BRB Nos. 08-0560 BLA
and 08-0560 BLA-A

H.L.M.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 04/07/2009
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday (Holliday & Lewis), Hazard, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denying Benefits (06-BLA-5487) of Administrative Law Judge Joseph E. Kane on a claim[1] 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). Based on employer's stipulation, as

[1] Claimant filed an application for benefits on January 2, 2005. Director's Exhibit 2.

supported by the record, the administrative law judge credited claimant with sixteen years of qualifying coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by medical opinion evidence under Section 718.202(a)(4), and total disability due to pneumoconiosis established under Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in claimant's appeal.

On cross-appeal, employer argues that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge erred in finding that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Claimant has filed a response brief to employer's cross-appeal, arguing that substantial evidence supports the administrative law judge's determination that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The Director has filed a letter indicating his intention not to participate in the cross-appeal.[2]

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, rational, and consistent with the 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'Keeffe v. Smith, Hinchman and 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

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant worked in qualifying coal mine employment for sixteen years and that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 16-17.

totally disabling.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Challenging the administrative law judge's weighing of the conflicting medical opinions of record on the issue of disability causation under Section 718.204(c),[4] claimant argues that the administrative law judge erred in according controlling weight to the opinion of Dr. Jarboe over the contrary opinions of Drs. Baker, Rasmussen, and Turner.[5] First, claimant argues that the disability causation opinion of Dr. Jarboe is entitled to no weight because the physician's finding of no evidence of total respiratory disability is contrary to the administrative law judge's determination that claimant is, in fact, totally disabled due to a respiratory impairment.

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[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

[4] Relevant to 20 C.F.R. §718.204(c), the record contains the following medical opinions: In a report dated June 22, 2006, Dr. Jarboe found no evidence of a totally and permanently disabling respiratory condition, and opined that, assuming the miner was disabled, his disability was not due to pneumoconiosis. Employer's Exhibit 2. In an addendum to his March 1, 2005 report, Dr. Baker opined that coal workers' pneumoconiosis, chronic bronchitis, and moderate resting arterial hypoxemia all had a material adverse effect on claimant's respiratory condition and contributed to his pulmonary impairment. Director's Exhibit 13. In a report dated September 14, 2006, Dr. Rasmussen opined that claimant had clinical pneumoconiosis that contributed significantly to his reduced single breath diffusing capacity and that his resting blood gas studies met the listings on CM-1159. Claimant's Exhibit 1. Dr. Turner, claimant's treating physician, stated that claimant was unable to perform pulmonary function studies, and based on his symptoms and the physician's findings, "it is felt that mostly like [sic] his pulmonary problem is related to pneumoconiosis." Director's Exhibit 11. In a report dated September 7, 2005, Dr. Dahhan found no evidence of pulmonary impairment and/or disability caused by, related to, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Director's Exhibit 16.

[5] Claimant, however, does not challenge the administrative law judge's crediting of the opinion of Dr. Dahhan, who opined that claimant does not have a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order at 18-19; Director's Exhibit 16.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that medical reports refuting the existence of any impairment hold little probative value on the issue of causation. *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). In the present case, however, the administrative law judge found total respiratory disability established based on qualifying blood gas studies that were interpreted as showing hypoxemia, and the agreement of all physicians that claimant suffered from a gas exchange abnormality. Decision and Order at 17. Under his analysis of the medical opinions relevant to total disability at Section 718.204(b), the administrative law judge noted that even though Dr. Jarboe opined that claimant was not disabled from a respiratory standpoint, contrary to the opinions of Drs. Baker, Turner, and Dahhan, Dr. Jarboe acknowledged claimant's hypoxemia and attributed this abnormality to claimant's severe cardiac disease rather than to a pulmonary disease.[6] Hence, the administrative law judge reasoned that Dr. Jarboe's contrary opinion was "best addressed under the framework of 20 C.F.R. §718.204(c)(1)" because it pertained directly to the cause of claimant's impairment. Decision and Order at 17; Employer's Exhibit 2. Under his assessment of the medical opinions relevant to disability causation at Section 718.204(c), the administrative law judge, within a proper exercise of his discretion, found that Dr. Jarboe's opinion, that claimant's hypoxemia was related entirely to heart disease, was entitled to controlling weight because Dr. Jarboe conducted a comprehensive review of the medical records as well as a complete pulmonary evaluation of claimant; he demonstrated a thorough understanding of claimant's history of heart problems; he provided detailed testimony and persuasive reasons supporting his opinion that the variation evident on claimant's arterial blood gas studies was not consistent with pneumoconiosis; and he rendered an opinion that was supported by the diagnostic studies of record. Because the administrative law judge's determination to credit Dr. Jarboe's opinion is rational, supported by substantial evidence, and contains no reversible error, we reject claimant's argument. *See Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 19.

Second, claimant contends that substantial evidence does not support the administrative law judge's finding that Dr. Baker's opinion was less persuasive and entitled to diminished weight because the physician failed to adequately consider the contribution of claimant's heart disease to his disability. Claimant avers that, contrary to

[6] In a report dated June 22, 2006, Dr. Jarboe opined, "It is likely that [claimant] is totally disabled as a whole man" and that his advanced age of 79 years and his significant cardiac disease "would make it impossible for him to continue to work as an underground coal miner or to perform work of a similar physical demand in a dust-free environment." Employer's Exhibit 2.

the administrative law judge's determination, Dr. Baker continually referenced claimant's heart condition in rendering his opinion that heart disease played an insignificant role in claimant's moderate resting hypoxemia and bronchitis. Claimant asserts that Dr. Baker recorded claimant's medical history of ischemic heart disease, a post coronary artery bypass grafting, and an angioplasty/stent; he opined that the decreased oxygen exhibited on the blood gas studies was caused by coal dust exposure, cigarette smoking, and arteriosclerotic heart disease; and he recommended that claimant seek further medical attention for his right carotid bruit. Likewise, claimant avers that, during his deposition on December 4, 2006, Dr. Baker unequivocally testified that there was no evidence of heart failure demonstrated on claimant's examination or indicated by symptomotology. Contrary to claimant's arguments, however, the administrative law judge permissibly found that Dr. Baker's conclusions with respect to the severity and significance of claimant's heart condition undermined the reliability of Dr. Baker's opinion concerning the cause of claimant's disability. Specifically, while Dr. Baker testified at his deposition that he did not detect any evidence of heart failure during his examination of claimant, the administrative law judge noted that the physician commented in his narrative report that claimant's electrocardiogram demonstrated "atrial fibrillation" as well as "ST changes." Decision and Order at 18; Director's Exhibit 13; Claimant's Exhibit 3 at 15-16. Similarly, the administrative law judge determined that even though Dr. Baker believed the severity of claimant's cardiac condition warranted claimant's referral to a specialist, he completely dismissed such condition as a substantially contributing cause of claimant's disabling hypoxemia. Additionally, the administrative law judge found that Dr. Baker did not interpret the significance of claimant's varying arterial blood gas study results, unlike Dr. Jarboe, who explained that the variation in values was indicative of a cardiac condition rather than pneumoconiosis. As the administrative law judge rationally concluded that Dr. Baker failed to fully account for claimant's cardiac condition, we affirm his determination that Dr. Baker's opinion was worthy of diminished weight on the issue of disability causation. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 18.

Third, claimant argues that the administrative law judge erred in finding that Dr. Rasmussen failed to adequately consider claimant's cardiac condition in rendering his opinion. Claimant asserts that Dr. Rasmussen conducted a complete pulmonary evaluation of claimant, consisting of a physical examination, medical history, and objective tests and, as such, any omission of a discussion of claimant's heart condition was harmless. Claimant's argument lacks merit.

In a report dated September 14, 2006, Dr. Rasmussen opined that claimant "has clinical pneumoconiosis, which contributes significantly to his reduced single breath diffusing capacity," and that his "resting blood gas studies meet the listings on CM-

1159." Claimant's Exhibit 1. The administrative law judge properly found that Dr. Rasmussen's failure to explain the impact of claimant's cardiac ailments on his respiratory condition undermined the credibility of his medical opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201, 1-204 (1986). Within a proper exercise of his discretion, the administrative law judge assigned less weight to Dr. Rasmussen's opinion because the physician failed to discuss the "varying blood gas values," and made no mention of claimant's heart condition, notwithstanding that the electrocardiogram he administered to claimant revealed "atrial fibrillation and right bundle branch block." Decision and Order at 18. This determination is rational and supported by substantial evidence. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *see also Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002) (it is beyond the Board's limited scope of review to overturn the administrative law judge's credibility determinations); Decision and Order at 18; Claimant's Exhibit 1. We, therefore, reject claimant's argument.

Finally, claimant argues that, pursuant to 20 C.F.R. §718.104(d), the administrative law judge erred in failing to accord determinative weight to the opinion of Dr. Turner, based on his status as the miner's treating physician. Additionally, claimant argues that the administrative law judge improperly discounted Dr. Turner's opinion on the ground that Dr. Turner failed to provide any supportive documentation or discussion of the medical records. Claimant maintains that, because the record is replete with claimant's hospital and treatment records, it was not incumbent upon Dr. Turner to provide additional documentation or to discuss these records. We disagree.

The administrative law judge permissibly determined that the probative value of Dr. Turner's opinion was undermined because the physician cited no test results to support his statement that claimant's heart disease had stabilized, and Dr. Turner failed to address the medical records that demonstrated that claimant suffered from severe cardiac problems. Decision and Order at 19; Director's Exhibit 11; Claimant's Exhibit 6. Hence, the administrative law judge acted within his discretion in finding that Dr. Turner's opinion, that claimant's pulmonary problem was related to pneumoconiosis, was inadequately reasoned to establish disability causation, notwithstanding his status as claimant's treating physician. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571 (4th Cir. 2002); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-155; *King*, 8 BLR at 1-265; Decision and Order at 19.

Based on the foregoing, we affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the medical evidence was insufficient to establish disability causation pursuant to Section 718.204(c), a requisite element of entitlement. Consequently, we affirm his finding that claimant is precluded

from entitlement to benefits, and need not address claimant's arguments with respect to the issue of legal pneumoconiosis at Section 718.202(a)(4), or employer's arguments on cross-appeal with respect to the issue of clinical pneumoconiosis at Section 718.202(a)(1). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-1.

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge