BRB No. 03-0638 BLA

HOBERT KEATHLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J & L COALS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 05/28/2004
	)	
Employer/Carrier-Respondents	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Timothy S. Williams (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 – Denial of Benefits (02-BLA-5237) of Administrative Law Judge Daniel J. Roketenetz on 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 nineteen years of coal mine employment. Decision and Order at 4. The administrative law judge found J & L Coals, Incorporated to be properly designated as the responsible operator in this case. *Id.* at 6. 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. *Id.* at 8-17. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in allowing employer to submit more than two medical reports. Claimant's Brief at 2. Claimant also contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and total respiratory disability based on the opinion of Dr. Sundaram, claimant's treating physician. *Id.* at 2-3. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, disagreeing with claimant's assertion that the administrative law judge erred in allowing employer to submit more than two medical reports.[3]

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

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[1]Claimant is Hobert Keathley, the miner, who filed his claim for benefits on February 22, 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.

[3]We affirm the administrative law judge's findings regarding the length of coal mine employment and his findings that total respiratory 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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant asserts that the administrative law judge erred "in allowing the submission of more than two (2) medical reports by the Defendant-Employer" and states that "[s]ome of these medical reports should have been ruled inadmissible." Claimant's Brief at 2. In his brief before the Board, claimant does not elaborate on his assertion regarding the administrative law judge's error in admitting two of employer's medical reports or even identify which two of the medical reports, submitted by employer, should not have been admitted into the record. Because claimant has failed to provide the Board with a basis to review the merits of his contention regarding the administrative law judge's admission of employer's evidence, we decline to review it.[4] 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *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)(ii),[5] the administrative law judge noted that the record contains four blood gas studies conducted on May 3, 2001, October 13, 2001, January 25, 2002, and February 19, 2002. Decision and Order at 15. The administrative law judge stated that the May 2001 and the February 2002 studies yielded qualifying[6] values. *Id.* The administrative law judge found that total respiratory disability has been demonstrated pursuant to Section 718.204(b)(2)(ii), "[g]iven that pneumoconiosis is a progressive disease, and the most recent study was qualifying." *Id.* Employer asserts that the administrative law judge erred in relying on the most recent blood gas study, because pneumoconiosis is a progressive disease, to find total respiratory disability demonstrated pursuant to Section 718.204(b)(2)(ii). Employer's Brief at 18 n.5. Employer further asserts if the administrative law judge's decision denying benefits is upheld, then the error the administrative law judge made pursuant to Section 718.204(b)(2)(ii) is harmless. *Id.* Because we affirm the administrative law judge's

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[4]We note that claimant did not raise the issue regarding employer's submission of medical evidence when this case was before the administrative law judge.

[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.

[6]A "qualifying" blood gas study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

Decision and Order denying benefits, *see* discussion, *infra*, we deem harmless any error the administrative law judge may have made in finding total respiratory disability demonstrated by the blood gas study evidence. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge erred in failing to accord greatest weight to the opinion of Dr. Sundaram, claimant's treating physician, to find total respiratory disability demonstrated pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 3. Drs. Baker, Dahhan, and Fino[7] found no pulmonary or respiratory impairment whereas Dr. Sundaram found total pulmonary disability. In weighing the medical opinion evidence, the administrative law judge found the opinions of Drs. Baker, Dahhan, and Fino to be "credit-worthy" because their opinions are "well-supported by the laboratory testing of record."[8] Decision and Order at 15. Conversely, the administrative law judge permissibly found the opinion of Dr. Sundaram to be "worthy of little, if any weight" because it lacked "reasoning and documentation." *Id.*; *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). Contrary to claimant's contention, the administrative law judge, citing 20 C.F.R. §718.104(d)(5), considered Dr. Sundaram's status as claimant's treating physician, but properly chose not to accord greater weight to this physician's opinion on this basis because the administrative law judge found it to be not well-reasoned or well-documented. Decision and Order at 13; *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)(there is no rule requiring deference to treating physicians' opinions in black lung claims).

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the

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[7]In accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the record reflects that Drs. Baker, Dahhan, and Fino had knowledge of claimant's usual coal mine employment as a roof bolter. Specifically, Drs. Baker, Dahhan, and Fino referenced claimant's usual coal mine work as a roof bolter in their reports. Director's Exhibits 12, 16, 19.

[8]The administrative law judge noted that the opinions of Drs. Dahhan and Fino were based on their examination of claimant and their review of the medical evidence of record. Decision and Order at 11-13.

evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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*).

In considering all of the relevant evidence pursuant to Section 718.204(b), the administrative law judge properly found that "the non-qualifying pulmonary function studies and the medical opinions of Drs. Dahhan and Fino dictate a finding that the Claimant is not suffering from a totally disabling respiratory impairment." Decision and Order at 16; *see Ondecko*, 512 U.S. at 280, 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 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*).

Because 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 judge's denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge