U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0054 BLA

BILLY M. BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILL BRANCH COAL CORPORATION, c/o ALPHA NATURAL RESOURCES	)	
	)	
and	)	DATE ISSUED: 01/12/2021
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States, Department of Labor.

Billy M. Bryant, Clintwood, Virginia.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C. for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals Administrative Law Judge Paul C. Johnson, Jr.'s Decision and Order Denying Benefits (2017-BLA-05331) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on September 23, 2015.[2]

The administrative law judge found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He found Claimant established 15.8 years of underground coal mine employment,[3] but not total disability. 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), or establish a change in an applicable condition of entitlement.[5] 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

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[1] On Claimant's behalf, Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Board review the administrative law judge's decision, but Ms. Jenkins is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant previously filed a claim on October 15, 2013, which the district director denied for failure to establish complicated pneumoconiosis or total disability. Director's Exhibit 1.

[3] The Board has applied the law of the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26; Director's Exhibit 3.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's last claim was denied for failure to establish

On appeal, Claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response.

In an appeal filed by a claimant without the assistance of counsel, the Benefits Review Board addresses whether substantial evidence supports the decision and order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and 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).

Evidentiary Limitations

As an initial matter, we address the parties' designation of x-ray evidence to establish complicated pneumoconiosis. The regulations provide that the parties are entitled to submit two affirmative x-ray interpretations, and one interpretation of each x-ray submitted by the opposing party and the Director. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

The parties designated the following evidence relevant to the existence of complicated pneumoconiosis on their evidence summary forms. In response to Dr. DePonte's positive reading of the x-ray obtained as part of the Department of Labor's (DOL's) October 14, 2015 complete pulmonary evaluation, Claimant submitted Dr. Miller's positive reading of the x-ray, Claimant's Exhibit 4, and Employer submitted Dr. Tarver's negative reading, Director's Exhibit 15. In support of his affirmative case, Claimant designated Dr. Miller's positive interpretation of the August 5, 2013 x-ray, Director's Exhibit 13, and Employer submitted Dr. Meyer's negative reading of that film as rebuttal evidence, Employer's Exhibit 1. Claimant also submitted Dr. DePonte's positive reading of the September 26, 2016 x-ray as affirmative evidence, Claimant's Exhibit 1, and Employer submitted Dr. Meyer's negative reading of that film as rebuttal

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complicated pneumoconiosis or total disability, he had to submit new evidence establishing either of these elements in order to proceed with his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

evidence, Employer's Exhibit 16. Employer submitted Dr. Meyer's negative readings of the May 16, 2016 and January 15, 2018 x-rays as affirmative evidence. Employer's Exhibit 1. Claimant submitted Dr. DePonte's positive reading of the May 16, 2016 x-ray, Claimant's Exhibit 2, and Dr. Seaman's positive reading of DOL's October 14, 2015 x-ray, Claimant's Exhibit 3, as rebuttal to Employer's affirmative evidence.

At the hearing, Employer asserted that either Dr. Miller's interpretation or Dr. Seaman's interpretation of DOL's October 14, 2015 x-ray was in excess of the evidentiary limits. Employer alleged that if Claimant was permitted to have two rebuttal readings of the DOL October 14, 2015 x-ray, it was also entitled to submit two readings and proffered Dr. Meyer's reading of that film, contained at Director's Exhibit 14. Hearing Transcript at 7-10. Because there was no objection by the parties, the administrative law judge admitted Dr. Meyer's reading into the record. *Id*. at 10. The administrative law judge's evidentiary ruling was improper.

Neither Claimant nor Employer was entitled to submit an additional x-ray reading of the DOL October 14, 2015 x-ray in view of their evidentiary designations prior to the hearing. Although Claimant designated Dr. Seaman's reading as rebuttal to Employer's affirmative evidence on his evidence summary form, it does not correspond to an x-ray that Employer submitted and therefore does not qualify as rebuttal evidence.[6] 20 C.F.R. §725.414(a)(2)(ii); Claimant's Evidence Summary Form. Employer also was not entitled to submit Dr. Meyer's reading of DOL's October 14, 2015 x-ray as either affirmative or rebuttal evidence since it had already designated Dr. Tarver's reading of the DOL x-ray as its rebuttal of that evidence and also had submitted two affirmative interpretations of other x-rays plus two rebuttal readings of Claimant's affirmative x-ray interpretations. Employer's Evidence Summary Form; Director's Exhibit 15; Employer's Exhibits 1, 16. Thus, the administrative law judge erred in considering both Dr. Seaman's positive reading and Dr. Meyer's negative reading of DOL's October 14, 2015 x-ray because they exceed the evidentiary limits and at the hearing neither Claimant nor Employer argued good cause for admitting them into the record.[7] *See* 20 C.F.R. 20 C.F.R. §§725.414(a)(2)(ii), (a)(3)(ii);

[6] Claimants are permitted "to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray . . . submitted by the designated responsible operator" and the Director pursuant to §725.406. 20 C.F.R. §725.414(a)(2)(ii). Dr. Seaman's x-ray reading does not correspond to an x-ray that Employer submitted.

[7] Additionally, the administrative law judge's chart of the x-ray evidence, Decision and Order at 7-10, lists Dr. Meyer's reading of the January 19, 2016 x-ray which was not designated by Employer. Employer's Exhibit 1. Employer also designated Dr. Meyer's reading of the September 28, 2016 x-ray as one of its two permitted rebuttal readings, but

725.456(b)(1); *Smith*, 23 BLR at 1-74 (the evidentiary limits cannot be waived absent good cause); Director's Exhibit 14; Claimant's Exhibit 3.

Notwithstanding the administrative law judge's evidentiary error, we need not remand the case for further consideration as he permissibly weighed the x-ray readings that were properly admitted into the record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed below, excluding Drs. Seaman's and Meyer's readings of DOL's October 14, 2015 x-ray, the administrative law judge's conclusion that Claimant did not establish complicated pneumoconiosis is otherwise supported by substantial evidence.

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), establishes an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

X-ray Evidence

There are ten properly designated readings of six chest x-rays spanning a period of four-and-one-half years from 2013 to 2018.[8] Decision and Order at 7-9. All of the physicians who read the x-rays are B readers and Board-certified radiologists. *Id*.

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it does not appear on the chart. Employer's Evidence Summary Form; Employer's Exhibit 16. Because Dr. Meyer's readings are consistent, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] The administrative law judge considered twelve readings, but again Dr. Seaman's positive reading and Dr. Meyer's negative reading of DOL's October 14, 2015 x-ray were inadmissible.

Dr. Miller interpreted the August 5, 2013 x-ray as positive for small opacities and a possible large opacity consistent with complicated pneumoconiosis in the upper right lung zone. Director's Exhibit 13. Dr. Meyer read the x-ray as negative for simple and complicated pneumoconiosis. Employer's Exhibit 1. He noted a focal opacity in the mid-right zone that was due to a prior infection with scarring or neoplastic process status post radiation therapy, and basilar pulmonary fibrosis in a pattern consistent with non-specific interstitial pneumonia or usual interstitial pneumonia. *Id.*

Dr. DePonte read the October 14, 2015 x-ray (obtained as part of Claimant's DOL complete pulmonary evaluation) as positive for simple pneumoconiosis and noted a large opacity in the right upper lung consistent with complicated pneumoconiosis or malignancy. Director's Exhibit 10. Dr. Miller read the October 14, 2015 x-ray as positive for simple and complicated pneumoconiosis, Category B, while Dr. Tarver read it as negative for both simple and complicated pneumoconiosis, but noted interstitial fibrosis due to diffuse interstitial fibrosis or usual interstitial pneumonia. Claimant's Exhibit 4; Director's Exhibit 15.

Dr. DePonte read the May 16, 2016 x-ray as positive for simple pneumoconiosis and a large opacity consistent with complicated pneumoconiosis, Category B, or possibly lung scarring. Claimant's Exhibit 2. She recommended comparison with prior films. *Id*. Dr. Meyer read the film as negative for simple and complicated pneumoconiosis. Employer's Exhibit 1. He also noted a "focal opacity in right mid zone with traction bronchiectasis suggests post-infectious scarring; radiation fibrosis may have this appearance." *Id*.

Dr. DePonte read the September 26, 2016 x-ray as positive for simple and complicated pneumoconiosis, Category B, and Dr. Meyer read it as negative for simple and complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 16.

Dr. Meyer read the January 15, 2018 x-ray as negative for simple and complicated pneumoconiosis, but noted a focal opacity consistent with Claimant's "known cicatricle bronchiectasis." Employer's Exhibit 1. He noted increased bronchiovascular markings in the left lower zone suggesting a recurrent infection or aspiration, and indicated a left hilar adenopathy adjacent to the left inferior pulmonary vein on a prior chest CT may account for asymmetric left lower lobe venous congestion edema. *Id*. There are no other readings of the January 15, 2018 x-ray.

The administrative law judge permissibly found Dr. DePonte's positive readings of the October 14, 2015 and May 16, 2016 x-rays equivocal because she opined Claimant had possible complicated pneumoconiosis but also offered alternate diagnoses for Claimant's x-ray findings. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision

and Order at 26. Considering the x-ray evidence as a whole, the administrative law judge found there are three equivocal positive readings for complicated pneumoconiosis, three unequivocal readings for the disease, and six negative readings.[9] Decision and Order at 26. He permissibly found Dr. Meyer's negative readings more credible because Dr. Meyer reviewed Claimant's x-rays "over a greater period of time than any other radiologist" and "reviewed multiple CT scans which provided him with a more complete imaging history of Claimant's lungs."[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 27. Because the administrative law judge performed both a qualitative and quantitative review of the x-ray evidence, and acted within his discretion in resolving the conflict in the readings, we affirm his finding that Claimant did not establish complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 27.

Biopsy Evidence

The administrative law judge accurately found "[n]one of the biopsy reports in the record contain a finding of massive lesions in the lung equivalent to a one-centimeter opacity when viewed on an x-ray film."[11] Decision and Order at 29. We therefore affirm

[9] Excluding Dr. Seaman's and Meyer's readings of the DOL x-ray, there are two equivocal positive readings, three unequivocal positive readings, and five negative readings.

[10] As discussed *infra*, the CT scan evidence does not establish complicated pneumoconiosis.

[11] A needle aspiration of the right lung on December 20, 2004, was too small to be diagnostic. Employer's Exhibit 9. A core biopsy of the right lung taken the same day showed changes consistent with necrotizing granuloma with yeasts, dense fibrosis, and moderate chronic inflammation, and reactive bronchial epithelial cells. *Id*. Bronchial washings on that day were negative for malignancy but showed inflammation and bronchial epithelial cells. *Id*. Claimant underwent bronchial lavages and a biopsy of the right lung on June 17, 2009, that was negative for malignancy and fungal organisms, but showed the presence of carbonaceous material within macrophages suggesting the possibility of mixed dust exposure. *Id*. Claimant underwent a bronchoscopy and biopsy of his right lung on July 4, 2015, which was interpreted as negative for granuloma and malignancy. *Id*. Dr. Caffrey reviewed slides from biopsies on June 17, 2009, and July 10,

the administrative law judge's finding that the biopsy evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(b).

Other Medical Evidence

The administrative law judge accurately found that, while the CT scan evidence shows abnormalities in Claimant's lungs, none of the reviewing physicians reported findings of massive lesions or large opacities for complicated pneumoconiosis.[12] Decision and Order at 20-21, 27. Regarding the medical opinion evidence, Dr. Ajjarapu conducted Claimant's DOL complete pulmonary evaluation and diagnosed complicated pneumoconiosis. Director's Exhibit 10. Although the administrative law judge did not address Dr. Ajjaarapu's opinion, we consider the error to be harmless as Dr. Ajjarapu indicated she based her diagnosis of complicated pneumoconiosis solely on Dr. DePonte's positive reading for complicated pneumoconiosis of DOL's October 14, 2015 x-ray and, thus, as a matter of law, her opinion is not sufficient to satisfy Claimant's burden of proof. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (mere restatement of an x-ray reading is not a reasoned medical opinion); *Larioni*, 6 BLR at 1-1278; Director's Exhibit 10. As neither Dr. Rosenberg nor Dr. Tuteur diagnosed complicated pneumoconiosis, we affirm the administrative law judge's finding that Claimant is unable to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 27. We further affirm the administrative law judge's determination that Claimant is not entitled to the irrebuttable presumption as it is supported by substantial

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2012, but concluded that the biopsy materials did not include samples of lung tissue and therefore were not sufficient to diagnose pneumoconiosis. Employer's Exhibit 5.

[12] Dr. Pugh read a December 9, 2004 CT scan as showing pneumonia or atypical pneumonia. Employer's Exhibit 7. Dr. Saadeh read an August 5, 2009 CT scan as showing a partial collapse of the right upper lobe and surrounding abnormalities likely due to persistent or recurrent infection related to blastomycosis. Employer's Exhibits 7, 8. Dr. Meyer interpreted the August 5, 2009 CT scan as negative for pneumoconiosis, but showing extensive bronchiectasis and cicatricial scarring in the right upper lobe. Employer's Exhibit 2. Dr. Westhuizen read a July 3, 2012 CT scan and identified ground-glass and reticulonodular opacities in the right lower lung, and an area of cylindrical bronchiectasis in the right upper lung. Claimant's Exhibit 6. Dr. Sinner read an October 8, 2012 CT scan and noted a resolving infiltrate of the lateral right lower lobe and chronic infiltrate associated with bronchiectasis in the right upper lobe. Employer's Exhibits 7, 8. Dr. Meyer also read the same scan as negative for pneumoconiosis, but noted mild ground-glass opacities and scarring with cicatricial bronchiectasis in the right upper lobe that may be due to prior infection or radiation. Employer's Exhibit 2.

evidence. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see Lester*, 993 F.2d at 1145-46; *Melnick*, 16 BLR at 1-33-34; Decision and Order at 28.

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Because all of the pulmonary function studies and arterial blood gas studies are non-qualifying,[13] we affirm the administrative law judge's determination that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 33. He also accurately found no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 33.

Regarding the medical opinion evidence, Dr. Ajjarapu opined Claimant is totally disabled, while Drs. Tuteur and Rosenberg opined he is not. Director's Exhibit 10; Employer's Exhibits 4, 6. The administrative law judge permissibly rejected Dr. Ajjarapu's opinion because it "is based in large part" on Dr. DePonte's positive reading for complicated pneumoconiosis of the DOL's October 14, 2015 x-ray and Claimant's coal mine dust exposure, while he found the weight of the x-ray evidence did not establish the disease.[14] Decision and Order at 33; s*ee Sterling Smokeless Coal Co. v. Akers*, 131 F.3d

[13] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[14] The administrative law judge noted "Dr. Ajjarapu candidly testified that she might have questioned Dr. DePonte's positive reading had she been aware of other negative interpretations and that her opinions 'absolutely'' may have been different had she been aware of additional medical evidence." Decision and Order at 36, *quoting* Employer's Exhibit 15 at 53.

438, 441 (4th Cir. 1997) (administrative law judge may discount medical opinions he finds contradict his findings); Director's Exhibit 10; Employer's Exhibit 15 at 33-34. Further, he permissibly found Dr. Ajjarapu's opinion less persuasive because "she, unlike Dr. Tuteur, did not review all the relevant medical evidence." Decision and Order at 34; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-555 (1989) (en banc); Employer's Exhibit 6. We therefore affirm the administrative law judge's determination that the medical opinions do not establish Claimant is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 34.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant did not establish total disability and, thus, is unable to invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 33. As Claimant did not establish total disability, benefits under 20 C.F.R. Part 718 are also precluded.[15] *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[15] Because we affirm the administrative law judge's finding that Claimant did not establish total disability, we need not address the administrative law judge's findings on the existence of pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).