

BRB No. 99-1038 BLA

GLENN HOSKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAM HUBBARD TRUCKING	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas F. Phalen, Jr.,  
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0755) of Administrative Law Judge Thomas F. Phalen, 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with twelve years of coal mine employment and adjudicated

this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge that, if reached on remand, he must consider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *Hoskins v. William Hubbard Trucking*, BRB No. 98-0725 BLA (Feb. 23, 1999)(unpub.).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge again denied benefits. On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

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

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Dr. Kabani opined that claimant suffers from pneumoconiosis,<sup>1</sup> Director's Exhibit 7, Dr. Dahhan opined that claimant does not

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<sup>1</sup>Dr. Kabani diagnosed chronic obstructive pulmonary disease due to smoking and coal dust exposure. Director's Exhibit 7.

suffer from pneumoconiosis, Director's Exhibit 38. The administrative law judge properly accorded greater weight to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Kabani because of Dr. Dahhan's superior qualifications.<sup>2</sup> See *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Kabani's opinion. Moreover, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to

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<sup>2</sup>The administrative law judge stated that "Dr. Dahhan's opinion is entitled to significant weight, as he possesses advanced qualifications with respect to pulmonary diseases -- he is [B]oard certified in internal medicine and pulmonary medicine." Decision and Order on Remand at 4. The administrative law judge also stated that "Dr. Kabani is not [B]oard certified in internal medicine, and, therefore, is less qualified than Dr. Dahhan in assessing pulmonary diseases." *Id.*

establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).<sup>3</sup>

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<sup>3</sup>The administrative law judge also accorded greater weight to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Kabani because he found Dr. Dahhan's opinion to be better supported by the objective evidence. Specifically, the administrative law judge stated that "the non-qualifying arterial blood gas and pulmonary function test scores, which scores *well exceeded* the regulatory values, support Dr. Dahhan's conclusion that [claimant] does not suffer from pneumoconiosis." Decision and Order on Remand at 4. However, pulmonary function studies are relevant only to the issue of total disability and not the existence of pneumoconiosis. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Nonetheless, inasmuch as the administrative law judge provided a valid alternate basis for discounting Dr. Kabani's opinion, see *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that he accorded greater to the opinion of Dr. Dahhan than to the contrary opinion of Dr. Kabani because of Dr. Dahhan's superior qualifications, see *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we hold that any error by the administrative law judge in this regard is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718.<sup>4</sup> See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

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<sup>4</sup>In view of our disposition of the case on the merits at 20 C.F.R. §718.202(a), we decline to address claimant's contention with regard to 20 C.F.R. §718.204(c)(4).