

BRB No. 97-0250 BLA

SHERMAN L. SCOTT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Daniel A. Beatty (Law Offices of Wayne R. Reynolds, P.C.), Belleville, Illinois, for claimant.

Robert B. Bush (Ice, Miller, Donadio & Ryan), Indianapolis, Indiana, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-0833) of Administrative Law Judge Rudolf L. Jansen 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 thirty-four years of coal mine employment, found employer to be the responsible operator, and concluded that

although the medical evidence indicated that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), the medical evidence failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(b). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Sections 718.202(a)(1) and 718.204(b). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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<sup>1</sup> We affirm as unchallenged on appeal the administrative law judge's findings regarding length and nature of coal mine employment, responsible operator status, and pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(c). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In this case, the administrative law judge denied benefits in part because he found that the evidence failed to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(b). Decision and Order at 18-19. Claimant contends that the administrative law judge erred by "relying totally" on the opinions of Drs. Cook and Tuteur, who opined that claimant's ventilatory impairment is unrelated to coal dust exposure but rather is due to chronic obstructive pulmonary disease caused by smoking. Director's Exhibit 25A; Employer's Exhibits 2, 3. Contrary to claimant's contention, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Cook and Tuteur than to those of Drs. Combs and Lenyo, who diagnosed claimant totally disabled in part by pneumoconiosis, because he found that Drs. Cook and Tuteur offered "cogent reasoning" in support of their opinions. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Specifically, the administrative law judge was convinced by their explanation that a ventilatory impairment resulting from pneumoconiosis is irreversible, whereas claimant's pulmonary function studies reveal an obstructive impairment which improves after bronchodilators are administered, a factor that the physicians concluded points to pulmonary disease due to smoking as the cause of claimant's impairment. Employer's Exhibit 2 at 36, 40-41; Employer's Exhibit 3 at 20, 22-23, 26, 28; see *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge also permissibly considered that Dr. Tuteur reviewed all of the medical evidence of record and concluded that the overall data set did not support Dr. Lenyo's opinion because claimant's respiratory abnormalities are not consistent with pneumoconiosis. Decision and Order at 13, 19; Director's Exhibit 25A at 78, 94, 98; Employer's Exhibit 2 at 39-41; see *Clark, supra*; *Kuchwara, supra*. In addition, the administrative law judge specifically noted Dr. Tuteur's testimony that, even assuming claimant has simple pneumoconiosis, category 1/1, it would be uncommon to see a measurable respiratory abnormality due to that level of disease. Decision and Order at 12-13; Employer's Exhibit 2 at 37-38. Finally, the administrative law judge permissibly "defer[red] to the superior credentials and expertise" of Drs. Cook and Tuteur, whom the record reveals are Board-certified in both internal and pulmonary medicine.<sup>2</sup> Decision and Order at 19; Director's Exhibit 25A at 22, 36; see *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b).

Because claimant has failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), a necessary element of entitlement under Part 718, the denial of benefits is affirmed.<sup>3</sup> See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1

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<sup>2</sup> The record indicates that Dr. Lenyo is Board-certified in internal medicine, Claimant's Exhibit 1, but does not contain Dr. Combs' credentials.

<sup>3</sup> In light of our disposition of this case, we need not address claimant's contentions

(1986)(*en banc*).

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

SO ORDERED.

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BETTY JEAN HALL  
Chief Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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pursuant to 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3-4.