

BRB No. 08-0258 BLA

A.R.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 10/30/2008
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 Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Ronald Bruce (Bruce Law Firm), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (04-BLA-5959) of Administrative Law Judge Joseph E. Kane 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). This case involves a claim filed on October 15, 2002 and is before the Board for the second time. In the initial decision, Administrative Law Judge Robert L. Hillyard, after crediting claimant with thirty-three years of coal mine employment,¹ found that the evidence established the existence of

¹ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Judge Hillyard also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Hillyard further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Hillyard awarded benefits.

Pursuant to employer's appeal, the Board vacated Judge Hillyard's findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). [A.R.] v. *Peabody Coal Co.*, BRB No. 06-0186 BLA (Sept. 22, 2006)(unpub.). The Board also vacated Judge Hillyard's findings pursuant to 20 C.F.R. §718.204(b), (c), and remanded the case for further consideration. *Id.*

Due to Judge Hillyard's unavailability, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane (the administrative law judge). In a Decision and Order on Remand dated November 14, 2007, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² Because no party challenges the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, since there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

law. 33 U.S.C. §921(b)(3), as incorporated 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 under 20 C.F.R. 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 the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

Claimant argues that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Claimant specifically contends that his March 17, 2003 pulmonary function study is qualifying because it produced an FEV1/FVC ratio of less than 55%. We disagree. As the administrative law judge correctly noted, for a pulmonary function test to constitute evidence of total disability pursuant to Section 718.204(b)(2)(i), it must produce *both* a qualifying FEV1 value *and* either an FVC or MVV equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV1 to FVC ratio equal to or less than 55%. Decision and Order at 7 n.7; *see* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). Although claimant is correct in stating that the March 17, 2003 pulmonary function study produced an FEV1 to FVC ratio equal to or less than 55%, the study did not also produce a qualifying FEV1 value.³ Director's Exhibit 10. Therefore, as the administrative law judge found, claimant's March 17, 2003 pulmonary function study is non-qualifying. We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).⁴

Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, claimant alleges no error in regard to the administrative law judge's consideration of the opinions of Drs. Repsher and Simpao.⁵ *See Cox v.*

³ Claimant was 67 years old and 68 inches tall at the time of the March 17, 2003 pulmonary function study. According to Appendix B of Part 718, the qualifying FEV1 value for an individual of claimant's age and height is 1.79. Claimant's pulmonary function test of March 17, 2003 produced an FEV1 value of 2.07. Director's Exhibit 10.

⁴ The only other pulmonary function study of record, a study conducted on May 17, 2004, was also non-qualifying. Employer's Exhibit 2.

⁵ The administrative law judge found that Dr. Repsher did not address the extent of claimant's disability. Decision and Order at 6; Employer's Exhibit 2. The

Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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

administrative law judge found that Dr. Simpao's finding of disability was too equivocal and insufficiently reasoned to support a finding of total disability. Decision and Order on Remand at 6-7; Director's Exhibit 10; Employer's Exhibit 1.