BRB Nos. 09-0757 BLA
and 09-0757 BLA-A

E.T. HALL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MAY MINING COMPANY	)	
	)	
and	)	
	)	
AMERICAN RESOURCES INSURANCE COMPANY	)	DATE ISSUED: 08/30/2010
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denial of Benefits (08-BLA-5047) of Administrative Law Judge Joseph E. Kane on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for eleven years, and adjudicated the claim, filed on January 19, 2007, pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that while claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the weight of the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing that the administrative law judge erred in admitting Dr. Alexander's x-ray interpretation into the record; in finding that clinical and legal pneumoconiosis was established at Section 718.202(a); and in his consideration of the pulmonary function study evidence of record at Section 718.204(b)(2)(i). Claimant responds to employer's cross-appeal, urging the Board to reject employer's arguments. The Director, Office Workers' Compensation Programs (the Director), responds to the appeal and the cross-appeal, urging the Board to reject employer's arguments and to remand this case for further findings on the issue of total respiratory disability at Section 718.204(b). Employer has also filed a reply brief in support of its position.[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, are rational, and are consistent with the applicable law, they are binding upon this Board and

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case involving a living miner's claim, as the parties stipulated to eleven years of coal mine employment, and there is no evidence, or allegation, that claimant had at least fifteen years of coal mine employment.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eleven years of qualifying coal mine employment, that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) and (a)(3), and that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii) and (iii), as these determinations are unchallenged on appeal. *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, 12, 18.

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).

Turning first to the procedural issue, employer argues that the administrative law judge should have excluded Dr. Alexander's interpretation of the June 6, 2007 x-ray from the record on the basis that it exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2)(ii). Employer asserts that claimant is only permitted to submit one rebuttal reading of the June 6, 2007 x-ray, contrary to the administrative law judge's allowance of two rebuttal readings of this same x-ray film. Because the administrative law judge admitted Dr. Ahmed's interpretation of the June 6, 2007 x-ray into the record, employer maintains that claimant's submission of Dr. Alexander's reading of this same x-ray contravenes the clear and unambiguous language of Section 725.414(a)(2)(ii), which permits claimants 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 by the Director." Employer's Brief in Reponse to Claimant's Appeal and In Support of Cross-Appeal (Employer's Brief) at 20. While the administrative law judge relied on the Board's decision in *Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006), as a basis for his admission of the x-ray reading in question, employer urges the Board to reverse its holding in *Ward* as antithetical to the plain language of the regulation. Claimant and the Director counter that the administrative law judge correctly admitted Dr. Alexander's x-ray reading into the record in accordance with *Ward*, and assert that employer has not proffered a compelling ground to revisit this issue. We agree with the position of claimant and the Director.

In *Ward*, the Board held that the rebuttal provisions set forth in Section 725.414(a)(2)(ii) and (3)(ii) "permitting each party to submit 'no more than one physician's interpretation of each chest X-ray' in rebuttal, refer to the x-ray *interpretations* that are proffered by the opposing party in its affirmative case, not to the underlying x-ray film." *Ward*, 23 BLR at 1-155-156 [emphasis in original]; *accord J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-84 (2008). Because Dr. Ahmed's interpretation was offered in rebuttal to Dr. Broudy's interpretation, and Dr. Alexander's interpretation was offered in rebuttal to Dr. Wiot's interpretation, *see* Director's Exhibits 12, 38; Claimant's Exhibit 2; Employer's Exhibit 2, the administrative law judge's admission of Dr. Alexander's x-ray reading was proper and in accordance with *Ward*. Consequently, we reject employer's argument that claimant exceeded the evidentiary limitations set forth in Section 725.414(a)(2)(ii).

Turning to the merits of this case, in order to establish entitlement to benefits 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 totally disabling. *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 of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

We first address employer's arguments on cross-appeal. Employer challenges the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Specifically, employer argues that the administrative law judge erroneously deferred to the numerical superiority of positive interpretations and failed to consider additional factors, namely the qualifications of the physicians, in his weighing of the conflicting x-ray readings of record. Employer asserts that the administrative law judge found that all of the x-rays in this case were equivocal, except for the February 5, 2007 x-ray, which was interpreted as positive by a B reader and a dually qualified Board-certified radiologist and B reader, and as negative by a dually qualified reader. Employer contends that the administrative law judge erred "by using the least qualified physician as the tie-breaker" to conclude that the February 5, 2007 x-ray was positive; rather, employer argues that, because greater deference should have been afforded to the opinions of the more qualified physicians, the administrative law judge should have found this x-ray to be equivocal and, as such, insufficient to establish the existence of pneumoconiosis. Employer's Brief at 18. Employer's arguments lack merit.

A review of the Decision and Order reveals that the administrative law judge conducted a proper qualitative and quantitative analysis of the x-ray evidence pursuant to Section 718.202(a)(1). Contrary to employer's arguments, the administrative law judge accurately reviewed the qualifications of the physicians and did not find that "all of the x-rays in this case were equivocal." Employer's Brief at 18. Rather, he found that the x-rays dated November 6, 2006 and April 28, 2008 were "inconclusive" because equally-qualified physicians provided equally probative, but contradictory interpretations as to the presence of pneumoconiosis. Decision and Order at 11-12; Director's Exhibits 13, 38; Claimant's Exhibit 1; Employer's Exhibits 3, 9; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Within a rational exercise of his discretion, the administrative law judge found that the February 5, 2007 x-ray, in addition to the June 6, 2007 x-ray, was positive for pneumoconiosis, as the February 5, 2007 film was read as positive by Dr. Alexander, a dually qualified physician, and by Dr. Baker, a B reader, and as negative by Dr. Spitz, a dually qualified physician. Based on "the preponderance of the positive readings" by qualified physicians, the administrative law judge permissibly concluded that the February 5, 2007 film was positive. 20 C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem*

Mines Corp., 8 BLR 1-211 (1985); Decision and Order at 12; Director's Exhibits 10, 38; Employer's Exhibit 1. Similarly, the administrative law judge determined that the June 6, 2007 film was read as positive by Drs. Alexander and Ahmed, dually qualified physicians, and as negative by Dr. Wiot, a dually qualified physician, and by Dr. Broudy, a B reader. Director's Exhibits 12, 38; Claimant's Exhibit 2; Employer's Exhibits 2, 4. The administrative law judge permissibly relied on "the preponderance of the positive readings by the most qualified readers" to conclude that this film was positive. Decision and Order at 12. The administrative law judge's determination to accord dispositive weight to the positive interpretations rendered by the physicians with superior radiological qualifications was rational and supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Next, employer contends that the administrative law judge erred in relying on the opinion of Dr. Baker to find legal pneumoconiosis established at Section 718.202(a)(4). Employer maintains that Dr. Baker's opinion is insufficient, as a matter of law, to support claimant's burden because it is based on a "marginally positive chest x-ray" and "the fact [that] claimant had been exposed to coal dust." Employer's Brief at 19. Employer avers further that the probative value of Dr. Baker's opinion is undermined by the physician's failure to explain his conclusion that claimant's hypoxemia, chronic obstructive pulmonary disease, and chronic bronchitis were related to claimant's coal dust exposure and cigarette smoking history. Employer's arguments lack merit. The administrative law judge determined that, in addition to clinical pneumoconiosis, Dr. Baker diagnosed chronic obstructive pulmonary disease and chronic bronchitis caused predominately by cigarette smoking, and substantially aggravated by coal dust exposure. The administrative law judge, within a rational exercise of his discretion, found that Dr. Baker's opinion was unequivocal and well-reasoned, as it was based on a positive x-ray interpretation, a qualifying pulmonary function study illustrating moderate obstructive defect, a blood gas study demonstrating severe resting arterial hypoxemia, a physical examination, and the miner's medical, employment, and cigarette smoking histories. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Thus, the administrative law judge could properly rely on Dr. Baker's diagnoses of both clinical and legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 14. As employer has not otherwise challenged the administrative law judge's crediting of Dr. Baker's opinion over the contrary opinions of Drs. Broudy and Westerfield, we affirm the administrative law judge's finding that the weight of the medical opinions of record was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4), as supported by

substantial evidence.[3]

Lastly, employer challenges the administrative law judge's determination that the pulmonary function study evidence was sufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i). Employer avers that the administrative law judge erroneously relied on the numerical superiority of the qualifying pulmonary function studies and failed to consider additional factors in his weighing of the pulmonary function study evidence, namely the age and the validity of the studies. We disagree.

