

BRB No. 05-0971 BLA

ARCHIE C. LIVELY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 06/20/2006
V & C INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’ PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier- 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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers’ Pneumoconiosis Fund), Charleston, West Virginia, for employer/carrier.

BEFORE: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals from the Decision and Order on Remand – Denying Benefits (03-BLA-5553) of Administrative Law Judge Daniel L. Leland (the administrative law judge) with respect to 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).

In his initial Decision and Order, the administrative law judge determined that although claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), he did not prove that he is totally disabled under 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant appealed to the Board which vacated the administrative law judge's findings with respect to the medical opinions of Drs. Mullins and Gaziano and remanded the case to the administrative law judge for reconsideration of total disability pursuant to Section 718.204(b)(2)(iv). Specifically, the Board instructed the administrative law judge to consider whether Dr. Mullins's finding of a twenty-five percent impairment under the *Guides to the Evaluation of Permanent Impairment* published by the American Medical Association (AMA) supported a finding of total disability. With respect to Dr. Gaziano's opinion, the Board indicated that the administrative law judge erred in discrediting his diagnosis of a totally disabling pulmonary impairment because it was based upon nonqualifying objective studies. *Lively v. V & C, Inc.*, BRB No. 04-0505 BLA (Mar. 30, 2005)(unpub.).

On remand, the administrative law judge accorded greatest weight to the opinion in which Dr. Zaldivar stated that claimant is not totally disabled. The administrative law judge also determined that the contrary opinions of Drs. Gaziano and Mullins were not adequately reasoned. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in crediting Dr. Zaldivar's opinion. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In determining that total disability was not established pursuant to Section 718.204(b)(2)(iv) in this case, the administrative law judge relied upon the opinion of Dr. Zaldivar. Dr. Zaldivar examined claimant and performed a chest x-ray, a pulmonary

function study (PFS), a blood gas study, a lung volume study, and a metabolic exercise capacity study. Dr. Zaldivar also reviewed the other medical evidence of record. Dr. Zaldivar noted that the PFS that he obtained from claimant showed a “moderate irreversible obstruction.” Dr. Zaldivar’s Report Dated February 12, 2003. Dr. Zaldivar also indicated in his “findings” that claimant has a “moderate irreversible airway obstruction.” *Id.* Dr. Zaldivar also obtained an exercise capacity test which he described as “normal.” *Id.* In the section of his opinion in which he set forth his conclusions, Dr. Zaldivar stated that:

There is no evidence of any pulmonary impairment. The mild airways obstruction which he has is of no clinical significance as evidenced by the normal pulmonary response to exercise. From the pulmonary standpoint, Mr. Lively is fully capable of performing his usual coal mine work or work requiring similar exercise.

Id. Claimant asserts that due to the conflict between Dr. Zaldivar’s description of the PFS results as showing a “moderate” obstruction and his subsequent characterization of claimant’s obstructive impairment as “mild,” the administrative law judge was required to discredit Dr. Zaldivar’s disability assessment at Section 718.204(b)(2)(iv). We hold that this contention is without merit.

Although Dr. Zaldivar’s descriptions of the extent of claimant’s obstructive impairment varied, his ultimate conclusion, that “it is of no clinical significance,” was premised upon the normal results of claimant’s exercise capacity test. Claimant does not take issue with either this test or Dr. Zaldivar’s characterization of the results. Thus, the administrative law judge’s decision to accord greatest weight to Dr. Zaldivar’s opinion on the ground that it was based upon a review of all of the medical evidence of record and upon additional pulmonary testing not performed by Drs. Mullins or Gaziano, is rational and supported by substantial evidence. Decision and Order on Remand at 3; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).¹ In addition, the administrative law judge acted within his discretion in determining that Dr. Mullins’s opinion does not support a finding of total disability, as the doctor did not explain the meaning of a twenty-five percent impairment under the AMA’s *Guides to the Evaluation*

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant’s last full year of coal mine employment occurred in West Virginia. Director’s Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

*of Permanent Impairment.*² Decision and Order on Remand at 3; Director’s Exhibit 12; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

We affirm, therefore, the administrative law judge’s finding that the medical opinions of record do not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Because the administrative law judge has properly determined that claimant did not prove that he is totally disabled pursuant to Section 718.204(b)(2), we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-28; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge’s Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² None of the parties submitted the *AMA Guides to the Evaluation of Permanent Impairment* for inclusion in the record. The administrative law judge could have referred to this source by applying the principle of judicial notice, but he was not required to do so. See *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).