

BRB No. 08-0720 BLA

M.G., on behalf of)	
J.G., deceased miner)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 05/22/2009
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand – Denial of Benefits (2005-BLA-05483) of Administrative Law Judge Janice K. Bullard 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 case is before the Board for the second

¹ Claimant, the miner’s widow, is pursuing the miner’s claim subsequent to his death.

time. In her first Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the miner's June 4, 2001 filing date, and found the medical evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). In addition, she found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), but sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, the administrative law judge denied benefits based on her determination that the medical evidence was insufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant appealed to the Board. In a Decision and Order issued on July 16, 2007, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration of the medical opinion evidence pursuant to Sections 718.204(b)(2)(iv)² and 718.204(c). *M.G. v. Director, OWCP*, BRB No. 06-0931 BLA (July 16, 2007)(unpub.). The Board affirmed the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. However, the Board remanded the case for the administrative law judge to reconsider the medical opinions of Drs. Baker and Dahhan on the issue of total respiratory disability pursuant to Section 718.204(b)(2)(iv) and, if reached, disability causation pursuant to Section 718.204(c). *M.G.*, slip op. at 4-5.

On remand, the administrative law judge set forth the Board's remand instructions and found the medical opinions of Drs. Baker and Dahhan insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). In addition, the administrative law judge found that, even assuming that total respiratory disability was established, the medical evidence was insufficient to establish that the miner's total disability was due to his pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing only that the administrative law judge erred in finding that Dr. Baker's opinion was insufficient to establish disability causation pursuant to Section 718.204(c). In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits because claimant failed to challenge the administrative law judge's finding that the evidence was insufficient to

² The Board accepted the argument of the Director, Office of Workers' Compensation Programs, in his Motion to Remand, that the administrative law judge erred in finding total respiratory disability established at 20 C.F.R. §718.204(b)(2)(iv), based on the medical opinion evidence.

establish total respiratory disability. Alternatively, the Director urges that the Board affirm the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability and disability causation on the merits, but argues that the case should be remanded to the district director because the Director did not provide the miner with a complete, credible pulmonary evaluation.

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.³ 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Pursuant to Section 718.204(b), the administrative law judge noted that she found that total respiratory disability was not established by the pulmonary function study evidence, blood gas study evidence or evidence of cor pulmonale pursuant to Section 718.204(b)(2)(i)-(iii) in her prior decision. Therefore, she concluded that the only means remaining to establish total respiratory disability was by the medical opinions of Drs. Baker and Dahhan pursuant to Section 718.204(b)(2)(iv). Decision and Order on Remand at 2. Weighing the medical opinion evidence, the administrative law judge found that Dr. Baker's opinion was not "sufficiently reasoned" to establish total respiratory disability. *Id.* at 3. Specifically, the administrative law judge found that Dr. Baker's reliance on the July 28, 2001 pulmonary function study, which yielded a qualifying FEV₁ value, was unpersuasive in light of the later, non-qualifying pulmonary function studies administered by Dr. Baker, and Dr. Baker's failure to discuss the impact of these studies on his finding of total respiratory disability.⁴ *Id.* The administrative law

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mining employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

⁴ Dr. Baker administered a pulmonary function study on July 28, 2001, which yielded qualifying results, although Dr. Baker noted only "fair" cooperation. Director's Exhibit 11. Dr. Baker also administered pulmonary function studies on November 1, 2001 and February 22, 2002, both of which yielded non-qualifying results. Director's

judge further noted that Dr. Baker was the miner's treating physician, but found that his opinion was not entitled to greater weight on that basis because it was not well-reasoned and well-documented. *Id.* In addition, the administrative law judge found Dr. Baker's opinion outweighed by the contrary opinion of Dr. Dahhan that the miner was not totally disabled, which was supported by the objective evidence. *Id.* at 3-4. The administrative law judge stated that "[a]t best, I find the medical opinion evidence to be in equipoise" and, thus, concluded that the medical opinions were insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). *Id.* at 4. The administrative law judge, therefore, found, in light of her prior finding that the objective evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iii), and her finding, on remand, that the medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), that total respiratory disability was not established at Section 718.204(b).

In challenging the administrative law judge's denial of benefits, claimant does not allege any error regarding the administrative law judge's consideration of the medical evidence and her finding that it failed to establish total respiratory disability at Section 718.204(b). Rather, claimant challenges only the administrative law judge's finding that the medical evidence failed to establish disability causation pursuant to Section 718.204(c).

It is well-established that a party challenging the administrative law judge's decision must identify specific errors in the administrative law judge's analysis of the evidence and law. 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Herein, claimant has not alleged any error with regard to the administrative law judge's finding that the medical evidence is insufficient to establish total respiratory disability and, therefore, the Board has no basis upon which to review the administrative law judge's finding at Section 718.204(b). *See Cox*, 791 F.2d at 446, 9 BLR at 2-49; *Sarf*, 10 BLR at 1-121; *Fish*, 6 BLR at 1-109. Accordingly, because claimant has not appropriately challenged the administrative law judge's finding that total respiratory disability was not established, we affirm her finding pursuant to 20 C.F.R. §718.204(b).

Exhibits 8, 9. In addition, Dr. Dahhan administered a pulmonary function study on October 11, 2001, which yielded non-qualifying results. Director's Exhibit 12. The Board, in its prior decision, affirmed the administrative law judge's findings regarding the pulmonary function study evidence. *M.G. v. Director, OWCP*, BRB No. 06-0931 BLA, slip op. at 3 n.4 (July 16, 2007)(unpub.).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total respiratory disability pursuant to Section 718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under Part 718. *See Hill*, 123 F3d at 415-16, 21 BLR at 2-196-7; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we need not address claimant's contention regarding the administrative law judge's finding that the medical evidence is insufficient to establish disability causation pursuant to Section 718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge