

BRB No. 06-0860 BLA

DONALD L. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXPLO-TECH, INCORPORATED	)	
	)	DATE ISSUED: 07/26/2007
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert M. Himmel (Frith Anderson & Peake), Roanoke, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (04-BLA-6552) of Administrative Law Judge Michael P. Lesniak rendered 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). Claimant filed the instant claim on June 17, 2003. Director's Exhibit 2. The administrative law judge accepted the parties' stipulation that claimant had twenty-eight years of coal mine employment, and that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R.

§718.204(b)(2).<sup>1</sup> Hearing Transcript at 12-13. The administrative law judge also found that the medical evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R §§718.202(a), 718.203, and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, challenging the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) based on the medical opinions of Drs. Desai and Orens. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance 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, 363 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any

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<sup>1</sup> Because claimant's last coal mine employment occurred in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 202 (1989) (*en banc*); Director's Exhibit 3.

<sup>2</sup> The administrative law judge found that the one x-ray of record was negative for pneumoconiosis and, therefore, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because there was no biopsy evidence to support a finding of pneumoconiosis, the administrative law judge determined that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Additionally, as claimant was not entitled to any of the presumptions set forth at 20 C.F.R. §§718.304, 718.305 or 718.306, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3), as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order – Awarding Benefits 8-9.

one 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*).

After reviewing the administrative law judge's Decision and Order – Awarding Benefits, the evidence of record, and employer's brief, we conclude that substantial evidence supports the administrative law judge's award of benefits. We specifically reject employer's assertion that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer asserts that the administrative law judge erred in crediting Dr. Desai's opinion at Section 718.202(a)(4) because the doctor used speculative language in diagnosing pneumoconiosis in his reports dated May 15, 2002 and July 22, 2002. Employer's Brief at 8. Employer further contends that the administrative law judge erred in crediting Dr. Desai's diagnosis of pneumoconiosis and emphysema because the doctor referenced, in support of his opinion, two CT scans performed in April 2004 and May 2005 that were not part of the evidentiary record in this case. Employer's Brief at 9.

Contrary to employer's assertion, the administrative law judge was not required to reject Dr. Desai's opinion as speculative. At the hearing, claimant testified that he visited Dr. Desai every three months for treatment of his lung conditions. Hearing Transcript at 26. Claimant submitted records from fourteen office visits, dated from March 2002 to September 2005, which chronicle his ongoing treatment by Dr. Desai for a respiratory condition. Claimant's Exhibits 5, 7B. In the early treatment notes, Dr. Desai stated his initial impression that claimant suffered from "possible pneumoconiosis." Claimant's Exhibit 5. However, after conducting additional objective tests, Dr. Desai made an affirmative diagnosis of pneumoconiosis, emphysema, and chronic obstructive pulmonary disease (COPD). In his September report, Dr. Desai observed that a pulmonary function study performed on March 11, 2005 was consistent with severe COPD and emphysema, and opined that claimant's lungs were "significantly compromised." *Id.* He also specifically opined in his last report dated September 15, 2005, that claimant suffered from emphysema, diffused granulomatous disease and upper lobe mass formation as a result of "COPD and past silica exposure" due to claimant's past work of "[thirty] plus years doing blasting and drilling" in the course of his employment.<sup>3</sup> Claimant's Exhibits 5, 7A. The March 11, 2005 pulmonary function study was admitted into the record and was credited by the administrative law judge as

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<sup>3</sup> The record establishes that claimant's usual coal mine work was as a "blaster" in the mines. Director's Exhibit 3.

supporting the parties' stipulation that claimant was totally disabled by an obstructive respiratory impairment.

We affirm the administrative law judge's decision to credit Dr. Desai's uncontradicted diagnosis that claimant suffered from an obstructive respiratory condition due in part to his coal mine employment, thereby satisfying the legal definition of pneumoconiosis.<sup>4</sup> The administrative law judge permissibly determined that, as claimant's treating physician, Dr. Desai had a thorough understanding of claimant's respiratory condition. *See* 20 C.F.R. §718.104(d) (2001); *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004) (Roth, J., dissenting); Decision and Order at 10. The administrative law judge observed that Dr. Desai's opinion, that claimant suffered from emphysema and COPD due in part to coal mine employment, was uncontradicted in the medical record, and was supported by claimant's work history, history of symptoms, and the objective laboratory data, including the results of claimant's March 11, 2005 pulmonary function study and his arterial blood gas testing.<sup>5</sup> Decision and Order – Awarding Benefits at 10. Consequently, the administrative law judge permissibly determined that Dr. Desai's opinion was reasoned and documented, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); and therefore, that it was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.202(a)(4). *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986) (A physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). We therefore affirm the administrative law judge's finding, based on the medical opinion of Dr. Desai, and his

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<sup>4</sup> Legal pneumoconiosis includes “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

<sup>5</sup> The administrative law judge did not discuss the fact that Dr. Desai's opinion references two CT scans that are not of record. However, we consider this error to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the administrative law judge properly credited Dr. Desai's opinion as being reasoned and documented, based on Dr. Desai's reliance on objective evidence that was admitted into the record, in reaching his conclusions. We affirm the administrative law judge's finding that Dr. Desai's opinion was reasoned based on the results of claimant's March 11, 2005 pulmonary function study, which test is of record, and which the doctor interpreted as showing an obstructive respiratory condition consistent with coal dust exposure. Claimant's Exhibit 5.

consideration of all relevant evidence, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).<sup>6</sup> *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Decision and Order – Awarding Benefits at 10-11. Furthermore, because employer does not challenge the administrative law judge’s findings with respect to the issue of disability causation, we affirm the administrative law judge’s determination that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge’s Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>6</sup> Because we affirm the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis based on Dr. Desai’s opinion, we need not reach employer’s contention that the administrative law judge erred in crediting the opinion of Dr. Orens that claimant suffered from pneumoconiosis. Employer’s Brief at 6-7.