BRB No. 00-1102 BLA

GEORGE L. WEBER, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SOUTHERN OHIO COAL 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 - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee LLP), Charleston, West Virginia, for employer.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0736) of Administrative Law Judge Daniel L. Leland 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 considered the instant claim, a duplicate claim which was filed on July 20, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000).[2] After crediting claimant with at least twenty-five years of coal mine employment, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge determined that, therefore, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings with respect to the newly submitted evidence at Sections 718.202(a)(1) and (a)(4) (2000), and 718.204(c)(2) and (c)(4) (2000). Claimant further contends that the administrative law judge erred in failing to credit Dr. Rasmussen's opinion as sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *See* 20 C.F.R. §718.204(c). Claimant otherwise generally contends that the administrative law judge erred in failing to make a finding on the merits that the evidence of record is sufficient to establish all of the requisite elements of entitlement under Part 718. Employer has filed a response brief in

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant previously filed a claim on May 24, 1993, which was finally denied by the district director on May 25, 1994 for claimant's failure to establish the existence of pneumoconiosis, total disability and total disability due to pneumoconiosis. Director's Exhibit 24. Claimant took no further action thereafter until filing the instant duplicate claim on July 20, 1998. Director's Exhibit 1.

support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he agrees with claimant that the administrative law judge erroneously weighed the newly submitted blood gas study evidence when considering it at Section 718.204(c)(2) (2000), but the Director otherwise indicates that he does not presently intend to respond to claimant's remaining arguments.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *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*).

On appeal, in contending that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), *see* 20 C.F.R. §718.204(c), claimant contends that the administrative law judge erred in discounting Dr. Rasmussen's medical opinion. Claimant contends that the administrative law judge should have credited Dr. Rasmussen's opinion as a well-reasoned and documented opinion, and should have found that Dr. Rasmussen was as well-qualified as Dr. Renn, whose contrary opinion the administrative law judge found was entitled to more weight on the basis of the doctors' relative qualifications. Claimant's contentions lack merit.

Dr. Rasmussen, who examined claimant on January 5, 2000, diagnosed claimant with pneumoconiosis arising out of coal mine employment, and indicated that claimant is totally disabled from a respiratory standpoint. Claimant's Exhibits 1, 3. Dr. Rasmussen further indicated that claimant's coal dust exposure is a significant contributing factor in his totally disabling respiratory impairment. *Id*. Dr. Rasmussen's opinion is the only opinion of record which, if credited, could support a finding of total disability due to pneumoconiosis and claimant does not contend otherwise. *See* 20 C.F.R. §718.204(c); *see also Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Contrary to claimant's contention, the administrative law judge properly discounted Dr. Rasmussen's opinion when considering the evidence under Section 718.204(c)(4) (2000), properly according greater weight to Dr. Renn's opinion, that claimant is not totally disabled from a respiratory standpoint, because Dr. Renn is Board-certified in pulmonary disease medicine, while Dr.

Rasmussen is not. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Roberts v. Bethlehem Mining Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7; Claimant's Exhibit 2; Employer's Exhibit 3. While claimant argues that the administrative law judge should have determined that Dr. Rasmussen was at least an equally well-qualified pulmonary specialist because Dr. Rasmussen has long been involved with pulmonary diseases, has served on the Department of Labor Medical Committee for Disability Standards for the Federal Black Lung Program, and has been a chief of a pulmonary section of a regional West Virginia hospital and the director of a pulmonary laboratory, *see* Petitioner's Brief at 4-5; Claimant's Exhibit 2, the administrative law judge is charged with resolving the conflicts posed by the record, and the administrative law judge's findings will not be disturbed on appeal if supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Inasmuch as the administrative law judge correctly stated that Dr. Renn is Board-certified in pulmonary diseases, and because Dr. Renn's curriculum vitae indicates that he has served on committees with regard to respiratory and pulmonary medicine, and has acted as a pulmonary disease consultant, a chief of a pulmonary function laboratory, and a director of a respiratory care laboratory, we hold that substantial evidence supports the administrative law judge's finding that, in light of Dr. Renn's distinguishing board-certification, Dr. Renn possesses superior qualifications in pulmonary disease medicine. We, therefore, affirm the administrative law judge's decision to credit Dr. Renn's opinion and discount the opinion of Dr. Rasmussen. *See Akers, supra; Roberts, supra.*

Inasmuch as the administrative law judge properly discounted Dr. Rasmussen's opinion, the only opinion of record which, if credited, could support a finding of total disability due to pneumoconiosis, claimant is precluded from establishing total disability due to pneumoconiosis, a requisite element of entitlement under Part 718.[3] *See Trent; Gee; Perry*; 20 C.F.R. §718.204(c). We, therefore, need not address the administrative law judge's findings with regard to the new evidence under Sections 718.202(a)(1) and (a)(4) (2000), 718.204(c)(2) and (c)(4) (2000), and 725.309 (2000), inasmuch as any errors the

[3]In addition to the opinions of Drs. Renn and Rasmussen, which are discussed *supra*, the record contains medical opinions from Dr. Jaworski, who examined claimant in 1998, Director's Exhibit 8, and Drs. Devabhaktuni and Zaldivar, who examined claimant in 1994 in connection with the prior claim. Director's Exhibit 24. Dr. Jaworski diagnosed claimant with pneumoconiosis, chronic obstructive pulmonary disease, and hypoxemia, and indicated that claimant has a respiratory impairment which is "severe," as manifested by his hypoxemia. Director's Exhibit 8. Dr. Jaworski did not comment on the etiology of the hypoxemia or respiratory impairment, however. *Id.* Dr. Devabhaktuni opined that claimant has no impairment, and Dr. Zaldivar indicated that claimant is not totally disabled, and retains the pulmonary capacity for coal mine employment. Director's Exhibit 24.

administrative law judge may have made thereunder would constitute harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge