

BRB No. 06-0973 BLA

S.B.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GREAT WESTERN COAL,)	DATE ISSUED: 07/25/2007
INCORPORATED)	
)	
and)	
)	
GREAT WESTERN RESOURCES)	
)	
Employer/Carrier-)	
Respondents)	
)	
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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Emily Goldberg-Kraft (Jonathan L. Snare, Acting 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-5428) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) 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 credited claimant with at least ten years of qualifying coal mine employment and adjudicated this claim, filed on October 11, 2002, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record 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), but was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at Section 718.204(b)(2)(iv). Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.¹

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 this Board and may not be disturbed.² 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 prove 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 one 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 challenges the administrative law judge's finding that the evidence of record

¹ Because no party challenges the administrative law judge's findings that the evidence fails to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2)(i)-(iii), we affirm these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

is insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv).³ Claimant contends that the opinion of Drs. Sivley, claimant's treating physician, is well-reasoned and documented and should not have been rejected for the reasons provided. Claimant's Brief at 3. Claimant's arguments are without merit, and essentially seek a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR at 1-113.

The administrative law judge accurately reviewed Dr. Sivley's reports, and properly found that her opinion, that claimant should avoid further exposure to fumes, odors, coal dust and all other forms of dust and gases, is insufficient to establish total respiratory disability. Decision and Order at 11-12; Claimant's Exhibits 1, 3. A doctor's recommendation that further coal dust exposure is contraindicated is insufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). While Dr. Sivley's reports also listed limitations in claimant's physical activities, the administrative law judge determined that the physician's assessment of limitations appeared to incorporate both pulmonary and non-pulmonary conditions, in conjunction with claimant's application for Social Security disability benefits, and that the non-pulmonary impairments were not relevant to the administrative law judge's assessment of total respiratory disability. *See* 20 C.F.R. §718.204(a); Decision and Order at 12; Claimant's Exhibits 1, 3.

The administrative law judge acknowledged Dr. Sivley's status as claimant's treating physician and properly applied the factors at 20 C.F.R. §718.104. Decision and Order at 12. The administrative law judge determined that although the record established that Dr. Sivley treated claimant for various conditions every one to three months, the record was ambiguous regarding the duration of their relationship and the extent to which Dr. Sivley treated claimant for pulmonary conditions rather than non-pulmonary problems. Moreover, the administrative law judge found that Dr. Sivley's pulmonary credentials were not of record, and that the record did not reflect that Dr. Sivley had conducted or reviewed any objective tests that measure respiratory impairment. Consequently, the administrative law judge reasonably concluded that even if Dr. Sivley had clearly and unequivocally stated that claimant suffered from a totally disabling respiratory or pulmonary impairment, her opinion was entitled to little weight, despite her status as claimant's treating physician. Decision and Order at 12; *see* 20 C.F.R. §718.104; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

³ Claimant's reference to "Section 718.204(c)" is misplaced. *See* Claimant's Brief at 2. The regulatory provisions for establishing total respiratory disability or pulmonary disability are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv).

Furthermore, the administrative law judge weighed the opinions of Drs. Dahhan and Baker against Dr. Sivley's opinion. Director's Exhibits 14, 28; Claimant's Exhibit 2; Decision and Order at 12-13. The administrative law judge found that Dr. Dahhan diagnosed "no functional respiratory impairment," while Dr. Baker stated that the degree of severity was "minimal with chronic bronchitis, decreased PO₂, and Coal Workers' Pneumoconiosis 2/1 impairment." *Id.* The administrative law judge permissibly gave greater weight to the opinions of Drs. Dahhan and Baker on the basis that their opinions were better documented and reasoned.⁴ See *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge gave additional weight to the opinions of Drs. Dahhan and Baker on the basis of their superior credentials, as she found that they were pulmonary experts.⁵ See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989) (unpub.). Although the administrative law judge determined that claimant's usual coal mine employment as a roof bolter involved heavy and/or strenuous labor, the administrative law judge reasonably concluded that claimant was not precluded from performing this work from a pulmonary or respiratory standpoint, as all of the objective clinical tests were interpreted as showing little, if any, impairment, and Dr. Dahhan, who conducted the more recent pulmonary evaluation, found no functional respiratory impairment. Decision and Order at 3-4, 12. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence of record was insufficient to establish a totally disabling respiratory impairment at Section 718.204(b)(2)(iv).

As claimant has failed to establish total respiratory disability, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.⁶ See *Anderson*, 12 BLR at 1-113.

⁴ Both Drs. Dahhan and Baker conducted physical examinations of claimant, took family, medical and social histories, and obtained x-rays, pulmonary function studies and blood gas studies. Director's Exhibits 14, 28; Decision and Order at 6-8.

⁵ Drs. Dahhan and Baker are both Board-certified in pulmonary medicine and are B readers. Director's Exhibits 14, 28, Claimant's Exhibit 2.

⁶ Claimant further asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable or gainful work is adversely affected. Claimant's Brief at 4-5. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. See 20 C.F.R. §725.477(b).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge