

BRB No. 98-0774 BLA

NORMAN PURDY)	
)	
Claimant-Petitioner))
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED:
)	
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 Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Norman Purdy, Madisonville, Kentucky, *pro se*.

Laura Metcoff Klaus and Marc R. Baluda (Arter & Hadden, LLP),
Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH,
Administrative Appeals Judge, and NELSON, Acting Administrative
Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-359) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The administrative law judge found and the parties stipulated to, at least forty-five years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Accordingly, benefits were denied. On appeal, claimant generally

contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Pursuant to Section 718.202(a), the administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the preponderance of the negative x-ray readings by physicians with superior qualifications. Director's Exhibits 10, 12, 13, 25; Employer's Exhibits 1-4; Decision and Order at 7; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) as there is no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 7-8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Thus, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3) is affirmed as it is supported by substantial evidence and is in accordance with law.

In his weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge properly found that the opinions of Dr. Jones diagnosing chronic obstructive pulmonary disease, and Dr. Kaye, finding

symptoms of pulmonary disease were not documented, and did meet the definition of pneumoconiosis as defined by the Act. Claimant's Exhibits 1, 2; Decision and Order at 9; 20 C.F.R. §718.201; *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Thus, the administrative law judge properly found that the opinions of Drs. Jones and Kaye did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

However, contrary to the administrative law judge's finding, Dr. Simpao's diagnosis of pneumoconiosis is documented, as it is based on an examination, history and objective tests. The administrative law judge failed to determine whether Dr. Simpao's opinion was reasoned *i.e.*, whether it was supported by its underlying documentation. Director's Exhibit 10; Decision and Order at 9; *Fields, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We therefore vacate the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand for reconsideration of the opinion of Dr. Simpao, as the administrative law judge mischaracterized this opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must weigh Dr. Simpao's opinion along with Dr. Gallo's to determine whether the existence of pneumoconiosis is established.

Pursuant to Section 718.204(c), the administrative law judge properly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(3) as all of the pulmonary function studies and blood gas studies of record produced non-qualifying values¹ and there is no evidence of cor pulmonale with right sided congestive heart failure in the record. See 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 9, 11; Employer's Exhibit 3; Claimant's Exhibit 3; Decision and Order at 9; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge's finding that the evidence is insufficient to establish

¹ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (2).

total disability pursuant to Sections 718.204(c)(1)-(3) is affirmed as it is supported by substantial evidence and is in accordance with law.

The administrative law judge, however, erred in his weighing of the medical opinion evidence pursuant to Section 718.204(c)(4). The administrative law judge found the evidence in equipoise as Dr. Simpao found claimant was totally disabled and Dr. Gallo found claimant was not totally disabled. Director's Exhibit 10; Employer's Exhibit 3; Decision and Order at 9. The administrative law judge, however, failed to weigh the two opinions or assess their credibility. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). We, therefore, vacate the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(c)(4) and remand for reconsideration of all the relevant evidence.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge