BRB Nos. 02-0322 BLA-A
and 02-0322 BLA-B

GILBERT L. PATTON	)	
	)	
Claimant-Respondent (A)	)	
Cross-Petitioner (B)	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent (B)	)	
Cross-Petitioner (A)	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James M. Phemister, Mary Z. Natkin, Matthew M. Ingraham and Jennifer L. Nelson (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (01-BLA-0322) of Administrative Law Judge Daniel L. Leland denying benefits 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 noted that

[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

employer stipulated that claimant had pneumoconiosis arising out of coal mine employment, *see* 20 C.F.R. §§718.202, 718.203, found ten years and five months of coal mine employment established, and determined that claimant had shown a material change in conditions by establishing total pulmonary disability, the element of entitlement previously adjudicated against him.[2] The administrative law judge found, however, that total disability due to pneumoconiosis was not established by the relevant medical opinion evidence pursuant to Section 718.204(c)(1). Accordingly, benefits were denied.[3]

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant originally filed a claim on November 26, 1984, which was denied by the Department of Labor on May 1, 1985, because claimant did not establish total disability due to pneumoconiosis, Director's Exhibit 32. No further action was taken by claimant on this claim. Subsequently, claimant filed the instant, duplicate claim on July 1, 2000, Director's Exhibit 1.

[3] Because the administrative law judge's findings as to the length of claimant's coal mine employment, that pneumoconiosis arising out of coal mine employment was established, *see* 20 C.F.R. §§718.202, 718.203, that total disability was established pursuant to Section 718.204(b)(2) and, therefore, that a material change in conditions was established pursuant to Section 725.309(d) (2000), have not been challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On appeal, claimant contends that the administrative law judge erred in finding that the relevant medical opinion evidence did not establish total disability due to pneumoconiosis pursuant to Section 718.204(c)(1). Employer responds, urging that the administrative law judge's Decision and Order denying benefits should be affirmed. Alternatively, in its appeal, employer contends that the administrative law judge erred in excluding from the record certain evidence submitted by employer. In response to employer's appeal, claimant urges the Board to affirm the administrative law judge's determination to exclude from the record certain evidence submitted by employer because it was either unduly repetitious or beyond the scope of evidence allowed to be submitted post-hearing.[4] The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to either employer's or claimant's appeals.[5]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to 20 C.F.R. §718.204(c)(1):

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it:

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[4] The administrative law judge excluded from the record medical reports submitted by employer which he found to be unduly repetitious and medical reports which were beyond the scope of evidence employer had been allowed to submit post-hearing.

[5] The Director, Office of Workers' Compensation Programs, originally filed an appeal in this case, BRB No. 02-0322 BLA, but, upon the Director's motion, the Board dismissed the Director's appeal. *Patton v. Sewell Coal Co.*, BRB Nos. 02-0322 BLA, 02-0322 BLA-A, 02-0322 BLA-B (Mar. 6, 2002)(unpub. order).

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).[6]

[6] "Legal" pneumoconiosis as defined under 20 C.F.R. §718.201(a)(2) includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, and a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," *see* 20 C.F.R. §§718.201(b).

The administrative law judge noted that the relevant medical opinion evidence consisted of the following: Drs. Cohen and Perper determined that claimant was totally disabled due to recurrent pneumothoraces (*i.e.*, collapsed lung) caused by centrilobulor and bullous emphysema, which they in turn believed was caused by both claimant's smoking history of over 40 pack years, as well as claimant's coal dust exposure; Dr. Cohen, a board-certified physician in internal medicine and pulmonary disease, who reviewed the evidence of record, found pathological evidence of pneumoconiosis, and citing to medical studies that indicated that coal dust exposure can cause obstructive lung disease such as emphysema, a viewpoint acknowledged by the National Institute for Occupational Safety and Health [NIOSH] and the Department of Labor in the revised regulations, *see* 20 C.F.R. §718.201(a)(2), found that claimant's coal dust exposure significantly contributed to his emphysema; Dr. Perper, a board-certified pathologist who reviewed the evidence, stated that medical studies, which have been cited in the revised regulations, have shown that coal mine dust exposure causes centrilobulor emphysema and there was no logical reason to exclude it as a cause of claimant's centrilobulor emphysema in this case, given the fact that the pathological biopsy evidence established that claimant had slight or mild to moderate coal workers' pneumoconiosis, *see* Claimant's Exhibits 2, 3; Employer's Exhibit 13; Drs. Caffrey, Crisalli, Tomashefski, Castle and Morgan found that claimant's centrilobulor and bullous emphysema, and resulting disabling pneumothoraces, were caused solely by his extensive smoking history;[7] Drs. Tomashefski, Crisalli, and Castle specifically stated that coal dust does not cause centrilobulor and bullous emphysema, but focal emphysema, and, along with Dr. Caffrey, found that claimant's simple coal workers' pneumoconiosis and focal emphysema was minimal and, therefore, could not have caused or aggravated any

[7] Dr. Tomashefski is a board-certified pathologist and specialist in pulmonary pathology who reviewed the evidence, Employer's Exhibits 7, 11, 15, Dr. Crisalli is a board-certified physician in internal medicine and pulmonary disease who examined claimant and reviewed the evidence of record, Employer's Exhibits 6, 10, Dr. Castle is a board-certified physician in internal medicine and pulmonary disease and B-reader who reviewed the evidence of record, Employer's Exhibits 8, 12, Dr. Caffrey is a board-certified pathologist who reviewed the evidence of record, Director's Exhibit 31; Employer's Exhibit 14, and Dr. Morgan is a B-reader who reviewed the evidence of record, Employer's Exhibit 9.

impairment; Dr. Morgan agreed that claimant's disability could not be attributed in any way to claimant's minimal coal workers' pneumoconiosis or coal dust exposure, but was due to bullae rupturing and persistent pneumothoraces caused by smoking.

Regarding the findings of Drs. Cohen and Perper, the administrative law judge found that "it is one matter to conclude that coal dust exposure can cause emphysema and quite another matter to find that claimant's emphysema arose out of his coal mine employment," Decision and Order at 8 (emphasis added by the administrative law judge), and therefore concluded that neither physician had given a coherent explanation for finding that claimant's emphysema arose out of his coal dust exposure, other than speculating that coal dust exposure was a cause because there was pathological evidence of pneumoconiosis. Decision and Order at 8-9. The administrative law judge also concluded that Drs. Cohen and Perper ignored the fact that claimant's pneumoconiosis was minimal, that his coal mine employment and coal dust exposure was not prolonged, and that he had a long smoking history. Thus, due to the speculative nature of their opinions and their reliance on theories rather than the specific facts of this case, the administrative law judge did not credit their opinions. Instead, the administrative law judge found the opinions of Drs. Caffrey, Crisalli, Tomashefski, Castle and Morgan well-reasoned as they fully considered the fact that claimant's pneumoconiosis was minimal, that his coal mine employment was brief, and that he had an extensive smoking history. In particular, the administrative law judge accorded greater weight to the opinion of Dr. Tomashefski because he was a board-certified pathologist that specializes in pulmonary pathology, *see* Employer's Exhibits7, 11 at 5, while Dr. Perper's specialty was forensic pathology, Employer's Exhibit 13.

Claimant contends, however, contrary to the administrative law judge's finding, that Drs. Cohen and Perper did not ignore the fact that claimant's coal mine employment was "brief" or that claimant's smoking history was "extensive." Rather, claimant contends that they accurately recorded the length of claimant's coal mine employment and smoking history and also found that claimant's disability was due to smoking, in addition to his coal dust exposure. Claimant further contends that the administrative law judge erred in finding that claimant's coal mine employment was not significant, without considering that claimant's coal mine employment was performed underground or claimant's specific susceptibility to coal mine dust. Specifically, claimant notes that ten years of coal mine employment is sufficient to invoke the rebuttable presumption that a miner's pneumoconiosis arose from his coal mine employment, *see* 20 C.F.R. §718.203(b), and Dr. Castle found that claimant's coal dust exposure was significant, Employer's Exhibit 8. Further, claimant contends that Dr. Perper correctly relied on the fact that claimant's specific coal dust exposure was "significant," as well as relying on claimant's symptoms, and the fact that there was radiological and pathological evidence of "slight to moderate"pneumoconiosis, consistent with the administrative law judge's finding, when he found that claimant's disability was due to his coal dust exposure, as well as his smoking.

Additionally, claimant contends that the administrative law judge did not adequately explain why he credited the contrary opinions of Drs. Caffrey, Crisalli, Tomashefski, Castle and Morgan. Specifically, claimant contends that Drs. Tomashefski, Caffrey, Castle, Crisalli and Morgan provided no support for their opinions and that their opinions are, in fact, contrary to the position set forth in the revised regulations which cite to the medical studies relied on by Drs. Cohen and Perper, and they do not explain why they disagree with those medical studies cited in the revised regulations and relied on by Dr. Cohen and Perper. Claimant notes that in the comments provided with the revised regulation at 20 C.F.R. §718.201, the Director cited with approval a medical study that indicated that "[c]entrilobulor emphysema (the predominant type observed) was significantly more common among the coal workers" and "[t]hese findings held even after controlling for age and smoking habits," *see* 65 Fed. Reg. 79941 (2000).[8] Finally, claimant notes that Dr. Crisalli admitted that he had no research expertise relating to pneumoconiosis, and that while Dr. Morgan admitted that "bullous emphysema is not always associated with cigarette smoking," he did not discuss any other causes for bullous emphysema. Claimant also contends that the administrative law judge did not consider whether claimant's emphysema could constitute legal pneumoconiosis, *see* 20 C.F.R. §718.201, and, therefore, did not properly consider whether claimant was totally disabled due to his emphysema that was aggravated by coal dust exposure or legal pneumoconiosis.

Although claimant notes that the medical study cited with approval by the Director in the comments to the revised regulation at Section 718.201 indicates that centrilobulor emphysema is more common among coal workers, the comments also note that the medical study states that "[t]he severity of the emphysema was related to the amount of dust in the lungs," *see* 65 Fed. Reg. 79941 (2000). In this case, then administrative law judge properly credited the opinions of Drs. Tomashefski, Caffrey, Crisalli and Castle, who all found that the evidence of coal macules in the claimant's lungs and/or focal emphysema caused by his coal dust exposure was too minimal or insignificant to cause any disability. Moreover, contrary to claimant's contention, the length of claimant's coal mine employment, while entitling him to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b), does not likewise entitle him to a presumption that his pneumoconiosis substantially contributed to his disability. In addition, along with Dr.

[8] The Director also cited with approval a medical study that indicated "that coal dust exposure sufficient to cause alveolar inflammation and fibrosis also initiates centriacinar emphysema," *see* 65 Fed. Reg. 79942 (2000).

Morgan, those physicians also found that claimant's coal workers' pneumoconiosis, diagnosed pathologically, was also too minimal or insignificant to cause any disability. Moreover, contrary to claimant's assertion, the administrative law judge did not discredit the opinions of Drs. Cohen and Perper because they were based on inaccurate assumptions regarding the length of claimant's coal mine employment and smoking history, but rather because they based their opinions on generalities rather than specifically focusing on the facts regarding claimant's condition. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985); *see also Sainz v. Kaiser Steel Corp.*, 5 BLR 1-758, 1-762 (1983), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). In addition, the administrative law judge, within his discretion, credited the opinions of Drs. Tomashefski, Caffrey, Crisalli, Castle and Morgan as reasoned, because they were based on a more thorough or complete review of the evidence of record, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985), and, within his discretion, gave more weight to Dr. Tomashefski's opinion in light of his superior qualifications as a specialist in pulmonary pathology, *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds.* 14 BLR 1-37 (1990)(recon. en banc); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark, supra*. Moreover, it is within the administrative law judge's discretion to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, if rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, the administrative law judge's finding that total disability due to pneumoconiosis was not established pursuant to Section 718.204(c) is affirmed, as rational and supported by substantial evidence. Consequently, because we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), a requisite element of entitlement, we affirm the administrative law judge's finding that entitlement under Part 718 is precluded,

Trent, *supra*; *Perry*, *supra*.[9]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9] Because the administrative law judge's Decision and Order denying benefits on the merits of entitlement is affirmed, we need not address employer's contention in its appeal that the administrative law judge erred in excluding from the record certain evidence submitted by employer, as any error in this regard would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).