

BRB No. 05-0264 BLA

MILLARD W. DYE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RAT CONTRACTORS)	
)	DATE ISSUED: 11/30/2005
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 on Remand of Stuart A. Levin,
Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III, Lexington, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia,
for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (99-BLA-0526) of
Administrative Law Judge Stuart A. Levin denying benefits on a miner's 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).² This case is

¹Claimant is Millard W. Dye, the miner, who filed his claim for benefits on
August 26, 1997. Director's Exhibit 1.

²The Department of Labor has amended the regulations implementing the
Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations
became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722,

before the Board for the third time. Initially, applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), but failed to establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b) (2000).³ 2003 Decision and Order on Remand at 3-4. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board affirmed the administrative law judge's finding of total respiratory disability. However, the Board vacated the administrative law judge's Section 718.202(a)(4) finding and remanded the case for the administrative law judge to further consider Dr. Koenig's diagnosis of bronchitis and obstructive lung disease due to coal dust exposure. *Dye v. Rat Contractors*, BRB No. 03-0536 BLA (Feb. 26, 2004)(unpub.). Additionally, the Board instructed the administrative law judge, on remand, to consider together all the relevant evidence regarding the existence of pneumoconiosis in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id.* The Board also vacated the administrative law judge's Section 718.204(b) (2000) finding and instructed the administrative law judge to consider, on remand, whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis, if reached. *Id.*

On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000).⁴ 2004 Decision and Order on Remand at 3. Accordingly, the administrative law judge denied benefits.

725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The earlier procedural history of this claim is outlined in *Dye v. Rat Contractors*, BRB No. 03-0536 BLA (Feb. 26, 2004)(unpub.).

⁴The administrative law judge did not cite to the revised regulations regarding total disability in his 2003 and 2004 decisions. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the revised regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the revised regulations.

On appeal, claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant's Brief at 2-3, 8-9. Employer has filed a response brief, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 (1965).

When this case was previously before the Board, the Board affirmed the administrative law judge's finding that Dr. Koenig's diagnosis of clinical pneumoconiosis is not supported by the underlying documentation. *See Dye*, slip op. at 3. However, the Board vacated the administrative law judge's Section 718.202(a) finding because the administrative law judge did not address Dr. Koenig's additional diagnosis of bronchitis and obstructive lung disease due to coal dust. *Id.* at 4. The Board stated that Dr. Koenig's additional diagnosis, if credited, was sufficient to satisfy the definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. In considering Dr. Koenig's finding of legal pneumoconiosis on remand, the administrative law judge noted that this physician stated that his finding was based on claimant's "chronic cough, sometimes of black sputum, increased RU, indicative of air trapping in a non-smoker." 2004 Decision and Order on Remand at 2. The administrative law judge stated that Dr. Koenig's support for finding that claimant's diagnosis of bronchitis/obstructive lung disease is due to coal dust "seems to be" claimant's chronic productive cough and the increased RU, but the administrative law judge found his "rationale for linking these findings to the diagnosis and especially the coal dust etiology is less than clear." *Id.* Additionally, the administrative law judge noted that "[w]hile there are no pulmonary test results included in the record that pre-date the miner's surgery for his esophageal problems, Dr. Koenig states the changes on pulmonary testing support a finding of bronchitis/obstructive lung disease, but again the rationale supporting [the] etiology of the disease is not explained." *Id.*

Next, the administrative law judge considered the opinions of Drs. Michos, Naeye, and Fino. Regarding Dr. Michos's report, the administrative law judge stated that this physician could not ascertain whether the changes in claimant's lungs were due to coal workers' pneumoconiosis or interstitial lung disease from the chronic severe reflux caused by the history of hiatal hernia with Barrett's esophagus. *Id.* The administrative law judge noted that Dr. Naeye did not discuss the presence or absence of bronchitis/obstructive lung disease, but stated that the

interstitial disease in claimant's lung could be the result of chronic reflux caused by his hiatal hernia and the esophageal disorder present before his surgery. *Id.* at 3. The administrative law judge further noted that Dr. Naeye found the abnormalities on the pulmonary function study to be more compatible with an interstitial pulmonary disease than coal workers' pneumoconiosis. Regarding Dr. Fino's report, the administrative law judge stated that this physician indicated that claimant had no history of bronchitis and that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.* Considering the record as a whole, the administrative law judge found Dr. Koenig's finding of legal pneumoconiosis to be insufficient, "in light of the contrary opinions of Drs. Naeye and Fino, to constitute a preponderance of the evidence establishing the presence of either bronchitis/obstructive lung disease due to coal dust exposure or 'legal' pneumoconiosis." *Id.*

Pursuant to Section 718.202(a)(4), claimant first contends that the administrative law judge erred by failing to consider a finding he allegedly made in his 2003 Decision and Order on Remand, that Dr. Koenig's diagnosis of legal pneumoconiosis was not challenged by any other physician. Claimant maintains that, based on the finding that the administrative law judge allegedly made, Dr. Koenig's opinion establishes the existence of legal pneumoconiosis as a matter of law. However, claimant mischaracterizes the administrative law judge's statement in his 2003 decision. When the administrative law judge stated in his 2003 decision that Dr. Koenig's finding of legal pneumoconiosis was not challenged by any other physician, he was not, himself, making such a finding. Rather, the administrative law judge appears instead to have been summarizing a statement that Administrative Law Judge Lawrence P. Donnelly made in his 2000 Decision and Order.⁵

Claimant next asserts that, in weighing the medical opinion evidence, the administrative law judge failed to consider Dr. Koenig's status as claimant's treating physician. Judge Donnelly stated in his 2000 Decision and Order that Dr. Koenig is claimant's treating physician, but this statement is not supported by the record.⁶ Moreover, an administrative law judge may not automatically accord

⁵Administrative Law Judge Lawrence P. Donnelly stated that "Dr. Koenig related the Claimant's bronchitis/obstructive lung disease to coal dust, bringing it within the statutory definition of pneumoconiosis at §718.201, a finding no other physician contested." 2000 Decision and Order at 10.

⁶While claimant testified that Dr. Koenig prescribed him inhalers, he also testified that his initial primary treating physician at the University of Virginia (UVA) was Dr. Hannan and that after Dr. Hannan left UVA his primary treating physician was Dr. Kern. Hearing Transcript at 22-24. Claimant did not testify

greater weight to the medical opinion of a treating physician. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge found that Dr. Koenig did not adequately explain his rationale for finding that coal dust exposure was the cause of claimant's lung disease, the administrative law judge could not have permissibly accorded this physician's opinion greater weight based solely on his status as claimant's treating physician. *Id.*

Claimant also contends that the administrative law judge erred in not considering Dr. Hannan's opinion. Specifically, claimant argues that Dr. Hannan's reports and testimony "provide strong support for Dr. Koenig's diagnosis of legal pneumoconiosis." Dr. Hannan performed thoracic surgery⁷ on claimant several times and, thereafter, submitted four letters in which he opined that the visual changes he saw during surgery in claimant's lungs are consistent with coal workers' pneumoconiosis.⁸ Director's Exhibits 26, 29, 33; Claimant's Exhibit 9. While the administrative law judge did not consider Dr. Hannan's reports in his most recent Decision and Order on Remand, he did consider this physician's reports and deposition testimony in his 2003 Decision and Order on Remand. In his 2003 decision, the administrative law judge stated that "[a]lthough Dr. Hannan [sic], in a deposition, stated he had prior surgical experience with pneumoconiosis, he also stated he was no expert on pneumoconiosis and he would defer to Dr. Koenig's opinion." 2003 Decision and Order on Remand at 3. Additionally, the administrative law judge found that "Dr. Koenig's opinion is not supported by Dr. Hannan's surgical observations," noting that "Dr. Hannan specifically deferred his diagnosis to Dr. Koenig who did not see or examine the actual lung tissue observed by Dr. Hannan." *Id.* Upon its review of the administrative law judge's 2003 Decision and Order on Remand, the Board

that Dr. Koenig, who worked at UVA, was also a treating physician. The record does not contain any treatment records by Dr. Koenig. There is no indication from Dr. Koenig's report that he was claimant's treating physician. Director's Exhibit 8.

⁷Claimant was diagnosed with reflux esophagitis with a stricture which required surgery. Employer's Exhibit 7 at 4.

⁸During surgery performed on claimant, Dr. Hannan found anthracotic reactive lymph nodes surrounding claimant's esophagus near the hilum of the lung. Director's Exhibits 26, 29, 33; Claimant's Exhibit 9. Dr. Hannan said that the black lymph nodes were consistent with coal workers' pneumoconiosis. *Id.* He made no statements regarding bronchitis.

affirmed the administrative law judge's finding that Dr. Koenig's opinion is not supported by the underlying documentation. *Dye*, slip op. at 3. The Board noted that Dr. Koenig based his diagnosis of coal workers' pneumoconiosis, in part, on the surgical note of Dr. Hannan, who had observed changes consistent with pneumoconiosis. However, the Board also stated that Dr. Hannan testified that he was no expert and would defer to Dr. Koenig's opinion. *Id.* Accordingly, we reject claimant's contention, that the administrative law judge erred in not considering Dr. Hannan's opinion, because the administrative law judge considered Dr. Hannan's opinion in his 2003 Decision and Order on Remand and found that Dr. Koenig's opinion is not supported by Dr. Hannan's observations, a finding which was affirmed by the Board.

Based on the foregoing, we affirm the administrative law judge's finding that Dr. Koenig's opinion is insufficient to establish the existence of legal pneumoconiosis. The administrative law judge properly found that Dr. Koenig did not adequately explain his rationale for linking claimant's lung disease to his coal dust exposure and properly found that his finding was contradicted by the opinions of Drs. Fino and Naeye. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809, 1-811 (1984).

Pursuant to the Board's instructions on remand, the administrative law judge considered all the relevant evidence at Section 718.202(a) in accordance with *Compton*. The administrative law judge found that:

the negative chest x-ray readings, the negative CT scan readings, the negative opinion report of Drs. Fino [sic] and the findings of Dr. Naeye that the changes on pulmonary function study are more consistent with interstitial changes due to esophageal problems and surgery outweigh Dr. Koenig's finding that the miner has bronchitis/obstructive lung disease due to coal dust exposure.

2004 Decision and Order on Remand at 3. Claimant asserts that the administrative law judge erred by not considering that Judge Donnelly found the x-ray evidence was in equipoise.⁹ Claimant's assertion, that Judge Donnelly's finding that the x-

⁹Administrative Law Judge Lawrence P. Donnelly found "the evidence is in equipoise as to the existence of pneumoconiosis. The Claimant has not established pneumoconiosis under § 718.202(a)(1). But the Employer has not established its absence." 2000 Decision and Order at 5.

ray evidence was in equipoise somehow helps claimant when weighing all the relevant evidence together in accordance with *Compton*, is without merit. A finding by an administrative law judge that the x-ray evidence is in equipoise is the equivalent of a finding that claimant has not met his burden of establishing the existence of pneumoconiosis at Section 718.202(a)(1). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, it is inconsequential that the administrative law judge did not note that Judge Donnelly found the x-ray evidence to be in equipoise. Because Judge Donnelly and the administrative law judge properly found that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to each of the subsections at Section 718.202(a)(1)-(4),¹⁰ we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Because claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement under Part 718, we affirm the administrative law judge's denial of benefits.¹¹ See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹⁰The Board previously affirmed, as unchallenged, Judge Donnelly's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Dye v. Rat Contractors*, BRB No. 00-0860 BLA (June 27, 2001)(unpub.).

¹¹Because we affirm the administrative law judge's denial of benefits based on his determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a), it is unnecessary for us to address claimant's assertions regarding the cause of his total respiratory disability pursuant to Section 718.204(c). 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 on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge