BRB Nos. 03-0409 BLA
and 03-0409 BLA-A

TIMOTHY OTIS OSBORNE	)	
	)	
Claimant-Petitioner/	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 09/25/2003
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents/	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (02-BLA-5236) 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).[1] After crediting claimant with thirteen and one-quarter years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to claimant's brief. Employer has filed a cross-appeal, contending that 20 C.F.R. §725.414 is invalid.[2] Assuming *arguendo* that Section 725.414 is valid, employer contends that the administrative law judge erred in his application of the regulation.[3] The Director has filed a response brief, contending that

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Section 725.414, in conjunction with Section 725.456(b)(1), sets flexible limits on the amount of medical evidence that can be admitted into the record. *See* 20 C.F.R. §§725.414, 725.456(b)(1).

[3] The administrative law judge struck Dr. Dahhan's June 18, 2001 medical report from the record pursuant to 20 C.F.R. §725.414(a)(3)(i) because it was based in part upon an x-ray interpretation that was not admitted into the record. Decision and Order at 5; Director's Exhibit 13. The administrative law judge similarly struck Dr. Dahhan's

Section 725.414 is valid. The Director, however, contends that the administrative law judge erred in excluding some of employer's evidence without providing employer with an opportunity to demonstrate good cause for its submission or to select which pieces of evidence it wished to keep in the record.

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 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).

Claimant contends that the administrative law judge erred in finding the opinions of Drs. Baker and Hussain insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] The administrative law judge noted that Dr. Baker, in his February 21, 2001 report, found two separate impairments. Decision and Order at 16. Dr. Baker initially opined that:

> Patient has a Class I impairment with the FEV1 and the Vital Capacity being greater than 80% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Director's Exhibit 12.

The administrative law judge properly found that Dr. Baker's initial impairment finding was not sufficiently reasoned because Dr. Baker failed "to explain how objective medical testing that reveals pulmonary capability near or at normal capacity is supportive of an impairment diagnosis."[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

December 12, 2002 deposition testimony from the record. Decision and Order at 6; Employer's Exhibit 6. The administrative law judge also struck Dr. Rosenberg's report from the record because he found that it was not appropriate rebuttal evidence. Decision and Order at 6; Employer's Exhibit 3.

[4] Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Dr. Baker interpreted claimant's non-qualifying pulmonary function and arterial blood gas studies conducted on February 21, 2001 as normal. Director's Exhibit 12.

(1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 16.

In his February 21, 2001 report, Dr. Baker also opined that:

> Patient has a second impairment based on the presence of Pneumoconiosis which is based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit their exposure to the offending agent. This suggests the patient is 100% disabled for further work in the coal mining industry or similar dusty occupations.

Director's Exhibit 12.

The administrative law judge noted that Dr. Baker's second impairment finding was based upon an assumption that miners who suffer with pneumoconiosis should avoid further coal dust exposure. Decision and Order at 16. The administrative law judge permissibly found that Dr. Baker's statements were insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989) (A medical opinion that merely advises against returning to work in a dusty environment is insufficient to establish a totally disabling respiratory or pulmonary impairment); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

In a report dated June 29, 2001, Dr. Hussain opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 11. The administrative law judge noted, however, that Dr. Hussain also indicated that claimant retained the respiratory capacity to perform the work of a coal miner. Decision and Order at 16; Director's Exhibit 11. Moreover, the administrative law judge properly found that Dr. Hussain's finding of a moderate pulmonary impairment was not sufficiently reasoned because Dr. Hussain provided no basis for his assessment.[6] *Clark*, 12 BLR at 1-155; Decision and Order at 16. The administrative law judge, therefore, properly found that Dr. Hussain's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge properly accorded greater weight to Dr. Broudy's opinion that claimant was not totally disabled from a respiratory standpoint because the

[6] Dr. Hussain interpreted claimant's non-qualifying pulmonary function and arterial blood gas studies conducted on June 29, 2001 as normal. Director's Exhibit 11.

doctor=s opinion was well reasoned and supported by the objective evidence.[7] *See Clark*, 12 BLR at 1-155; *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 17; Employer=s Exhibit 2. Inasmuch as it is supported by substantial evidence, 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).

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) or employer's contentions raised in its cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Dr. Broudy interpreted claimant's October 30, 2002 pulmonary function study results as normal, except for a reduced MVV which he indicated was "probably effort related." Employer's Exhibit 2. Dr. Baker opined that claimant's October 30, 2002 arterial blood gas study was normal. *Id.*

All of the pulmonary function and arterial blood gas studies of record are non-qualifying. *See* Director's Exhibits 11-13; Employer's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
PETER A. GABAUER, JR.
Administrative Appeals Judge