

BRB No. 97-1759 BLA

WESLEY MILLER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
WHITAKER COAL CORPORATION)	
)	
and)	
)	
SUN COAL COMPANY)	
)	
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 of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

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

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-333) of Administrative Law Judge Alfred Lindeman 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). The administrative law judge credited claimant with fourteen years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(c)(4) and to award benefits on the basis of the opinions of Drs. Clarke and Baker. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand this case for further development of the evidence.¹

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 the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

¹ The Director has filed a Motion to Remand in this case to which claimant has not responded. The Board accepts the Director's Motion to Remand as his response brief and herein decides the case on its merits.

Claimant asserts that the administrative law judge erred in evaluating the medical opinions of record. In weighing the medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish total disability by a preponderance of the evidence.² The administrative law judge permissibly did not credit the opinion of Dr. Clarke or Dr. Baker's May 1993 opinion pursuant to Section 718.204(c)(4) since he found that their diagnoses were not supported by the objective evidence of record and the underlying documentation did not support the physicians' conclusions. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 5-6; Claimant's Exhibits 1, 4. The Director, however, urges remand because in considering Dr. Baker's May 1996 opinion, that claimant's impairment was "mild," the administrative law judge found that total disability was not established. Decision and Order at 6; Director's Exhibit 10. Dr. Baker did not comment on whether claimant's mild impairment would preclude performance of claimant's usual coal mine employment in light of the physical requirements of his duties. Thus, the Director argues for remand so that his statutory obligation to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act, may be satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *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); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). We agree with the Director that his obligation has not been satisfied in this case as Dr. Baker failed to address whether claimant's condition would prevent him from performing his usual coal mine employment and thus Dr. Baker's 1996 opinion is not relevant on the issue of total disability. As the Director concedes that he has not satisfied his statutory obligation in the instant case, we vacate the

² The administrative law judge's findings that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

administrative law judge's denial of benefits and remand the case to the district director to afford the Director the opportunity to fulfill his statutory obligation. *Newman, supra; Pettry, supra; Hall, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete pulmonary examination of claimant and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge