BRB No. 00-1176 BLA

CHARLES SHORT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CUMBERLAND MOUNTAIN SERVICE CORPORATION	)	
	)	
and	)	
	)	
U.S. FIDELITY & GUARANTY	)	
	)	
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 on Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford & Siemon), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer and carrier.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (98-BLA-0005) of Administrative Law Judge Robert L. Hillyard (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).[1] This case is before the Board for the fourth time. The administrative law judge previously considered the claim in his November 9, 1998 Decision and Order wherein he denied benefits. In his November 9, 1998 Decision and Order, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.203(b) (2000), respectively, and also found that the blood gas study evidence supported a finding of pulmonary disability under 20 C.F.R. §718.204(c)(2) (2000), while the medical opinions failed to establish total respiratory disability due to pneumoconiosis under 20 C.F.R. §718.204(c)(4) (2000).[2] Accordingly,

[1]The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The administrative law judge combined the issue of total respiratory or pulmonary disability with the issue of total disability due to pneumoconiosis in considering the medical opinion evidence at 20 C.F.R. §718.204(c)(4) (2000). He thus did not separately

benefits were denied.

The Board, in *Short v. Cumberland Mountain Service Corp.*, BRB No. 99-0244 BLA (Nov. 16, 1999)(unpublished), addressed claimant's appeal of the administrative law judge's finding on disability causation at 20 C.F.R. §718.204(b) (2000).[3] The Board also addressed employer's response supporting the administrative law judge's denial of benefits and challenging the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) (2000) and 20 C.F.R. §718.204(c)(2) (2000), and the response of the Director, Office of Workers' Compensation Programs (the Director), supporting claimant's position. The Board agreed with employer's contention that the administrative law judge erred in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) (2000) and vacated that finding. The Board instructed the administrative law judge that if, on remand, he found the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000), he must then consider whether the evidence establishes the presence of the disease under 20 C.F.R. §718.202(a)(2) - (4) (2000). The Board next addressed the issues of total respiratory disability and disability causation, as raised by claimant, employer and the Director. The Board held that, "All of the parties' arguments have some merit." Board's 1999 Decision and Order at 5. The Board thus vacated the administrative law judge's findings at 20 C.F.R. §718.204(c)(2), (c)(4) and (b) (2000), further remanding the case.[4]

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consider the evidence relevant to these issues. *See* 20 C.F.R. §718.204 (b), (c).

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[4]The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(3) (2000). Board's 1999 Decision and Order at 3 n.1.

In his decision and order dated August 25, 2000, which is the subject of the instant appeal, the administrative law judge again denied benefits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) through (a)(4) (2000). The administrative law judge further found that the evidence, as a whole, failed to support a finding that claimant suffers from a totally disabling respiratory impairment under 20 C.F.R. §718.204(c) (2000). Specifically, the administrative law judge found that the blood gas studies supported a finding of total disability pursuant to 20 C.F.R. §718.204(c)(2) (2000) while the other relevant evidence did not. Accordingly, benefits were denied.

On appeal, claimant contends that the Board, in its 1999 Decision and Order, erroneously remanded the case for issues not raised by claimant. Claimant also argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Claimant further asserts, that in light of the administrative law judge's finding that the blood gas study evidence was sufficient to establish total respiratory disability under 20 C.F.R. §718.204(c)(2) (2000), he erred in finding that the evidence considered as a whole did not. Employer responds, seeking affirmance of the decision below. The Director has not filed a brief in the appeal.[5]

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. 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, claimant must establish that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled by it. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to establish any one element precludes a finding of entitlement.

[5]We affirm the administrative law judge's finding that the medical opinion evidence failed to establish total respiratory disability at 20 C.F.R. §718.204(c)(4) (2000) as the finding is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially contends that the Board, in its 1999 Decision and Order, erroneously remanded the case for issues not raised by claimant, in violation of 20 C.F.R. §802.211(b)[6] and 20 C.F.R. §802.212(b).[7] Specifically, claimant notes (1) that he challenged only the administrative law judge's finding on disability causation and did not challenge the administrative law judge's findings on the existence of pneumoconiosis or total disability; and (2) that employer, in the previous appeal in BRB No. 99-0244 BLA did not file an appeal or cross-appeal of the administrative law judge's November 9, 1998 Decision and Order - Denial of Benefits. Claimant thus asserts that the Board was without authority to remand the case for any issue other than the issue of disability causation, which was the sole issue raised by claimant in the prior appeal.

Claimant's contentions lack merit. Employer was not required to file a cross-appeal in order to challenge the administrative law judge's findings that the x-ray evidence was sufficient to establish the existence of pneumoconiosis and that the blood gas study evidence supports a finding of total respiratory or pulmonary disability. Inasmuch as these arguments, raised by employer in the prior appeal, supported the administrative law judge's ultimate finding of a denial of benefits, employer could properly raised them in its response brief, as opposed to filing a cross-appeal. 20 C.F.R. §§802.201, 802.211(b); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *cf. Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993). The Board, therefore, neither erred in addressing these issues nor, in turn, remanding the case to the administrative law judge for further findings on these issues. *Id.*

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[6]The regulation at 20 C.F.R. §802.211(b) provides, in part, that a supporting brief, memorandum of law or other statement filed with the Board to accompany a petition for review, "[s]pecifically states the issues to be considered by the Board..." 20 C.F.R. §802.211(b).

[7]The regulation at 20 C.F.R. §802.212(b) provides, in part, that arguments advanced in a response brief "shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (see §802.205(b))." 20 C.F.R. §802.212(b).

We thus reject claimant's arguments in this regard.

We next address claimant's contention that the administrative law judge erred in finding that the evidence as a whole does not establish total respiratory or pulmonary disability, where he found that the blood gas study evidence supported a finding of total disability. The administrative law judge accorded more weight to the more recent blood gas studies of record, noting that four of the five most recent studies resulted in qualifying values. The administrative law judge thus found that the blood gas study evidence supported a finding of total disability under 20 C.F.R. §718.204(c)(2) (2000).[8] The administrative law judge further found that the evidence failed to establish total disability under 20 C.F.R. §718.204(c)(1), (c)(3) and (c)(4) (2000), and ultimately concluded as follows:

> Weighing the medical evidence as a whole, including the evidence both in support of and against a finding of total disability, I find that the evidence fails to support a finding that the Claimant suffers from a totally disabling respiratory impairment.

Decision and Order on Remand - Denial of Benefits at 13. Claimant's entire argument is as follows:

> Finally, we submit that the ALJ erred in finding that total disability had not been established, notwithstanding that the arterial blood gas studies were declared to be supportive of a disability finding under 20 C.F.R. §718.204(c)(2). There are five different grounds under the regulation for determining that total disability has been proven, and the ALJ found it under (c)(2). It was error to do whatever the ALJ was doing in this instance – whether it was requiring a majority of the tests under [718].204 to be positive, or a perfect score. The Board directed the ALJ to reconsider the evidence under 718.204(c)(2) alone, and he apparently did so – the rest of the opinion was unnecessarily made. The ALJ finding [sic] of total disability should be affirmed.

Claimant's Brief at 8.

[8]The revised regulation at 20 C.F.R. §718.204(b)(2)(ii) addresses blood gas study evidence on the issue of total respiratory or pulmonary disability.

Contrary to claimant's assertion, the administrative law judge did not err in finding that the evidence of record failed to establish a totally disabling respiratory impairment, notwithstanding his finding that the weight of the blood gas study evidence supported a finding of total disability. The administrative law judge properly considered, consistent with the Board's remand instruction, all the relevant evidence of record, both like and unlike, in determining that the evidence as a whole failed to establish total respiratory disability at 20 C.F.R. §718.204(c) (2000). *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).[9] Further, while the administrative law judge did not specify a reason for not according determinative weight to the blood gas study evidence to resolve the issue of total disability, claimant asserts no error in this regard. *See* Claimant's Brief at 8.

[9]In its 1999 Decision and Order, the Board affirmed, as unchallenged on appeal, the administrative law judge's prior findings that the evidence was insufficient to establish total respiratory disability under 20 C.F.R. §718.204(c)(1) and (c)(3) (2000). *See* Board's 1999 Decision and Order at 3 n.1. Relevant to the issue of total disability, the Board's remand instruction was limited to the administrative law judge's redetermination of the weight of the blood gas study evidence and medical opinion evidence. Accordingly, the administrative law judge's reconsideration on remand of the evidence under 20 C.F.R. §718.204(c)(1) and (c)(3) (2000) was outside the scope of the Board's instruction. The error is, however, harmless as the administrative law judge's findings on remand reflect his prior findings that none of the pulmonary function studies produced qualifying values at 20 C.F.R. §718.204(c)(1) (2000), *see* 20 C.F.R. §718.204(b)(2)(i), and that there is no evidence to support a finding of total disability under 20 C.F.R. §718.204(c)(3) (2000), *see* 20 C.F.R. §718.204(b)(2)(iii). Administrative Law Judge's August 25, 2000 Decision and Order on Remand - Denial of Benefits at 11, 12; Administrative Law Judge's November 9, 1998 Decision and Order - Denial of Benefits at 11.

Based on the foregoing, we reject claimant's contentions and affirm the administrative law judge's determination that the evidence as a whole failed to establish a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b). We also affirm the administrative law judge's denial of benefits in the instant case, without reaching claimant's challenge to the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis, as an award of benefits is precluded. *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits, is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge