BRB No. 97-1005 BLA

CARL HENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WHITAKER COAL CORPORATION	)	
	)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Killcullen, Chartered),Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (96-BLA-0653) of Administrative Law Judge Robert L. Hillyard, 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 claim, filed on June 1, 1995, was properly adjudicated pursuant to the permanent regulations at 20 C.F.R. Part 718.[1] After crediting claimant with

[1]The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor on June 1, 1995. Director's Exhibit 1. The claim was initially denied by the district director on October 30, 1995. Director's Exhibit 13. On November 3, 1995, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 14. Administrative Law Judge Robert L.

twenty-six years of coal mine employment, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203. However, the administrative law judge found the evidence of record insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in failing to find the existence of complicated pneumoconiosis, and in his weighing of the medical opinion evidence in general. Employer responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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 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, 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 prove 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*).

Initially, claimant argues that the administrative law judge erred in failing to find the existence of complicated pneumoconiosis based on Dr. Myers' findings of "A" opacities.

Hillyard conducted a hearing on the claim in Corbin, Kentucky, on October 8, 1996. Decision and Order at 2; Hearing Transcript at 1. Judge Hillyard issued his decision on April 10, 1997.

[2]The administrative law judge's findings regarding claimant's years of coal mine employment, as well as his findings under 20 C.F.R. §§718.202, 718.203, 718.204(c)(1)-(3) are unchallenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge substituted his opinion for that of the physician and argues that the administrative law judge is not required to defer to physicians with better credentials. Claimant's contentions lack merit. Initially, notwithstanding claimant's contention, the administrative law judge may credit physicians with superior credentials, *see Staton v. Norfolk & Western Railway 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)*; Roberts v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985), and indeed, under the regulations, must consider the qualifications of the x-ray readers. *See* 20 C.F.R. §718.202(a)(1). In the case at hand, the administrative law judge properly found that Dr. Myers' interpretation of the September 2, 1994 x-ray, noting "A" opacities, was outweighed by the five other interpretations in the record, three from B-readers, who did not find large opacities on the September 1, 1994, April 27, 1995 or June 16, 1995 x-rays. *See Staton, supra; Woodward, supra; Roberts, supra; see also Melnick v. Consolidation Coal Co.,* 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 7; Director's Exhibits 11, 12; Claimant's Exhibits 2, 4; Employer's Exhibit 2. Accordingly, we affirm the administrative law judge's finding that the evidence of record fails to establish the existence of complicated pneumoconiosis under Section 718.304.

Next, claimant contends that his testimony, combined with Dr. Myers' opinion, establishes total disability under Section 718.204(c)(4). We disagree. In a living miner's claim under Part 718, a finding of total disability may not be made solely on the basis of a miner's statements or testimony, but must be corroborated by at least "a quantum of medical evidence." *See Trent, supra; Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Matteo v. Director, OWCP,* 8 BLR 1-200 (1985). The administrative law judge properly found that none of the four physicians of record diagnosed the existence of a totally disabling respiratory or pulmonary impairment. *See* Decision and Order at 7. Moreover, the administrative law judge properly noted that, notwithstanding the doctor's recommendation to avoid further dust exposure, Dr. Myers specifically opined that claimant has the respiratory capacity to perform his usual coal mine employment. *See Zimmerman v. Director,* 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Director, OWCP*, 11 BLR 1-91 (1988)*;* Decision and Order at 7; Claimant's Exhibit 2.

Finally, claimant, citing the Board's decision in *Bentley v. Director, OWCP,* 7 BLR 1-612 (1982), argues that he is totally disabled for comparable and gainful work because of his age, work experience and education. Claimant's argument lacks merit. Initially, the Board's decision in *Bentley* is inapposite.[3] Moreover, under Section 718.204(c), the test for total disability is medical, not vocational. *See* 20 C.F.R. §718.204(c)*; Carson v.*

[3]In *Bentley v. Director, OWCP,* 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

Westmoreland Coal Co., 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Consequently, claimant's arguments are rejected. The administrative law judge's finding that the medical opinion evidence of record fails to establish total disability under Section 718.204(c)(4), as well as his finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c) as a whole, are supported by substantial evidence, and are therefore affirmed. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994). Inasmuch as the administrative law judge properly found that claimant failed to establish total disability under Section 718.204(c), a requisite element of entitlement, we affirm his denial of benefits under Part 718. *See Trent, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge