BRB Nos. 89-1784 BLA
and 89-1784 BLA-A

JOSEPH PRESTO	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BARNES AND TUCKER COMPANY	)	DATE ISSUED:
	)	
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 of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Theresa C. Homady (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (87-BLA-1373) of Administrative Law Judge Charles P. Rippey 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). The administrative law judge credited claimant with at least thirty-one years of qualifying coal mine employment, as stipulated by the parties, but found that claimant had failed to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), or total disability due to pneumoconiosis pursuant to any of the provisions at 20 C.F.R. Part 410. Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge's Decision and Order does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5

U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits, and contends in a cross-appeal that the administrative law judge erred in considering this claim pursuant to the provisions at 20 C.F.R. Part 410 rather than those at 20 C.F.R. Part 718. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 by 30 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Claimant contends that the administrative law judge failed to provide an adequate rationale, as required by the terms of the APA, for finding that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a). We disagree. In reviewing the x-ray evidence of record, the administrative law judge permissibly accorded greater weight to the interpretations of physicians who were both Board-certified radiologists and B-readers, and acted within his discretion in finding that the weight of the evidence was insufficient to establish invocation at Section 727.203(a)(1), based on a numerical preponderance of negative interpretations by such readers. Decision and Order at 2; see Prater v. Clinchfield Coal Co., 12 BLR 1-121 (1989); Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

The administrative law judge also reasonably found that the weight of the pulmonary function study evidence of record was insufficient to establish invocation at Section 727.203(a)(2), as the qualifying[1] studies of record had all been invalidated in well-reasoned opinions by qualified physicians,[2] and the remaining four studies produced non-qualifying

[1] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203(a)(2) and (a)(3), respectively. A "non-qualifying" study yields values that exceed those values.

[2] A review of the record reveals four qualifying pulmonary function studies, which were all deemed unacceptable by multiple physicians due to excessive variability between maneuvers and poor patient cooperation. The study of April 29, 1980, obtained by Dr. Klemens, was invalidated by Drs. Singh, Fino, Pickerill and Gress. Director's Exhibit 26; Employer's Exhibits 5, 7, 17, 18. The study of October 7, 1986, obtained by Dr. Klemens, was invalidated by Drs. Fino, Pickerill and Gress. Director's Exhibit 38; Employer's Exhibits 3, 4, 7, 11, 18. Dr. Gress invalidated his own study of January 12, 1987, as did Drs. Pickerill and Fino. Employer's Exhibits 5, 18. Finally, the study of October 27, 1988, obtained by Dr. Malhotra, was invalidated by Drs. Pickerill, Fino and Solic. Claimant's Exhibit 4; Employer's Exhibits 20-22. The record does not reflect Dr. Malhotra's qualifications;

values. Decision and Order at 2; see Minton v. Director, OWCP, 6 BLR 1-670 (1983); Yeager v. Bethlehem Mines Corp., 6 BLR 1-307 (1983). Claimant contends that the administrative law judge should have discussed the credibility and weight assigned to Dr. Singh's opinion, since Dr. Singh originally validated and subsequently invalidated the April 29, 1980 study. However, remand of this case for further consideration of this pulmonary function study is unnecessary, as the administrative law judge additionally relied on the invalidations of Drs. Fino, Pickerill and Gress in determining that this study was invalid. Director's Exhibits 26, 27; Employer's Exhibits 5, 7, 17, 18. See generally Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

The administrative law judge further properly found that the evidence was insufficient to establish invocation pursuant to Section 727.203(a)(3), as none of the blood gas studies of record produced qualifying values. Decision and Order at 3.

Finally, in evaluating the medical opinions of record pursuant to Section 727.203(a)(4), the administrative law judge acted within his discretion as trier-of-fact in finding that the opinions of the three physicians who diagnosed a totally disabling respiratory impairment were not credible, as their conclusions were based in part upon unreliable documentation. Decision and Order at 3; see Baker v. North American Coal Corp., 7 BLR 1-79 (1984); Arnoni v. Director, OWCP, 6 BLR 1-423 (1983). The administrative law judge rationally relied on the opinions of the three highly qualified examining physicians who determined that claimant did not have a totally disabling respiratory impairment, as the administrative law judge found that these opinions were well-reasoned and supported by objective evidence. Decision and Order at 3. See King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). Claimant's assertion that the administrative law judge impermissibly substituted his own opinion for those of qualified physicians, and rejected the medical reports which were not in accordance with his own medical conclusions, is without foundation in the record. The administrative law judge's findings pursuant to Section 727.203(a)(1) - (a)(4) are supported by substantial evidence and are affirmed.

Drs. Klemens and Gress are Board-certified in Internal Medicine, Employer's Exhibits 3, 7; Dr. Singh is Board-certified in Internal Medicine and Board-eligible in Pulmonary Medicine, Employer's Exhibit 17; and Drs. Fino, Pickerill, and Solic are all Board-certified in Internal Medicine with a Subspecialty in Pulmonary Diseases. Employer's Exhibits 3-5, 22.

Claimant additionally contends that the administrative law judge failed to provide an adequate rationale for finding that the evidence of record was insufficient to establish entitlement pursuant to the provisions at 20 C.F.R. Part 410. Employer correctly maintains, however, that because this claim lies within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit and was adjudicated after March 31, 1980, it is properly considered pursuant to the provisions at 20 C.F.R. Part 718 if claimant cannot establish entitlement pursuant to 20 C.F.R. Part 727.[3] See Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). Inasmuch as the administrative law judge found that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment arising out of coal mine employment, claimant is precluded from entitlement to benefits under the Act. See generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985). Consequently, we agree with employer any error in failing to consider this claim pursuant to the regulations at Part 718 is harmless error. Larioni, supra.

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge

[3] We also note that subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that 20 C.F.R. §410.490 does not apply to a case, such as this, which has been properly adjudicated pursuant to 20 C.F.R. Part 727. Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991); see Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991).