BRB Nos. 06-0747 BLA
and 06-0747 BLA-A

GEORGE ROBERTS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 05/24/2007
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (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, and employer cross-appeals, the Decision and Order – Denying Benefits (04-BLA-5474) of Administrative Law Judge Rudolf L. Jansen rendered on a claim filed on August 27, 2002, 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 twenty-seven years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits and cross-appeals, contending that the administrative law judge erred in determining that employer's evidence exceeded the evidentiary limitations contained in 20 C.F.R. §725.414. The Director filed limited responses in letter briefs, urging the Board to reject claimant's contention that he failed to provide claimant with a complete and credible pulmonary evaluation and arguing that employer's allegation of error in the administrative law judge's finding with regard to 20 C.F.R. §725.414 has merit.[1]

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 applicable 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).

We first address the issue presented by employer's cross-appeal. Employer contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by 20 C.F.R.

[1] The administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

§725.414. Specifically, employer argues that the administrative law judge erroneously applied Section 725.414 in excluding the post-bronchodilator portion of Dr. Broudy's March 12, 2003 pulmonary function study. In his decision, the administrative law judge noted the pulmonary function studies listed by employer on its evidence summary form in support of its affirmative case. This evidence consisted of Dr. Rosenberg's April 21, 2004 pre-bronchodilator test results and Dr. Broudy's March 12, 2003 pre-bronchodilator and post-bronchodilator test results. Decision and Order at 7-8; Director's Exhibit 12; Employer's Exhibit 3. The administrative law judge determined that employer's submission consisted of three separate pulmonary function studies in support of its affirmative case, which exceeded the allowable limit set forth in 20 C.F.R. §725.414(a)(3)(i) of the results of no more than two pulmonary function tests. The administrative law judge therefore only admitted into the record the results of Dr. Rosenberg's April 21, 2004 pre-bronchodilator test results and Dr. Broudy's March 12, 2003 pre-bronchodilator test results, but not Dr. Broudy's March 12, 2003 post-bronchodilator test results. The administrative law judge stated that:

> The Employer submitted three pulmonary function studies, which is one over the limit as set forth in the regulations at 20 C.F.R. §725.414(a)(2)(i) and (3)(i). Therefore, only one of Dr. Broudy's spirometry studies are [sic] included in this Decision for consideration.

Decision and Order at 7 n.5.

Employer argues that Dr. Broudy's pulmonary function study, which consisted of a pre-bronchodilator portion and a post-bronchodilator portion, is actually a single pulmonary function study. As such, employer argues that the administrative law judge's "interpretation of the regulations is in violation of 20 C.F.R. §718.103(b)(8), which specifically provides for a bronchodilator to be administered and requires the physician to report 'values obtained both before and after administration of the bronchodilator.'" Employer's Brief at 3. The Director's agrees with employer and points out that Section 718.103(b)(8) envisions post-bronchodilator test results as a non-compulsory component of a pulmonary function study. Director response to cross-appeal at 2. The Director asserts that the administrative law judge's treatment of Dr. Broudy's post-bronchodilator test results as a separate pulmonary function study is contrary to Section 718.103, which treats such results as an optional component of "a single pulmonary function study." *Id*. The Director's reasonable interpretation of the Act and regulations is entitled to deference. *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994). Consequently, we hold that where a pulmonary function study includes both pre-bronchodilator and post-bronchodilator values, results of both tests amount to a single pulmonary function study for purposes of determining whether the evidentiary limitations at Section 725.414(a)(3)(i) are exceeded. The administrative law judge's error in this case is

harmless however, in light of our affirmance of his findings pursuant to 20 C.F.R. §718.204(b)(2), as discussed *infra*. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We next address claimant's arguments on appeal with respect to the administrative law judge's denial of benefits. In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant argues that the administrative law judge erred in failing to find that Dr. Baker's opinion established total disability. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the relevant medical opinion evidence of record, *i.e.*, the opinions of Drs. Baker, Simpao, Broudy and Rosenberg. Decision and Order at 14-15. In discussing Dr. Simpao's opinion diagnosing a mild impairment that would preclude claimant's return to his previous coal mine work, the administrative law judge stated:

> In support of this conclusion, Dr. Simpao referred to his examination, the blood gas study, the x-ray, the pulmonary function study and the EKG. However, all of these tests produced essentially normal results, with the exception of a slight decrease in the patient's pO_2 as noted by all of the examining physicians. Dr. Simpao fails to explain his conclusion in the face of these normal tests or how his physical findings led him to believe that Mr. Roberts could no longer perform the physical duties of his former coal mine work. In addition, Dr. Simpao does not demonstrate in his report that he was familiar with the exertional requirements of the patient's coal mine work so that these requirements could be compared with his current capabilities. As a result, I assign less probative weight to Dr. Simpao's opinion surrounding the issue of total disability.

Decision and Order at 14.

In light of these findings, the administrative law judge acted within his discretion in giving less probative weight to Dr. Simpao's opinion.[2] *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Additionally, the administrative law judge permissibly found that since none of the other examining physicians, *i.e.*, Drs. Baker, Broudy and Rosenberg, found that claimant was disabled from returning to his former coal mine work, the weight of the medical opinion evidence did not support a finding of total disability Section 718.204(b)(2)(iv).

Contrary to claimant's assertion, the administrative law judge implicitly found that Dr. Baker's impairment rating of minimal to none was not a determination of total disability, and thus, was insufficient to support a finding of total disability. *See Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred in failing to consider the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's findings regarding the extent of any respiratory impairment.

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. The Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-6-7 (2004).

Claimant alleges no error with regard to the administrative law judge's consideration of the opinions of Drs. Simpao, Broudy and Rosenberg. Thus, as claimant raises no other argument at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] *See Cox v. Benefits Review Board*,

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[2] The administrative law judge found, based on claimant's hearing testimony, that claimant's last coal mine employment duties included welding and repairing mining equipment. Decision and Order at 5.

[3] In summarizing his findings, the administrative law judge stated that "[i]n sum, none of the pulmonary function studies are qualifying, none of the blood gas studies are qualifying, and three of the four examining physicians, including the two doctors with the most comprehensive reports, did not find that [claimant] was disabled from a pulmonary standpoint. Considering all of this evidence together, I conclude that Claimant has not established that he is totally disabled under 20 C.F.R. §718.204(b)." Decision and Order at 15.

791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). In light of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits.[4] *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Next, claimant contends that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*). Specifically, claimant asserts that the Director has failed to fulfill his statutory obligation to provide him with a complete, credible pulmonary evaluation with regard to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv) because the administrative law judge gave less probative weight to Dr. Simpao's diagnosis of a mild impairment, which the administrative law judge found was unsupported.

The Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90; *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*), takes the position that a remand of the case for a full pulmonary evaluation is not warranted, based on the facts of this case. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). The Director asserts that "Dr. Simpao's disability assessment meets the requirements of Section 413(b)" and "Dr. Simpao's disability opinion was simply outweighed by the contrary evidence." Director's Brief at 3-4. We agree. As discussed *supra*, the evidence is insufficient to establish total disability on the merits. The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 11. The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's report was incomplete.[5]

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[4] In view of our disposition of the case on the merits at 20 C.F.R. §718.204(b), we need not address claimant's contentions at 20 C.F.R. §718.202(a)(1) and (4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5] The administrative law judge summarized Dr. Simpao's opinion thusly:

> On November 12, 2002, Dr. Valentino S. Simpao examined Claimant for a pulmonary examination, at the Director's request. (DX 11). Based on a 30-

Because Dr. Simpao's report was complete as to the issue of total disability and the administrative law judge merely found it outweighed by the contrary medical opinions, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994); *see also Gallaher v. Bellaire Corp*., 71 Fed.Appx. 528, 2003 WL 21801463 (6th Cir. Aug. 4, 2003)(unpub.).

> year coal mining history with 20 of those years underground, symptoms, medical history, a smoking history of one or two packs when he was in his teens, x-ray, pulmonary function study, blood gas study, and EKG, Dr. Simpao diagnosed category 1/1 coal workers' pneumoconiosis. This physician also found that "coal dust was medically significant" in diagnosing the patient's condition. Dr. Simpao found a "mild" impairment based on the x-ray, blood gas study, EKG, symptomology and his physical findings and that Mr. Roberts did not retain the respiratory capacity to perform his last coal mine employment. The record shows that Dr. Simpao is a board-certified pulmonary specialist.

Decision and Order at 6; Director's Exhibit 11.

Accordingly, the administrative law judge's Decision and Order - Denying 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