In reviewing the pulmonary function studies of record, the administrative law judge determined that the studies dated February 5, 2007 and March 18, 2007 yielded qualifying values, while the June 6, 2007 study did not. Director's Exhibits 10, 12; Claimant's Exhibit 3; Employer's Exhibit 4. The administrative law judge noted that Dr. Broudy neither affirmed nor denied the validity of the March 18, 2007 study, since three trials had been performed, but only one tracing was available for review, but that Dr. Broudy stated, after examining the tracings, that claimant's effort "may have been satisfactory." Employer's Exhibit 8. As the administering technician reported that claimant's effort was "good," Claimant's Exhibit 3, the administrative law judge rationally concluded that this test was reliable.[4] Thus, the administrative law judge acted within his discretion in finding that the preponderance of the pulmonary function studies produced qualifying values and established total respiratory disability. Decision and Order at 17-18. As the three studies were essentially contemporaneous, and substantial evidence supports the administrative law judge's findings, we affirm his determination that claimant established total respiratory disability at Section 718.204(b)(2)(i). *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); Decision and Order at 17-18.

Turning to the merits of claimant's appeal, claimant asserts that, after properly concluding that the pulmonary function studies were sufficient to establish total disability, the administrative law judge erred in finding that the medical opinions of Drs.

[3] A determination under 20 C.F.R. §718.203 is subsumed in a finding of legal pneumoconiosis 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

[4] A review of the record also reveals that Dr. Ranavaya validated the February 5, 2007 pulmonary function study that produced qualifying values. Director's Exhibit 10. While the administrative law judge did not address this validation report, it provides further support for his finding that a preponderance of the reliable pulmonary function studies of record established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

Broudy and Westerfield constituted "contrary probative evidence" under Section 718.204(b)(2)(iv) that outweighed the remaining evidence. Claimant maintains that the opinions of Drs. Broudy and Westerfield are consistent with the qualifying pulmonary function studies, as Dr. Broudy diagnosed a moderately severe pulmonary obstruction and opined that claimant has a significant respiratory impairment, and Dr. Westerfield opined that claimant's respiratory impairment would preclude claimant's performance of arduous work. Relying on *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990), and *Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995), claimant argues that, although Drs. Broudy and Westerfield concluded that claimant is not totally disabled, their other findings are consistent with the qualifying pulmonary function study evidence and, thus, their opinions cannot be considered contrary probative evidence sufficient to outweigh the administrative law judge's earlier finding that claimant is totally disabled under Section 718.204(b)(2)(i). Additionally, claimant avers that the administrative law judge provided no logical reason for crediting the opinions of Drs. Broudy and Westerfield over the opinion of Dr. Baker, that claimant is totally disabled. Claimant's Brief at 4-8.

The Director agrees with claimant's argument that the administrative law judge's weighing of the medical opinion evidence at Section 718.204(b)(2)(iv) cannot be affirmed. First, the Director avers that the administrative law judge erred by failing to explain his determination that the review of additional tests by Drs. Broudy and Westerfield enhanced the probative value of their reports. The Director argues that the administrative law judge's failure to explain his determination is particularly problematic in light of his findings that the pulmonary function studies, on the whole, established total disability and that the arterial blood gas studies were inconclusive. Consequently, the Director asserts that the administrative law judge's discussion of the issue fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Second, the Director contends that the administrative law judge failed to determine whether the opinions of Drs. Broudy and Westerfield, that claimant can return to work as a mechanic in a dust-free environment, were well-reasoned, as neither doctor discussed claimant's specific job duties, which claimant testified were "very hard" and "physically demanding," *see* Hearing Transcript at 25; and neither doctor specifically addressed the exertional requirements of claimant's job duties and the relationship between those duties and claimant's pulmonary impairment, or explained how claimant could perform his usual coal mine work, notwithstanding his pulmonary impairment. Director's Brief at 12-14. We agree with the arguments of claimant and the Director that the administrative law judge's findings under Section 718.204(b)(2)(iv) are flawed.

The administrative law judge determined that on June 6, 2007, Dr. Broudy performed a complete pulmonary evaluation of claimant, and reported that claimant

worked as a mechanic; that the "results of spirometry just exceed the minimum Federal criteria for disability in coal workers;" and that claimant "does have significant respiratory impairment, but would not be considered totally disabled by any standard." Director's Exhibit 12; Employer's Exhibit 4. After reviewing additional records on June 8, 2007, Dr. Broudy classified claimant's significant obstructive airways disease as "moderately severe," based on spirometric studies that "just exceed the minimum Federal criteria for disability in coal workers suggesting that in a dust free environment [claimant] would indeed retain the capacity to perform such work." *Id*. On May 21, 2008, Dr. Broudy noted that his opinion remained unchanged, notwithstanding his review of more records. Employer's Exhibit 5. Similarly, Dr. Westerfield opined, after a review of claimant's medical records on February 4, 2008, that claimant was not totally disabled and could return to work in a dust-free environment, notwithstanding his moderate airway obstruction. Dr. Westerfield stated, "[p]ulmonary function studies do not qualify [claimant] for arduous work, but he could maintain [the] energy requirements of moderate and heavy work," and opined that, from a respiratory standpoint, claimant could return to his previous position in coal mining. Employer's Exhibit 6.

The United States Court of Appeals for Sixth Circuit, within whose jurisdiction this case arises, has held that, when crediting a physician's opinion that a miner is not totally disabled, the administrative law judge must consider whether the physician has any knowledge of the precise exertional requirements of the miner's usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-219, 20 BLR 2-360, 2-374 (6th Cir. 1996); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). It is also well-established that a determination as to whether the "physicians' opinions relied upon by the [administrative law judge] constitute substantial evidence depends on whether those physicians understood the work requirements they presumed [the miner] could fulfill." *Killman v. Director, OWCP*, 415 F.3d 716, 721, 23 BLR 2-250, 2-259 (7th Cir. 2005); *see Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). In evaluating the medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge credited those of Drs. Broudy and Westerfield, that claimant was not totally disabled, on the ground that these physicians reviewed "a broader scope of evidence," including Dr. Baker's examination and test results, and based their opinions on the pulmonary function studies and arterial blood gas studies of record. Decision and Order at 18. However, as the administrative law judge found that the pulmonary function studies of record affirmatively established total disability at Section 718.204(b)(2)(i), and that the blood gas studies were inconclusive, he failed to adequately explain, in compliance with the APA, why the review of additional tests enhanced the probative value of the opinions of Drs. Broudy and Westerfield. *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); *see also Director, OWCP v. Congleton*, 743 F.2d 428, 430, 7 BLR 2-12, 2-16 (6th Cir. 1984); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 17-18. In addition, as the Director correctly

avers, the administrative law judge should have assessed whether Drs. Broudy and Westerfield were aware of the physical demands of claimant's job as a mechanic, particularly since Dr. Broudy diagnosed a severe respiratory impairment and Dr. Westerfield diagnosed a moderate respiratory impairment. *See Cornett*, 227 F.3d at 587, 22 BLR at 2-124; *Ward*, 93 F.3d at 218-219, 20 BLR at 2-374; Director's Exhibit 12; Employer's Exhibits 4, 6. Consequently, we vacate the administrative law judge's finding that the weight of the medical opinions of record did not establish total respiratory disability at Section 718.204(b)(2)(iv), and remand the case for further consideration of the evidence thereunder.

Because the administrative law judge must reweigh the medical opinion evidence at Section 718.204(b)(2)(iv), we must also vacate his finding that the evidence as a whole failed to establish total respiratory disability pursuant to Section 718.204(b). On remand, the administrative law judge must reconsider the medical opinion evidence at Section 718.204(b)(2)(iv) to determine whether it demonstrates total respiratory disability, and then consider whether all relevant evidence, when weighed together, establishes total respiratory disability at Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). If, on remand, the administrative law judge finds that claimant has established total respiratory disability at Section 718.204(b), he must consider the issue of disability causation at Section 718.204(c) to determine if claimant is entitled to benefits.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge