

BRB Nos. 99-0415 BLA
and 99-0415 BLA-A

CLAYTON BILLUPS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOUTHERN APPALACHIAN COAL)	DATE ISSUED:
COMPANY)	
)	
Employer-Respondent)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	
Cross-Petitioner)	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.

John H. Skaggs and Matthew R. Whitler (Calwell & McCormick),
Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee), Charleston, West Virginia, for
employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire,
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (92-BLA-0859) of Administrative Law Judge Clement J. Kichuk 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 is on appeal before the Board for a second time. In a Decision and Order issued on September 30, 1993, Administrative Law Judge Robert J. Feldman credited claimant with at least eleven years of qualifying coal mine employment, and adjudicated this claim, filed on December 6, 1990, pursuant to the provisions at 20 C.F.R. Part 718. Judge Feldman found that the evidence was 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), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(1), (4), 718.203(b) and 718.204(b), (c)(4), and remanded this case for reevaluation of the evidence thereunder because the administrative law judge, without foundation in the record, had accorded greater weight to the opinions of Department of Labor physicians on the ground that they were impartial. The Board instructed the administrative law judge on remand to weigh all relevant evidence, like and unlike, in determining whether the preponderance of the evidence established total respiratory disability pursuant to Section 718.204(c)(1)-(4) in accordance with *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and, if total disability was established, to determine whether claimant's pneumoconiosis was at least a contributing cause thereof pursuant to Section 718.204(b), in accordance with *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). The Board further instructed the administrative law judge, if on remand he again found entitlement to benefits established, to determine whether claimant's son was his dependent for purposes of augmenting benefits pursuant to 20 C.F.R. §§725.208 and 725.209. As the administrative law judge did not address the contested issue of whether the named employer was properly designated the responsible operator herein, the Board instructed the administrative law judge to consider this issue on remand and determine whether the Director, Office of Workers' Compensation Programs (the Director), effectively proceeded against all potential putative responsible operators and their respective officers, as mandated by the regulations at 20 C.F.R. §§725.492 and 725.495(a). *Billups v. Southern Appalachian Coal Co.*, BRB No. 94-0243 BLA (Nov. 29, 1995)(unpub.).

On reconsideration, the Board rejected the Director's challenge to its instructions to the administrative law judge on remand concerning the responsible operator issue, and denied the relief requested. *Billups v. Southern Appalachian Coal Co.*, BRB No. 94-0243 BLA (Jan.30, 1998)(unpub. order on recon.).

On remand, this case was assigned to Administrative Law Judge Clement J. Kichuk. In his Decision and Order on Remand issued on December 11, 1998, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), or total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c)(1)-(4), (b), and thus denied benefits. While determining that the issue was rendered moot, the administrative law judge found that the Director had not met his duty of effectively proceeding against all potential putative responsible operators and their respective officers. Consequently, the administrative law judge found that the named employer was not the responsible operator herein and that the Black Lung Disability Trust Fund (Trust Fund) was liable for payment of benefits, if awarded.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(1), 718.203(b), and 718.204(b), (c)(4). The Director responds, urging affirmance of the administrative law judge's denial of benefits, and cross-appeals, challenging the administrative law judge's findings regarding Trust Fund liability. Employer responds, urging affirmance of the denial of benefits and the administrative law judge's finding that it was not properly designated the responsible operator herein.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant initially asserts that the positive x-ray interpretations of record establish the existence of pneumoconiosis at Section 718.202(a)(1), and that the administrative law judge's reliance on numerical superiority to resolve the conflicting

x-ray interpretations was improper. Claimant's arguments are without merit. The administrative law judge properly reviewed the relative qualifications of the readers and accurately determined that the record contained eleven interpretations of two films. Decision and Order on Remand at 4-5. As the film obtained on December 15, 1990 was read positive for pneumoconiosis by two B-readers, and negative for pneumoconiosis by three dually-qualified Board-certified radiologists and B-readers, the administrative law judge permissibly gave greater weight to the negative interpretations of the better qualified physicians and found this film to be negative for the existence of pneumoconiosis. Decision and Order on Remand at 11; see *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge then determined that the film obtained on May 27, 1992 was read positive for the existence of pneumoconiosis by two dually-qualified Board-certified radiologists and B-readers, but negative by three equally qualified physicians and one B-reader, and reasonably found that claimant failed to meet his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the evidence. Decision and Order on Remand at 11-12; see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge's findings pursuant to Section 718.202(a)(1) are supported by substantial evidence, in accordance with applicable law, and thus are affirmed.

Although unchallenged by claimant on appeal, see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we also affirm, as supported by substantial evidence, the administrative law judge's finding that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), (3), and that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In evaluating the medical opinions, the administrative law judge acted within his discretion as trier-of-fact in according determinative weight to the opinion of Dr. Zaldivar, buttressed by the opinion of Dr. Altmeyer, that claimant did not have pneumoconiosis, based on Dr. Zaldivar's superior qualifications as a Board-certified pulmonologist. Decision and Order on Remand at 12; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge permissibly gave less weight to the contrary opinion of Dr. Ranavaya, whose diagnosis of pneumoconiosis was admittedly based on claimant's work history and abnormal x-ray, because an employment history alone is not diagnostic of disease and a majority of the better qualified physicians interpreted Dr. Ranavaya's film as negative. Decision and Order on Remand at 12-13; see *generally Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n. 4 (1984). Moreover, a medical opinion which is merely a restatement of an x-ray opinion may not establish

the existence of pneumoconiosis under Section 718.202(a)(4). See *Worhach, supra*; *Anderson, supra*. Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. See *Trent, supra*. Consequently, we need not address the Director's arguments on cross-appeal regarding the responsible operator issue, and we need not reach claimant's remaining arguments with regard to the etiology of the disease at Section 718.203(b), total respiratory disability at Section 718.204(c)(4), or disability causation at Section 718.204(b).¹

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

¹Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the Board held in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*)(McGranery, J., concurring and dissenting), that 20 C.F.R. §725.495, which provides for the enforcement of penalties, cannot be used to modify the definition of a responsible operator at 20 C.F.R. §725.491(a) to include corporate officers. The Board's holding in *Lester* supersedes any prior Board decisions regarding whether corporate officers can be held personally liable as responsible operators pursuant to Section 725.491(a).