section 718.202(a)(4). He was not, therefore, required to determine whether pneumoconiosis was established under the other subsections at Section 718.202(a). Accordingly, we need not consider claimant's argument as to whether the administrative law judge correctly found that pneumoconiosis was not established by x-ray evidence at Section 718.202(a)(1). We affirm the administrative law judge's finding that pneumoconiosis was established by medical opinion evidence at Section 718.202(a)(4), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Further, we decline to address claimant's argument that he is entitled to a new pulmonary evaluation on the issue of pneumoconiosis because the administrative law judge rejected Dr. Simpao's opinion finding pneumoconiosis. As the Director contends, because the administrative law judge found the existence of pneumoconiosis established at Section 718.202(a)(4) based on Dr. Rosenberg's opinion, whether the administrative law judge credited Dr. Simpao's opinion on pneumoconiosis is irrelevant. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work as a foreman with the medical reports assessing disability. Claimant contends that, considering the heavy concentrations of dust exposure he received on a daily basis, his condition precludes him from engaging in his usual employment in a dusty environment.

In finding that the medical opinion evidence failed to establish total respiratory disability, the administrative law judge rejected Dr. Simpao's opinion of moderate respiratory impairment because he failed to explain his conclusion in light of claimant's non-qualifying pulmonary function and arterial blood gas studies. Instead, the administrative law judge rationally credited the medical opinions of Drs. Dahhan and Rosenberg, who opined that claimant retained the physiological capacity to continue his previous coal mine employment and did not suffer from any respiratory or pulmonary impairment, as they were supported by the non-qualifying pulmonary function and blood gas study evidence, as well as other underlying documentation. This is a valid reason for according greater weight to the opinion of Drs. Dahhan and Rosenberg.³ *See Director,*

³ Dr. Simpao examined claimant, noted physical findings and conducted an x-ray along with a pulmonary function study and blood gas study, which resulted in non-qualifying values. Director's Exhibit 12. Dr. Dahhan examined claimant, conducted an x-ray and CT scan, and noted physical findings and symptoms. He noted that claimant's pulmonary function study and blood gas study were non-qualifying. Dr. Dahhan also

OWCP v. Rowe, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-2 n.4 (1983). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at Section 718.204(b)(2)(iv).

The administrative law judge also found that the five pulmonary function studies of record were non-qualifying, as were the three arterial blood gas studies of record. The administrative law judge further found that there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7-9. Hence, based on the preponderance of the evidence, the administrative law judge rationally found that claimant failed to establish a total respiratory disability at Section 718.204(b)(2)(i)-(iv). See *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 9.

Further, contrary to claimant's argument, contraindication against further dust exposure is not sufficient to establish total respiratory disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Nor, contrary to claimant's argument, does a finding of pneumoconiosis provide a presumption that claimant is totally disabled by it. See *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

Accordingly, we affirm the administrative law judge's finding that total respiratory disability was not established at Section 718.204(b)(2)(i)-(iv). Because claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. See 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

reviewed claimant's medical records. Employer's Exhibit 1. Dr. Rosenberg both examined claimant and reviewed his medical records. Dr. Rosenberg conducted a physical examination, an x-ray, and a pulmonary function and blood gas study.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge