BRB No. 93-2354 BLA

LONES MILLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
JEANNA CONSTRUCTION COMPANY	)	
	)	
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 of George A. Fath, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Collett & Buckle), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (92-BLA-1579) of Administrative Law Judge George A. Fath 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

[1] Claimant is Lones Mills, the miner, who filed an initial application for benefits on December 26, 1972, which was finally denied on December 4, 1979. Director's Exhibit 83. Claimant filed this claim for benefits on June 18, 1986. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) and considered the claim pursuant to 20 C.F.R. Part 718. Pursuant to the parties' stipulation, the administrative law judge credited claimant with twenty-five years of coal mine employment, found that he had one dependent, and determined that the claim was timely filed, that claimant was a miner under the Act, and that employer was the responsible operator. The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203, but concluded that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, accordingly, denied benefits.

On appeal, claimant asserts that the evidence establishes the existence of a totally disabling respiratory impairment. Claimant's Brief at 3. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, miner, responsible operator status, and pursuant to 20 C.F.R. §§725.308, 718.202(a)(2)-(4), and 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.204(c)(4), claimant contends that the opinions of Drs. Williams, Clarke, and Penman are "creditable" and therefore establish total respiratory disability. Claimant's Brief at 3. The administrative law judge correctly noted that all but one of the physicians who addressed total respiratory disability concluded that claimant could perform his usual coal mine employment.[3] *See* Director's Exhibits 10, 42, 43, 49, 50, 55, 60, 68, 70, 72, 74; Employer's Exhibits 3, 14. The administrative law judge permissibly found the opinion of Dr. Clarke, whose qualifications are not of record, to be outweighed by the contrary opinions of physicians who are Board-certified internists, Drs. Broudy, Lane, Fino, and Anderson. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Employer's Exhibits 9-12.

In addition, the administrative law judge accorded diminished weight to Dr. Clarke's opinion because, in light of the uniformly non-qualifying pulmonary function and blood gas studies, "he failed to explain how he came to the conclusion that the miner is totally
disabled." Decision and Order at 9; *see Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). The administrative law judge permissibly accorded less weight to Dr. Clarke's opinion for these reasons; therefore, we affirm his finding pursuant to Section 718.204(c)(4).[4]

Thus, as claimant has failed to establish total disability under 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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[3] Contrary to claimant's contention, Drs. Williams and Penman opined that claimant was not totally disabled. Director's Exhibits 10, 43.

[4] The record contains no evidence that Dr. Clarke was claimant's treating physician. *See Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 17 BLR 2-16 (1993). In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), we need not address his application of the material change in conditions standard, *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and the true-doubt rule, *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____NANCY S. DOLDER
Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge