

BRB No. 03-0276 BLA

E. J. RUDD	)		
	)		
Claimant-Respondent	)		
	)		
v.	)		
	)		
NFC MINING, INCORPORATED	)	DATE	ISSUED:
	)	10/14/2003_____	
	)		
and	)		
	)		
AIG INSURANCE COMPANY	)		
	)		
Employer/Carrier-Petitioners	)		
	)		
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)		
	)		
Party-in-Interest	)	DECISION and ORDER	

Appeal of the Decision and Order - Awarding Benefits and Order Denying Employer=s Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Rita A. Roppolo (Howard M. Radzely, Acting 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Order Denying Employer=s Motion for Reconsideration (01-BLA-0823) of Administrative Law Judge Joseph E. Kane on a claim<sup>1</sup> 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).<sup>2</sup> The administrative law judge initially credited claimant with twenty-eight and one-half years of qualifying coal mine employment. Next, the administrative law judge found that claimant established the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, the presence of a totally disabling respiratory impairment, and that pneumoconiosis was a substantially contributing cause of the total disability. Accordingly, benefits were awarded. Subsequently, employer filed a Motion for Reconsideration and, because employer failed to proffer any meritorious arguments on reconsideration, the administrative law judge denied employer=s motion.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a total respiratory disability. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.<sup>3</sup>

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<sup>1</sup> Claimant, E. J. Rudd, filed his application for benefits on July 31, 2000. Director=s Exhibit 1.

<sup>2</sup> 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.

<sup>3</sup> We affirm the administrative law judge=s determinations regarding length of coal mine employment and pursuant to 20 C.F.R. ' ' 718.202(a), 718.203(b), 718.204(b)(2)(i)-(iii), and 718.204(c) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in relying on Dr. Westerfield's opinion that claimant was totally disabled due to heart disease to find that claimant suffered from a totally disabling respiratory impairment, since Dr. Westerfield's opinion went on to state that claimant had only a very mild respiratory or pulmonary impairment, the product of obesity and past heart surgery which, would not interfere with a return to claimant's usual coal mine employment. Employer's Exhibit 2.

In finding total disability established, the administrative law judge, weighing all the relevant evidence found that the probative value of the qualifying pulmonary function studies and doctors' opinions outweighed the non-qualifying pulmonary function studies and blood gas studies of record. The administrative law judge found that while some of the doctors' opinions demonstrated analytical deficiencies, they nonetheless supported a finding of total disability.<sup>4</sup> In addressing Dr. Westerfield's opinion, the administrative law judge found that it was well-reasoned and documented and demonstrated a sufficient understanding of how claimant's physical condition impacted on his ability to continue his previous coal mine employment. Decision and Order at 21. On reconsideration, the administrative law judge stated, "The fact that Dr. Westerfield attributed Claimant's impairment to non-respiratory factors does not remove the doctor's opinion from consideration when addressing Claimant's impairment level." Order Denying Employer's Motion for Reconsideration at 3.

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<sup>4</sup> Dr. Mallampalli classified claimant's impairment as Class 2 under the AMA Physician Guides to the Evaluation of Permanent Impairment. Dr. Mallampalli noted that claimant's coal mine employment involved operating heavy equipment, including the dozer, loader and excavator, and that he also worked at the tippie, crushing and loading coal in the preparation plant. Employer's Exhibit 1.

Dr. Westerfield opined that claimant had a very mild respiratory impairment and was able from a pulmonary perspective to return to his previous coal mine employment, but was totally disabled due to heart disease. Dr. Westerfield noted that claimant worked 28-30 years in strip mining until 1999, operating heavy equipment, loaders and dozers, and sometimes a coal or rock drill. Employer's Exhibit 2.

Dr. Cuevas opined that claimant's medical conditions, including lung problems, prevented him from returning to his previous coal mine employment. Dr. Cuevas noted that claimant worked for approximately 28 years in coal mine employment as a heavy equipment operator, operating bulldozers and road graders, loading rock and coal. Claimant's Exhibits 1 and 2

Dr. Wright stated that claimant was a heavy equipment operator, including running an excavator loader shuttle, and also worked as a supervisor. Dr. Wright opined that claimant did not retain the physical capacity to return to usual coal mine employment. Claimant's Exhibit 1.

Dr. Sundaram noted that claimant was an equipment operator for 28 years in surface mining and noted that claimant did not have the physical capacity to return to his previous coal mine employment, classifying claimant's impairment as 26-50% under the most recent AMA Physician Guides to Evaluation of Permanent Impairment. Director's Exhibit 30.

In order to demonstrate the total disability element of entitlement, claimant must establish a totally disabling respiratory impairment; disability due to non-respiratory conditions cannot establish the total disability element. 20 C.F.R. ' 718.204(b)(2); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994); *Beatty v. Danri Corporation & Triangle Enterprises*, 49 F.3d 993, 1002, 19 BLR 2-136, 2-154 (3d Cir. 1995), *aff=g* 16 BLR 1-11, 1-15 (1991). In this case, the administrative law judge stated at page 21 of his Decision and Order that Dr. Westerfield clearly opined that claimant was totally disabled and that he accorded the opinion probative weight on the issue of claimant=s impairment level as it was thorough, clear, and demonstrated an above adequate understanding of claimant=s physical conditions and the concomitant implications upon his usual coal mine employment. Decision and Order at 21. At page 12 of his Decision and Order, however, the administrative law judge stated that Dr. Westerfield had opined that claimant was totally disabled from his heart disease, but from a respiratory standpoint, claimant would be able to return to his previous coal mine employment. Decision and Order at 12.

The administrative law judge erred therefore in his characterization of Dr. Westerfield=s opinion as one establishing a totally disabling respiratory impairment. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Goode v. Eastern Assoc. Coal Co.*, 6 BLR 1-1064 (1984); *see Street*, 42 F.3d at 243, 19 BLR at 2-5-6; *Beatty*, 49 F.3d at 1002, 19 BLR at 2-154. Thus, because the administrative law judge relied in part on Dr. Westerfield=s opinion to find that claimant was totally disabled, we must vacate that finding and remand the case for the administrative law judge to reconsider the medical opinion evidence along with the other relevant evidence at Section 718.204(b). *Tackett*, 7 BLR at 1-706; *Goode*, 6 BLR at 1-1066.

Accordingly, the Decision and Order - Awarding Benefits and the Order Denying Employer=s Motion for Reconsideration of the administrative law judge are vacated and the case is remanded for further consideration consistent with this opinion.

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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PETER A. GABAUER, Jr.  
Administrative Appeals Judge