

BRB No. 99-0298 BLA

JOHN D. SMITH, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JEWELL SMOKELESS COAL)	DATE ISSUED:
CORPORATION)	
)	
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 on Remand-Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Thomas C. Antenucci (Copeland, Molinary & Bieger, P.C.), Abingdon, Virginia, for claimant.

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

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (86-BLA-4239) of Administrative Law Judge Clement J. Kichuk 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 The administrative law judge concluded that the medical

¹ Claimant initially filed a claim for benefits on November 1, 1985, Director's Exhibit 1. Administrative Law Judge Giles J. McCarthy issued a Decision and Order awarding benefits. Judge McCarthy found that claimant established a coal mine employment history of eight years and that claimant established pneumoconiosis due to coal mine employment

opinion evidence failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(4), and that even if claimant were able to establish the presence of a totally disabling respiratory impairment, the evidence of record failed to establish that the totally disabling impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 13. Accordingly, benefits were denied.

pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(c), and total disability at 20 C.F.R. §718.204(c)(4). Subsequent to an appeal by employer, the Board vacated Judge McCarthy's findings at Section 718.204(c)(4) and remanded the case for further findings pursuant to that section and, if reached, 20 C.F.R. §718.204(b). *Smith v. Jewell Ridge Coal Corp.*, BRB No. 89-1639 BLA (Mar. 16, 1992)(unpub.). On remand, Administrative Law Judge Bernard Gilday found the evidence insufficient to establish total disability and accordingly denied benefits. Subsequent to an appeal by claimant, the Board vacated this denial of benefits and remanded the claim for further consideration. *Smith v. Jewell Smokeless Coal Corp.*, BRB No. 93-1686 BLA (Nov. 29, 1994)(unpub). On remand, Administrative Law Judge Gilday again concluded that claimant failed to establish total disability. Subsequent to an appeal by claimant, the Board affirmed Judge Gilday's Decision and Order, in part and reversed in part, and remanded the case to the administrative law judge with instructions to enter an award of benefits. *Smith v. Jewell Smokeless Coal Corp.*, BRB No. 95-1099 BLA (Jan. 30, 1996). Subsequently, employer filed a Motion for Reconsideration. The Board granted the motion, vacated that portion of the Decision and Order which reversed the denial of benefits, and remanded the claim for further consideration. *Smith v. Jewell Smokeless Coal Corp.*, BRB No. 95-1099 BLA (Decision and Order on Reconsideration)(Nov. 21, 1997).

On appeal, claimant contends that the administrative law judge mischaracterized the opinion of Dr. McVey, claimant's treating physician. Claimant also contends that the administrative law judge failed to address all relevant evidence and erred in according greater weight to the opinions of Drs. Byers and Garzon, without assessing the credibility of their conclusions. Claimant further asserts that the evidence of record supports his burden of establishing total disability due to pneumoconiosis pursuant to Section 718.204(b). Employer responds and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief.

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 this 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).

Initially, we conclude that, contrary to claimant's argument, the administrative law judge's error in stating the date of Dr. McVey's opinion, instructing claimant to return to coal mine employment, as 1992 on page 9 of the decision is harmless, inasmuch as he correctly stated the date as 1982 on page 3 of the decision, and the error did not affect his analysis of the evidence, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant further contends that the administrative law judge erred in his weighing of the medical opinion evidence of total disability at Section 718.204(c)(4) inasmuch as the administrative law judge failed to address medical evidence which serves to either support or discredit those opinions. Specifically, claimant contends that the opinions of Drs. Byers and Garzon, both of whom concluded that claimant did not suffer from a totally disabling respiratory impairment, Employer's Exhibits 3, 4, relied on unsupported diagnoses of asbestosis and were unsupported by the underlying x-ray evidence and pulmonary function study evidence. Claimant further asserts that the opinion of Dr. Robinette, Claimant's Exhibit 5, was supported by the findings of Drs. Hansen and Karpynek, Director's Exhibits 12, 17, 25; Employer's Exhibit 1, and thus carried claimant's burden of demonstrating a totally disabling respiratory impairment pursuant to Section 718.204(c)(4).

When this case was most recently before the Board, the Board granted employer's motion for reconsideration and in light of *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), vacated Judge Gilday's determination to accord diminished weight to the opinions of Drs. Byers and Garzon at Section 718.204(c)(4). The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which held in *Ballard, supra*, that when an administrative law judge who has determined that

claimant has established the presence of pneumoconiosis, considers the issue of total disability at Section 718.204(c)(4), he should not automatically give less weight to medical opinions which do not diagnose the existence of the disease. *See also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *but see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Accordingly, the Board instructed the administrative law judge to reconsider the opinions of Drs. Byers and Garzon in light of the holding in *Ballard*. The Board also instructed the administrative law judge to reconsider the weight to be accorded to the opinion of Dr. Robinette, as well as the other opinions of record in light of the holding of the Fourth Circuit in *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), in which the court held that a physician who demonstrates familiarity with the exertional requirements of claimant's usual coal mine employment may be accorded greater weight. *Smith v. Jewell Smokeless Coal Corp.*, BRB No. 95-1099 BLA (Nov. 21, 1997)(unpub.).

On remand, the administrative law judge found that Dr. Byers's opinion that claimant was not disabled and was able to return to his previous coal mine employment, was entitled to determinative weight as Dr. Byers provided a better explanation for his findings than did Dr. Robinette. Decision and Order at 13. The administrative law judge concluded that Dr. Robinette's opinion was entitled to less weight because of his equivocal statement that claimant's pulmonary disease was chronic and "probably" irreversible. Decision and Order on Remand at 11.

The administrative law judge's crediting of Dr. Byers's opinion is supported by substantial evidence. Decision and Order on Remand at 10. We thus affirm the administrative law judge's conclusion that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). Claimant's assertions of error regarding the administrative law judge's analysis of the evidence are tantamount to a request for the Board to reweigh the evidence, which is outside the Board's scope of authority. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to claimant's assertion, a physician's erroneous failure to diagnose pneumoconiosis does not necessarily undermine the validity of his conclusions regarding the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Furthermore, the administrative law judge permissibly concluded that Dr. Robinette's opinion was entitled to less weight because it was equivocal, (*i.e.*, the physician concluded that claimant's pulmonary impairment was "probably" irreversible, Claimant's Exhibit 5), *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and failed to fully account for claimant's lengthy smoking history, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Moreover, the administrative law judge addressed the opinions of both Drs. Hansen and Karpynek, proffered by claimant as

support for the conclusions of Dr. Robinette, and in a permissible exercise of his discretion accorded little weight to the physicians' conclusions as they were not reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.* 8 BLR 1-46 (1985), and not fully explained, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Hicks, supra*. Accordingly, we conclude that the administrative law judge has complied with our previous remand instructions and has permissibly held that claimant has failed to affirmatively demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). Inasmuch as claimant has failed to establish the presence of a totally disabling respiratory impairment, a requisite element of entitlement pursuant to 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*), we must affirm the denial of benefits.²

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

² In view of our affirmance of the administrative law judge's determination that claimant was unable to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), we need not address claimant's assertions regarding Section 718.204(b). *See, Trent, supra; Gee, supra; Perry, supra*.