BRB Nos. 99-0814 BLA
and 99-0814 BLA-A

ODELL MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CALVARY COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Edmond Collett, Hyden, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis), Hazard, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (98-BLA-0693) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge accepted the parties stipulation that claimant had at least twenty-one years of coal mine employment as supported by the evidence of record and adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] While the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), the administrative law judge did find the existence of pneumoconiosis established by the medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4). In addition, the administrative law judge found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(c). Employer responds, urging the Board to affirm the administrative law judge's finding that total disability was not demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4). Alternatively, employer contends in its cross-appeal that the administrative law judge erred in finding the existence of pneumoconiosis established by the medical opinion evidence of record pursuant to Section 718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to claimant's appeal or employer's cross-appeal.

[1] Claimant originally filed a claim on February 20, 1981, but subsequently claimant's request to withdraw his claim was granted by Administrative Law Judge Rudolph L. Jansen by order dated July 11, 1984, Director's Exhibit 40. Thus, as the administrative law judge noted, Decision and Order at 3-4, claimant withdrew his original claim pursuant to 20 C.F.R. §725.306, whereby claimant's original claim would be considered not to have been filed, *see* 20 C.F.R. §725.306(b). Claimant filed the instant claim on April 3, 1997, Director's Exhibit 1. Inasmuch as no prior claim would be considered to have been filed by claimant or, therefore, to have been finally denied at the time claimant filed the instant claim, the instant claim, as the administrative law judge noted, is not a duplicate claim under 20 C.F.R. §725.309(d).

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 into the Act 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, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of the fifteen physicians who provided relevant opinions and properly found that only Drs. Anderson, Director's Exhibit 12, and Clarke, Director's Exhibit 26, found that claimant was totally disabled.[2] Dr. Anderson found that claimant was able, from a pulmonary standpoint, to perform his usual coal mine work, but noted that claimant's Category 2, 2/2, x-ray reading invoked an irrebuttable presumption of disability pursuant to Kentucky's workers' compensation law, Director's Exhibit 12. On the basis of a 2/1 x-ray reading, Dr. Clarke found claimant was totally disabled, Director's Exhibit 40, and subsequently read an x-ray as 2/3 and noted that claimant's "pulmonary disability" had become worse from a "radiological standpoint," Director's Exhibit 26.

The administrative law judge noted that Dr. Anderson had found claimant's pulmonary function was normal and, implicitly, but for Kentucky's law, would not have found claimant disabled from a pulmonary or respiratory standpoint. Decision and Order at 17-18. The administrative law judge also found that Dr. Clarke's disability opinion was

[2] Inasmuch as the administrative law judge's findings that none of the pulmonary function study or blood gas study evidence of record demonstrated total disability pursuant to Section 718.204(c)(1)-(2) and that there was no evidence of cor pulmonale with right-sided congestive heart failure, Decision and Order at 17, are unchallenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

based only on an x-ray reading, without providing any reasoning for his finding that claimant was totally disabled.

Claimant contends that the administrative law judge failed to consider the opinion of Dr. Powell, whom claimant alleges opined that claimant was disabled from a pulmonary standpoint. Contrary to claimant's contention, Dr. Powell found that claimant had no pulmonary impairment and, while checking "no" in answer to a medical report form question as to whether claimant was able from a pulmonary standpoint to perform his usual coal mine work, explained his answer by stating that claimant should avoid exposure to coal mine dust if he wished to avoid progression of his pneumoconiosis, *see* Director's Exhibit 14, Decision and Order at 12. Dr. Powell's opinion that claimant should avoid coal dust exposure does not constitute an opinion that claimant is totally disabled, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Claimant further contends that "[i]t appears" that the administrative law judge substituted his opinion for Dr. Anderson's in finding that Dr. Anderson would not have found claimant totally disabled without the Kentucky state law. In addition, claimant contends that the opinions of Drs. Anderson and Clarke are reasoned and that the administrative law judge previously found them reasoned under Section 718.202(a)(4).

Contrary to claimant's contentions, Dr. Anderson found claimant was able, from a pulmonary standpoint, to perform his usual coal mine work, Director's Exhibit 12. Moreover, x-rays are not diagnostic of the extent of respiratory disability, but only of the presence or absence of disease, *see Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129, n. 4 (1987), and a diagnosis of pneumoconiosis does not go to the issue of impairment or disability, *see Jarrel v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting). It is also for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *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), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Finally, claimant also contends that the administrative law judge erred in failing to consider the physical requirements of claimant's coal mine work in weighing whether the medical opinion evidence was sufficient to establish total disability, that the relevant evidence establishes that claimant is also unable to perform comparable and gainful employment and that, because pneumoconiosis is a progressive disease, it may be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual

coal mine work.

Contrary to claimant's contention, the opinions of record finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We also reject claimant's contention that a single medical opinion "may be sufficient for invoking the presumption" of total disability, as the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence pursuant to Section 718.204(c), *see Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*. In addition, the administrative law judge did not, as claimant contends, reject the opinions of Drs. Anderson and Clarke because they were based on non-conforming pulmonary function study results and the administrative law judge did not find that total disability was not established based only on non-qualifying objective test results.

Ultimately, the administrative law judge found that the preponderance of the medical opinion evidence, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 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), failed to demonstrate total disability pursuant to Section 718.204(c)(4). Inasmuch as the administrative law judge's finding that the medical opinion evidence failed to demonstrate total disability pursuant to Section 718.204(c)(4) is supported by substantial evidence, *see Snorton, supra*; *Sheckler, supra*; *see also Ondecko, supra*, it is affirmed. Thus, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1)-(4) as supported by substantial evidence, *see Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

Consequently, inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total disability, a requisite element of entitlement, we affirm the administrative law judge's finding that entitlement under Part 718 is precluded, *see Trent, supra*; *Perry, supra*.[3]

[3] Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c), we need not address the administrative law judge's findings and employer's contentions in its cross-appeal regarding the administrative law judge's findings pursuant to Section 718.202(a), *see Trent, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge