BRB Nos. 87-0971 BLA
and 87-0971 BLA-A

CHARLES C. CONOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FOX TEN COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Howard B. Eisenberg (SIU Legal Clinic), Carbondale, Illinois, for claimant.

Richard R. Elledge (Gould & Ratner), Chicago, Illinois, for employer.

Priscilla Anne Schwab (Judith E. Kramer, 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision

and Order (85-BLA-269) of Administrative Law Judge Edward J. Murty, Jr., 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 thirty-four years of qualifying coal mine employment, and properly adjudicated this claim, filed on April 21, 1980, pursuant to the provisions at 20 C.F.R. Part 718.[1] The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), as well as total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge further found, however, that since there was no evidence that claimant's surface mining conditions were substantially similar to conditions in an underground mine, claimant was not entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), 20 C.F.R. §718.305, and the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant appeals and the Director cross-appeals, challenging the administrative law

[1] We reject employer's contention that the only viable claim herein is claimant's second claim filed on May 2, 1983. Claimant requested a copy of his file by letter of September 17, 1980, within a year of the denial of his original claim filed on April 21, 1980, and indicated his intent to pursue the claim. Director's Exhibit 33. Since the district director did not respond until after claimant filed his second claim, the district director properly found that claimant's letter constituted a request for modification pursuant to 20 C.F.R. §725.310, Director's Exhibit 34, and thus the second claim merged into the original claim. *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

judge's findings pursuant to Section 718.305. Employer responds, urging affirmance of the administrative law judge's denial of benefits.[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 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).

[2] The administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b), his finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), and his findings with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning first to the issue of total disability, employer contends that the administrative law judge erred in finding that claimant established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) based on the opinion of Dr. Gowda, despite the administrative law judge's determination that "it is by no means clear that it is a reasoned opinion." Decision and Order at 4; Director's Exhibits 17, 18. We agree. The administrative law judge cannot rely on the opinion of Dr. Gowda to support a finding of total disability unless he finds that the opinion is both documented and reasoned. 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Claimant and the Director also correctly contend that the administrative law judge did not provide a valid reason for discounting Dr. Lenyo's opinion of total respiratory disability.[3] Decision and Order at 3, 4; Claimant's Exhibit 1. Further, the administrative law judge found that Dr. Mathews did not discuss

[3] Contrary to claimant's arguments, the administrative law judge permissibly discredited Dr. Lenyo's opinion regarding the cause of disability, since the physician failed to account for claimant's smoking history or history of lung cancer. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). On the issue of total disability, however, the administrative law judge discounted Dr. Lenyo's opinion because he was disturbed by the physician's failure to explain why he found claimant totally disabled when the objective studies were non-qualifying, and the administrative law judge speculated that the assessment was based on claimant's symptom of dyspnea witnessed during examination. Decision and Order at 3, 4. A review of the record, however, reveals that Dr. Lenyo's assessment of disability was based on x-ray and physical examination abnormalities, his observation of claimant's dyspnea while undressing and during the examination, and pulmonary function study findings of marked reduction in claimant's vital capacity and reduction of the mid-expiratory flow rate and maximum voluntary ventilation values. Claimant's Exhibit 1; *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

impairment, when in fact the physician opined that claimant was totally disabled due to exertional dyspnea since February of 1980, *see* Director's Exhibit 20; and the administrative law judge did not address the consultative opinion of Dr. Long, *see* Director's Exhibits 13, 39, which constitutes relevant evidence on this issue. *See generally Tucker v. Director, OWCP*, 10 BLR 1-35, 1-42 (1987). Additionally, the administrative law judge must weigh all probative evidence together, like and unlike, and determine whether claimant has established total disability pursuant to Section 718.204(c) by a totality of the evidence. *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields*, *supra*. Consequently, we vacate the administrative law judge's findings at Section 718.204(c)(4) and remand this case for the administrative law judge to re-evaluate the medical opinions of record, weigh all contrary probative evidence and determine whether claimant has a totally disabling respiratory impairment pursuant to Section 718.204(c).

Next, claimant and the Director note that claimant's uncontradicted testimony described the dusty conditions of his surface mining employment, *see* Hearing Transcript at 11-15, and they contend that claimant does not bear the additional burden of proving what conditions prevail in an underground mine in order to establish substantial similarity of conditions. We agree. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Seventh Circuit, wherein appellate jurisdiction of this claim lies, held that in order to qualify for the presumption at Section

718.305, a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment. *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509 (7th Cir. 1988) *remanding Leachman v. Midland Coal Co.*, 10 BLR 1-79 (1987). Since the record reflects that claimant has produced sufficient evidence of the surface mining conditions under which he worked, we vacate the administrative law judge's findings pursuant to Section 718.305. On remand, if the administrative law judge finds total disability established pursuant to Section 718.204(c), he must weigh the evidence and make a factual finding regarding substantial similarity of conditions, based on his expertise and appropriate objective factors, such as the miner's proximity to the tipple, by comparing the surface mining conditions established by the evidence to conditions known to prevail in underground mines. *Id.* If the administrative law judge finds the evidence sufficient to establish substantial similarity of conditions, claimant is entitled to the presumption at Section 718.305, and the administrative law judge must then determine whether employer has established rebuttal of that presumption. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge