BRB No. 02-0802 BLA

BENNIE ALLEN Claimant-Petitioner v. SANDY FORK MINING COMPANY, INCORPORATED and TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

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

Bennie Allen, Manchester, Kentucky, *pro* se.

J. Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (01-BLA-0163) of Administrative Law Judge Robert L. Hillyard 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] This case involves a claim filed on July 2, 1999.[2] After crediting claimant with twenty-five and one-half years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Assuming *arguendo* that claimant had established the existence of pneumoconiosis, the administrative law judge found that claimant would have been entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). However, the administrative law judge further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the

[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 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]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on January 29, 1996. Director's Exhibit 38. By Order dated March 29, 1996, the district director ordered claimant to show cause, within thirty days, why his claim should not be denied by reason of abandonment in accordance with 20 C.F.R. §725.409 (2000). *Id.* The district director further informed claimant that in the absence of further contact, his claim would be considered abandoned. *Id.* In that event, the district director advised claimant that the March 29, 1996 Order would serve as the final notice of denial. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim.

Claimant filed a second claim on July 2, 1999. Director's Exhibit 1. The administrative law judge found that:

> [N]o medical evidence was submitted with the first application for benefits and there was no judgment on the merits of the claim. The [c]laimant's second claim was filed more than one year after the final denial. Pursuant to §725.409 (2000), the [c]laimant's current claim will be considered a new claim for benefits.

Decision and Order at 12.

administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[3]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 Part 718 in a living miner's claim, a claimant must establish the existence of 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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[3]On September 25, 2002, the Board received employer's Motion for Remand and Motion for Dismissal of claimant's appeal. In support of its motion, employer submitted a letter dated September 16, 2002 from the district director stating that he was considering a September 6, 2002 letter from claimant as a request for modification.

Subsequently, on October 15, 2002, the Board received employer's Notice of Action by the District Director re: Request for Modification. In its notice, employer advised the Board that the district director had issued a letter dated September 26, 2002 informing claimant that his modification request would not be considered because of the appeal pending before the Board.

By Order dated October 25, 2002, the Board ordered claimant to immediately notify the Board whether or not he wished to pursue the instant appeal or pursue modification before the district director. The Board further advised claimant that, upon such notification, the Board would continue to consider claimant's appeal or remand the case to the district director for modification proceedings. Having received no response from claimant, we proceed to consideration of claimant's appeal.

In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge acted within his discretion in crediting the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists over the x-ray interpretations rendered by physicians qualified as only B readers. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 12-13. Because a preponderance of the x-ray readings rendered by the best qualified physicians (*i.e.*, physicians dually qualified as B readers and Board-certified radiologists) is negative for pneumoconiosis, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 17. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Since there is no biopsy evidence of record, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 13. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[5] *Id*.

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[4]Claimant's July 30, 1999 x-ray was the only film that was interpreted by physicians dually qualified as B readers and Board-certified radiologists. Of the five interpretations of claimant's July 30, 1999 x-ray rendered by dually qualified physicians, only one is positive for pneumoconiosis. *See* Director's Exhibits 10, 11, 31-33.

[5]Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption does not apply. *See* 20 C.F.R. §718.306.

The final method of establishing the existence of pneumoconiosis is by medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[6] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Six physicians offered opinions regarding the existence of pneumoconiosis. Dr. Baker's opinion supports a finding of both clinical and legal pneumoconiosis.[7] Director's Exhibit 9. The opinions of Drs. Westerfield and Fino support a finding of clinical pneumoconiosis.[8] Finally, the opinions of Drs.

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[6]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7]Dr. Baker examined claimant on July 30, 1999. In a report dated July 30, 1999, he diagnosed coal workers' pneumoconiosis. Director's Exhibit 9. Dr. Baker also diagnosed chronic obstructive pulmonary disease and chronic bronchitis. *Id.* Dr. Baker attributed these latter diseases to claimant's coal dust exposure and cigarette smoking. *Id.* He further indicated that claimant had an occupational lung disease that was caused by his coal mine employment. *Id.*

[8]Dr. Westerfield reviewed Dr. Baker's July 30, 1999 report. In a report dated November 29, 1999, Dr. Westerfield opined that claimant suffered from severe chronic obstructive pulmonary disease "most likely due to cigarette smoking." Director's Exhibit 21. Although Dr. Westerfield noted that Dr. Baker diagnosed coal workers' pneumoconiosis, Dr. Westerfield opined that claimant's reduction in lung function could not be due to this disease. *Id.* Dr. Westerfield opined that claimant was totally disabled due to his chronic obstructive pulmonary disease. *Id.* Dr. Westerfield found no evidence that claimant's respiratory disability was due to coal workers' pneumoconiosis. *Id.*

Dr. Westerfield subsequently examined claimant on December 9, 1999. In a report dated December 9, 1999, he diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Westerfield attributed claimant's chronic obstructive pulmonary disease to cigarette smoking. *Id.*

During a deposition taken on January 10, 2000, Dr. Westerfield reiterated that claimant suffered from coal workers' pneumoconiosis. Director's Exhibit 25 at 21. He also diagnosed chronic obstructive pulmonary disease due to cigarette smoking. *Id.* at 23. Dr. Westerfield indicated that claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure. *Id.* at 30.

Dr. Fino reviewed the medical evidence of record. In a report dated December 17, 1999, he opined that coal workers' pneumoconiosis was present radiographically. Director's Exhibit 24.

Lane, Powell and Broudy support a finding that claimant does not suffer from pneumoconiosis.[9] Director's Exhibits 22, 23.

In considering whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated that:

> The record contains reports by six different physicians. Drs. Broudy, Powell, and Lane found that pneumoconiosis was not present. These three are highly qualified physicians and gave thorough and reasoned reports. They are entitled to substantial weight. Dr. Fino, also highly qualified, found pneumoconiosis to be present radiographically in his consultative December 17, 1999 report based on Dr. Baker's positive reading. However, Dr. Fino read an x-ray dated July 30, 1999 as negative for pneumoconiosis. However, because I have found the weight of the x-ray evidence to be negative for pneumoconiosis, and due to his conflicting statements, this portion of his report is entitled to less weight. Dr. Westerfield diagnosed legal pneumoconiosis. Dr. Baker diagnosed both clinical and legal pneumoconiosis.
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> The reports of Drs. Powell and Lane were given in 1990 while the others were made in 1999 and 2000. All the medical opinions were given after [claimant] stopped his coal mine work. While more recent medical evidence can be given greater weight, I find that the reports of Drs. Powell and Lane are thorough and reasoned and given after the termination of [claimant's] coal mine employment and are entitled to

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[9]Dr. Lane examined claimant on March 1, 1990. In a report dated March 5, 1990, he diagnosed chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Lane further indicated that claimant did not have an occupational lung disease caused by his coal mine employment. *Id.* During a July 2, 1990 deposition, he reiterated that claimant's chronic obstructive pulmonary disease was not attributable to his coal dust exposure. *Id.*

Dr. Powell examined claimant on February 23, 1990. In a report dated May 31, 1990, he opined that there was "no coal pneumoconiosis." Director's Exhibit 22. Dr. Powell opined that claimant suffered from an obstructive ventilatory defect. *Id.* During a July 2, 1990 deposition, Dr. Powell opined that claimant's obstructive ventilatory defect was due to cigarette smoking. *Id.*

Dr. Broudy examined claimant on December 10, 1999. In a report dated December 10, 1999, he diagnosed severe chronic obstructive airways disease due to cigarette smoking. Director's Exhibit 23.

> substantial weight. Based on the reports of the six physicians, as discussed above, and placing greater weight on the reports of Drs. Lane, Powell, and Broudy, I find that the [c]laimant has not established the existence of pneumoconiosis by a preponderance of the evidence pursuant to 20 C.F.R. §718.202(a)(4).

Decision and Order at 13-14.
[10]

[10]Contrary to the administrative law judge's characterization, Dr. Westerfield diagnosed clinical, not legal, pneumoconiosis. *See* Director's Exhibits 22, 25.

Dr. Fino's diagnosis of coal workers' pneumoconiosis is based solely upon his assessment of three interpretations of claimant's July 30, 1999 x-ray.[11] Consequently, the administrative law judge permissibly discredited Dr. Fino's opinion because the administrative law judge had previously found that the weight of the x-ray evidence of record was negative for pneumoconiosis and because Dr. Fino subsequently interpreted claimant's July 30, 1999 x-ray as negative for pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see generally Taylor v. Director,* OWCP, 9 BLR 1-22 (1986); Decision and Order at 13.

However, the administrative law judge failed to provide a basis for crediting the opinions of Drs. Lane, Powell and Broudy that claimant does not suffer from pneumoconiosis over the contrary opinions of Drs. Westerfield and Baker. Although the administrative law judge noted that Drs. Lane, Powell and Broudy are "highly qualified physicians" and found that their opinions were "thorough and reasoned," *see* Decision and Order at 13-14, he failed to address whether Drs. Westerfield and Baker were also highly qualified and whether their reports were similarly "thorough and reasoned."[12] Consequently, the administrative law judge's analysis of the medical opinion evidence does not comply with the requirements of the

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[11]In his review of the medical evidence, Dr. Fino reviewed three interpretations of claimant's July 30, 1990 x-ray (positive interpretations rendered by Drs. Baker and Barrett and a negative interpretation rendered by Dr. Sargent). Director's Exhibit 24. In his December 17, 1999 report, Dr. Fino opined that coal workers' pneumoconiosis was "present radiographically." *Id.* Dr. Fino subsequently personally interpreted claimant's July 30, 1999 x-ray as negative for pneumoconiosis. *See* Director's Exhibit 30.

[12]Dr. Lane is Board-certified in Internal Medicine. Director's Exhibit 22. Dr. Powell is Board-certified in Internal Medicine and Pulmonary Disease. *Id.*

Dr. Westerfield is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 22.

Although the administrative law judge indicated that Dr. Baker is Board-certified in Internal Medicine and that Dr. Broudy is Board-certified in Internal Medicine and Pulmonary Disease, *see* Decision and Order at 9, the qualifications of these physicians are not found in the record. On remand, the administrative law judge is instructed to reconsider whether these physicians are Board-certified in any medical specialty. Should the administrative law judge find that either, or both, of these physicians are Board-certified, he should provide the basis for his finding.

Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must 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. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.[13]

We now turn our attention to the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Because all five of the pulmonary function studies of record are qualifying,

[13]On remand, the administrative law judge should separately consider whether the medical opinion evidence is sufficient to establish (1) clinical pneumoconiosis and (2) legal pneumoconiosis. *See* 20 C.F.R. §718.201.

[14] the administrative law judge's finding that the pulmonary function study evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) is affirmed. Decision and Order at 15; Director's Exhibits 9, 22, 23. Because all five of the arterial blood gas studies of record are non-qualifying, we affirm the administrative law judge's finding that the arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).
[15] Decision and Order at 16.

Since there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 16.

The administrative law judge also found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). He properly found that the opinions of Drs. Baker, Westerfield and Broudy support a finding of total disability.
[16] Decision and Order at 16. The administrative law judge further noted that Dr. Fino acknowledged that, if claimant's pulmonary function testing was valid, claimant was disabled. *Id*.; Director's Exhibit 24. Drs. Lane and Powell did not directly address whether claimant suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 22. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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[14]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

[15]The record contains the results of pulmonary function and arterial blood gas studies conducted on February 23, 1990, March 1, 1990, July 30, 1999, December 9, 1999 and December 10, 1999. Director's Exhibits 9, 22, 23.

[16]Dr. Baker opined that claimant did not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 9. Dr. Westerfield opined that claimant was totally disabled due to his chronic obstructive pulmonary disease. Director's Exhibit 22. Dr. Broudy opined that claimant did not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 23.

Although we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) respectively, the administrative law judge erred in not weighing the pulmonary function study and medical opinion evidence of record against the arterial blood gas study evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). Consequently, should the administrative law judge, on remand, find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together to determine whether claimant has established total disability pursuant to 20 C.F.R. §20 C.F.R. §718.204(b).

Finally, in considering whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1),
[17] the administrative law judge stated:

> Five of the physicians found that the pulmonary disability was due to smoking and not to coal mine employment. Dr. Baker was the only person to attribute the [c]laimant's disability, at least in part, to coal mine work. Dr. Westerfield explained at some length, in his deposition, why he attributed the [m]iner's respiratory problems to his smoking. Dr. Broudy also discussed the [c]laimant's obstructive disease and his reasons for attributing it to smoking.
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> I find that the medical opinions of Drs. Westerfield, Broudy, Fino, Lane, and Powell outweigh the opinion of Dr. Baker. Therefore, I find

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[17] Revised Section 718.204(c)(1) provides that:

> 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:
>
> (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).

> that the [c]laimant could not establish that his respiratory impairment was due to coal mine employment, pursuant to 20 C.F.R. §718.204(c)(1).

Decision and Order at 16.

The administrative law judge's analysis of whether the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1) does not comply with the requirements of the APA. *See Wojtowicz*, *supra*. The administrative law judge did not provide a basis for crediting the opinions of Drs. Westerfield, Broudy, Fino, Lane and Powell over that of Dr. Baker. Consequently, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(b), he must reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge