

BRB No. 05-0985 BLA

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| ROBERT LEE CURRY              | ) |                         |
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| Claimant-Petitioner           | ) |                         |
|                               | ) |                         |
| v.                            | ) | DATE ISSUED: 06/26/2006 |
|                               | ) |                         |
| DIRECTOR, OFFICE OF WORKERS'  | ) |                         |
| COMPENSATION PROGRAMS, UNITED | ) |                         |
| STATES DEPARTMENT OF LABOR    | ) |                         |
|                               | ) |                         |
| Respondent                    | ) | DECISION and ORDER      |

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

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (04-BLA-5713) of Administrative Law Judge Robert L. Hillyard rendered on a subsequent 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).<sup>1</sup> The administrative law judge

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<sup>1</sup> Claimant filed prior claims in 1981, 1983, 1989 and 2000. Director's Exhibits 1-5. The district director denied the 2000 claim on August 23, 2001 because claimant failed to establish any element of entitlement. Director's Exhibit 4. Claimant did not appeal. Claimant filed his current claim on May 17, 2002. Director's Exhibit 6.

credited claimant with seven years of coal mine employment,<sup>2</sup> and found that the evidence developed since the prior denial of benefits did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that the administrative law judge erred in the evaluation of the x-ray evidence and in finding that claimant was not totally disabled. Claimant further argues that Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation pursuant to 20 C.F.R. §725.406. In response, the Director moves to remand this case to the district director for further evidentiary development on behalf of claimant.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(1), the administrative law judge reasonably found that the sole positive interpretation, a "1/0" reading of a September 17, 2002 x-ray by Dr. Simpao, who has no radiological qualifications, was outweighed by the negative re-reading by Dr. Barrett, a dually qualified Board-certified radiologist/B reader. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1 (2004); Decision and Order at 7; Director's Exhibits 13, 14, 25. Because the administrative law judge permissibly considered both the quality and the quantity of

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<sup>2</sup> The administrative law judge properly found that because claimant's last employment occurred in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit is controlling. Decision and Order at 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

the x-ray evidence in finding that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), claimant's arguments to the contrary lack merit. *See Staton*, 65 F.3d 59-60, 19 BLR 2-280. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge discounted Dr. Simpao's opinion provided to claimant by the Department of Labor, finding Dr. Simpao's opinion diagnosing pneumoconiosis to be inadequately supported. Decision and Order at 9. Similarly, the administrative law judge discounted Dr. Massa's opinion diagnosing pneumoconiosis finding it unreasoned and undocumented. Claimant does not challenge the administrative law judge's finding pursuant to Section 718.202(a)(4). It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Pursuant to Section 718.204(b)(2)(iv), claimant argues that the administrative law judge erred in finding he was not totally disabled. Claimant generally asserts that the exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of claimant's respiratory impairment because his work entailed exposure to heavy concentration of dust. Claimant's Brief at 5. Claimant further contends that since pneumoconiosis is a progressive and irreversible disease, it can "be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis the claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable work." Claimant's Brief at 5-6. The administrative law judge discounted the opinion of Dr. Simpao, the only medical opinion on total disability submitted with this claim, because he failed to explain how the objective testing supports his diagnosis of total disability. Decision and Order at 11. Because claimant, who is represented by counsel, has failed to adequately raise or brief any issue arising from the administrative law judge's weighing of Dr. Simpao's medical opinion under Section 718.204(b)(2)(iv), the Board has no basis upon which to review those findings. *See* 20 C.F.R. §§802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR 1-119. We therefore affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

Claimant contends that the Director failed to provide him with a complete and credible pulmonary evaluation with Dr. Simpao's opinion. Claimant's Brief at 4. The Director agrees, and asserts that "given that the ALJ completely discounted Dr. Simpao's diagnoses of pneumoconiosis and total disability" the Director did not fulfill his statutory duty to provide claimant with a complete and credible medical examination. Director's Brief at 3. Consequently, we grant the Director's motion to remand this case to the

district director, based on the Director's concession. *Newman v. Director, OWCP*, 745 F.2d. 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge