

BRB No. 99-0959 BLA

DAVID H. FETTEROLF, SR.)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jill M. Otte (Henry L. Solano, 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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (98-BLA-1349) of Administrative Law Judge Ralph A. Romano awarding 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 found that claimant established over twenty-four years of coal mine employment and that the Director conceded that the existence of pneumoconiosis is established. The administrative law judge further determined that claimant's pneumoconiosis arose out of coal mine employment

pursuant to 20 C.F.R. §718.203 and that the medical opinions established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred in his consideration of the medical opinions at 20 C.F.R. §718.204.¹ Claimant responds, urging affirmance.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from 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. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

¹The administrative law judge's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.203 and 718.204(c)(1)-(3) are affirmed as they are unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

At Section 718.204(c)(4), the administrative law judge found that the record contains medical opinions by Drs. Kraynak and Mariglio, as well as the deposition of Dr. Kraynak.² Decision and Order at 7; Director's Exhibit 11; Claimant's Exhibits 2, 4. Dr. Kraynak's December 17, 1998 opinion states that claimant is totally disabled due to his exposure to anthracite coal dust. Claimant's Exhibit 2. Dr. Mariglio opined on June 2, 1998 that claimant showed no pulmonary impairment. Director's Exhibit 11. The administrative law judge found that Dr. Kraynak's opinion is "normally entitled to greater weight as the treating physician." Decision and Order at 7. The administrative law judge further found the opinion well-reasoned even though Dr. Kraynak only began treating claimant on December 11, 1998. *Id.* The administrative law judge found that Dr. Kraynak considered all relevant evidence in rendering his opinion and that the physician was in the best position to assess the degree to which pneumoconiosis contributes to the miner's impairment because the physician actually diagnosed pneumoconiosis. The administrative law judge accorded less weight to Dr. Mariglio's opinion, stating that the physician provided little explanation of his determination that claimant does not have an impairment. The administrative law judge further found that since the presence of pneumoconiosis has been conceded, and Dr. Mariglio did not find the existence of pneumoconiosis, the physician's opinion was not as probative of the issue of total disability. Thus, the administrative law judge credited Dr. Kraynak's opinion and found that total disability and causation were established.

On appeal, the Director contends that the administrative law judge erred in according determinative weight to Dr. Kraynak's opinion. First, the Director contends that the administrative law judge erred in finding that Dr. Kraynak is a treating physician as the record indicates that the physician only examined the miner once, as did Dr. Mariglio. Petition for Review at 9-10. Second, the Director contends that Dr. Kraynak's opinion is premised primarily on a qualifying pulmonary function study, which the administrative law judge found unreliable in his consideration of the pulmonary function studies at Section 718.204(c)(1). The Director further argues that Dr. Kraynak conceded that a blood gas study performed by Dr. Stelmach and which Dr. Mariglio relied upon in making his diagnosis was "basically normal." Claimant's Exhibit 4 at 10; Director's Exhibit 12. The Director argues that Dr.

²The record also contains a note by Dr. Nicola, which states that claimant should not work in dusty mines that have a silica hazard. Director's Exhibit 10. The administrative law judge's failure to consider this opinion is harmless error as an opinion which advises against further dust exposure is insufficient to establish total disability. See *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Kraynak's opinion is therefore without a foundation. Petition for Review at 9. Lastly, the Director contends that since his concession regarding the existence of pneumoconiosis is based on positive x-rays, the administrative law judge should have addressed the disability issue independently of the causation issue, and thus argues that Dr. Mariglio's failure to diagnose pneumoconiosis does not necessarily undermine his finding that claimant is not disabled. Petition for Review at 10-12.

After consideration of the arguments made by the Director on appeal, the evidence of record, and the administrative law judge's Decision and Order, we are persuaded by the Director that the administrative law judge committed error in this case. Initially, we agree with the Director that Dr. Kraynak's status as a treating physician does not require the administrative law judge to accord his opinion greater weight, inasmuch as both Drs. Kraynak and Mariglio rendered their opinions on the basis of one physical examination of claimant.³ Director's Exhibit 11; Claimant's Exhibit 4 at 10. Moreover, the administrative law judge's finding that Dr. Kraynak's opinion is well-reasoned on the issue of total disability is further undermined by his failure to discuss the fact that the qualifying pulmonary function study the physician relied upon was found to be unreliable by the administrative law judge, a finding which claimant does not dispute on appeal. Decision and Order at 6. The only other basis for the administrative law judge's decision to accord greater weight to Dr. Kraynak's opinion, that the physician was in the best position to assess the degree to which pneumoconiosis is responsible for claimant's impairment because he actually diagnosed the existence of pneumoconiosis, is without merit as the relevant inquiry at Section 718.204(c) is whether claimant has established a totally disabling pulmonary disability, not the cause of the disability. Similarly, the administrative law judge improperly reasoned that Dr. Mariglio's opinion was entitled to less weight regarding the issue of total disability at Section 718.204(c) because the physician did not diagnose the existence of pneumoconiosis.

The administrative law judge's consideration of the medical opinions by Drs. Kraynak and Mariglio does not comply with the Administrative Procedure Act, 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) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 7-8. We therefore vacate the administrative law judge's findings at Section 718.204(b),

³The administrative law judge did, however, note that Dr. Kraynak only began his treatment of claimant on December 11, 1998, six days before he completed his medical report. Decision and Order at 7.

(c)(4) and remand the case for further consideration of the medical opinions. If, on remand, the administrative law judge finds that claimant has established total disability at Section 718.204(c)(4), he must then weigh all like and unlike evidence together to determine whether claimant has established total disability by a preponderance of the evidence at Section 718.204(c). 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); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Finally, if the administrative law judge finds total disability established, he must then consider whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). See *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and the 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