BRB Nos. 03-0406 BLA
and 03-0406 BLA-A

HAROLD ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 03/24/2004
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (02-BLA-5193) of Administrative Law Judge Joseph E. Kane in a miner's 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).[2] The administrative law judge credited the miner with almost sixteen and one-half years of coal mine employment. Decision and Order at 4. Initially, pursuant to 20 C.F.R. §725.414, the administrative law judge excluded from his consideration the 2002 opinion of Dr. Broudy and the opinion of Dr. Vuskovich that were submitted by employer. Decision and Order at 6-7. Applying the regulations pursuant to 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) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 14-20. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and Section 718.202(a)(4). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant's Brief at 6-8. Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, asserting that the limitations on the development of medical evidence contained at 20 C.F.R. §725.414 are invalid. Employer's Brief in Support of Cross-Petition for Review at 6-11. Employer further asserts, assuming *arguendo* that the regulations are valid, that the administrative law judge erred in his application of Section 725.414 to exclude from consideration the medical opinions of Drs. Broudy and Vuskovich.

[1]Claimant is Harold Asher, the miner, who filed his claim for benefits on March 1, 2001. Director's Exhibit 2.

[2]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.

Employer's Brief in Support of Cross-Petition for Review at 17. The Director, Office of Workers' Compensation Programs, has filed a response[3] to employer's cross-appeal.[4]

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).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[5] Dr. Baker reported that claimant is "100% occupationally disabled for further coal dust exposure" and has "a Class I impairment." Director's Exhibit 15. Dr. Hussain found a mild impairment and that claimant has the respiratory capacity to perform work as a coal miner. Director's Exhibit 14. Dr. Dahhan opined that claimant has no pulmonary impairment and that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 18; Employer's Exhibit 4 at 8, 10.

In considering the medical opinion evidence, the administrative law judge accorded less weight to Dr. Baker's opinion regarding claimant's total respiratory disability because he found this physician's opinion to be unreasoned. Decision and Order at 19. In doing so, the administrative law judge stated that Dr. Baker failed "to explain how objective medical testing that reveals pulmonary capability near or at normal capacity is supportive of an impairment diagnosis" and that Dr. Baker's "premise that

[3]The Director, Office of Workers' Compensation Programs (the Director), requests that the Board reject employer's assertion that the evidentiary limitations at 20 C.F.R. §725.414 are invalid. Director's Brief at 3-9. Additionally, the Director asserts that the administrative law judge erred in excluding Dr. Vuskovich's opinion but properly excluded Dr. Broudy's 2002 opinion. Director's Brief at 9-10.

[4]We affirm the administrative law judge's finding of "16.46" years of coal mine employment, his designation of Shamrock Coal Company as responsible operator, and his findings that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

pneumoconiosis immediately impairs one from coal mine work is . . . unreasoned." *Id.* Therefore, the administrative law judge permissibly accorded Dr. Baker's opinion little or no probative weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987)*; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, the administrative law judge properly gave less weight to Dr. Hussain's report because he found that this physician "fails to provide his rationale for diagnosing a moderate[6] impairment." Decision and Order at 19; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47. The administrative law judge, within a proper exercise of his discretion, found Dr. Dahhan's opinion to be "well reasoned and well documented [because this physician] sufficiently catalogs the results from his battery of tests and examination, and his conclusions are supported reasonably by the objective evidence." Decision and Order at 19. Therefore, we affirm the administrative law judge's determination to "grant [Dr. Dahhan's] opinion probative weight." *Id.*; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47.

Claimant contends that the administrative law judge erred in failing to consider claimant's usual coal mine work in discussing the opinions of Drs. Baker and Hussain. Claimant's Brief at 7. Contrary to claimant's contention,[7] the administrative law judge was not required to make such an inquiry regarding claimant's usual coal mine work[8] because he permissibly discredited the opinions of Drs. Baker and Hussain regarding total respiratory disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Because Dr. Dahhan found that claimant has no pulmonary impairment, Director's Exhibit 18; Employer's Exhibit 4 at 8, 10, it was unnecessary for

[6]The administrative law judge's misstatement that Dr. Hussain diagnosed a moderate impairment at this point in his Decision and Order is harmless error, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge previously noted that Dr. Hussain found a mild impairment and that claimant retains the respiratory capacity to perform his coal mine employment. Decision and Order at 11, 19.

[7]Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant asserts that the administrative law judge erred in failing to mention his age, education, or work experience in conjunction with the administrative law judge's assessment that the claimant was not totally disabled. Claimant's Brief at 7. Claimant's age, education, and work experience are relevant to establishing total respiratory disability at 20 C.F.R. Part 410. Because claimant filed his claim subsequent to March 31, 1980, however, the provisions of 20 C.F.R. Part 718, rather than 20 C.F.R. Part 410, are to be applied. 20 C.F.R. §718.2; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

[8]The administrative law judge determined that "[c]laimant's job required mild to moderately heavy manual labor." Decision and Order at 5.

him to demonstrate awareness of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability by the medical opinion evidence.[9] *See* 20 C.F.R. §718.204(b)(2)(iv); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

In considering all of the relevant evidence pursuant to Section 718.204(b), the administrative law judge properly found that claimant failed to establish total respiratory disability by a preponderance of the evidence. Decision and Order at 20; *see Ondecko*, 114 S.Ct. at 2259, 18 BLR at 2A-12; *Kuchwara*, 7 BLR at 1-170. Therefore, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b). *See Fields*, 10 BLR at 1-21; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, *see* 20 C.F.R. §718.204(b), a requisite element of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), we also affirm the administrative law

[9]The administrative law judge failed to consider Dr. Broudy's January 3, 2003 medical opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). We deem the administrative law judge's failure to consider Dr. Broudy's 2003 report to be harmless, *see Larioni*, 6 BLR at 1-1278, because this opinion is supportive of the administrative law judge's finding that claimant failed to demonstrate total respiratory disability by the medical opinion evidence. Employer's Exhibit 5.

judge's denial of benefits.[10] We, therefore, need not address the arguments, regarding 20 C.F.R. §725.414, raised in employer's cross-appeal.[11]

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[10]Because we hold that the administrative law judge has properly found that claimant failed to establish total respiratory disability, *see* discussion, *supra*, claimant's contentions regarding the existence of pneumoconiosis are moot, and the Board need not address those specific contentions. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134, 1-136 (1984); *Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1222 (1984).

[11]Employer asserts that because "it is likely that the claimant will request modification, . . . [i]t will greatly complicate the modification proceedings if the evidentiary issues in the original claim are left unresolved." Employer's Brief in Support of Cross-Petition for Review at 17. We reject employer's assertion that the Board must address the contentions it has raised on cross-appeal. Because we affirm the administrative law judge's denial of benefits, *see* discussion, *supra*, it is not necessary for the adjudication of this appeal to address the issues raised by employer in its cross-appeal.