

BRB No. 97-1775 BLA

PHILLIP BELLINI)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
U.S. STEEL MINING 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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

W. Fred Cox (McDowell County Black Lung Association), Gary, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1340) of Administrative Law Judge John C. Holmes 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 is on appeal to the Board for the second time. In the original Decision and Order dated September 19, 1989, Administrative Law Judge Julius A. Johnson credited claimant with thirteen and one-half years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Administrative Law Judge Johnson found that the evidence of record was

sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board, but the appeal was dismissed as abandoned by Order dated June 24, 1991. Claimant filed the instant claim on July 17, 1995. Director's Exhibit 1. Administrative Law Judge Holmes found that the newly submitted evidence was again sufficient to establish the existence of pneumoconiosis, see 20 C.F.R. §718.202(a)(1), but insufficient to establish total disability, see 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in weighing the medical opinions of record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.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 Inasmuch as the administrative law judge's length of coal mine employment finding as well as his finding that claimant suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge, in the instant case, found that the preponderance of the objective evidence and medical opinions did not establish total disability. See 20 C.F.R. §718.204(c)(1)-(4). In so finding, the administrative law judge discussed the opinions of Drs. Rasmussen and Vasudevan, who both opined that claimant's respiratory impairment would not preclude performance of claimant's usual coal mine employment. Decision and Order at 3. The administrative law judge, however, failed to consider the opinions of Drs. Jones and Hippensteel and other medical evidence which was admitted into evidence at the hearing.² Claimant's Exhibits 1-6; Employer's Exhibit 1; Hearing Transcript at 5-10. The administrative law judge only discussed the medical evidence and opinions submitted prior to the hearing. Decision and Order at 2-3. Although the administrative law judge has broad discretion in procedural matters, he has provided no basis for excluding the reports, if that is the case. 20 C.F.R. §725.456; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). In any event, the administrative law judge should have discussed the reports at some point in his Decision and Order in order to satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge's failure to discuss this relevant evidence requires remand, *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); see also *Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984), as the APA requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge has failed to consider the report of Dr. Jones, claimant's treating physician, which, if credited, could support a finding of total disability, and failed to weigh it along with the medical opinions he did discuss or determine its respective probative value. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c) and remand the case for reconsideration of

²By Order dated October 29, 1997, the Board noted that Claimant's Exhibit Nos. 1 through 6 and Employer's Exhibit No. 1 were not forwarded to the Board with the record by the district director and directed the parties to provide the Board with copies of the exhibits. The parties complied with the Board's request and the missing exhibits are now part of the record.

all of the medical opinion evidence thereunder. See *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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 administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge