BRB Nos. 08-0295 BLA
and 08-0295 BLA-A

G.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 10/23/2008
	)	
	)	
Employer-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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

C. Phillip Wheeler, Jr. (Kirk Law Firm), Pikeville, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits (2006-BLA-5748) of Administrative Law Judge Larry S. Merck 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 credited the miner with twenty-five years of coal mine employment based on the parties'

stipulation, and adjudicated this claim, filed on May 4, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718.[1] The administrative law judge noted that employer did not contest the existence of pneumoconiosis arising out of coal mine employment, and found the evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. § 718.304(a), and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's treatment of Dr. Sikder's opinion on the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), arguing that the administrative law judge failed to accord proper consideration to her opinion as the miner's treating physician pursuant to 20 C.F.R. §718.104(d). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing in the alternative that the administrative law judge erred in excluding the medical report by Dr. Thorarinsson of Tri State Pulmonary Associates, Inc. from the record on the ground that it was a medical report rather than a treatment note, and therefore exceeded the evidentiary limitations of 20 C.F.R. §725.414.[2] The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.[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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] At the hearing, employer withdrew the issues of the timeliness of the claim; whether claimant was a miner; whether claimant was employed after December 31, 1969; whether claimant established the existence of pneumoconiosis, or pneumoconiosis arising out of coal mine employment; whether employer secured the payment of benefits with insurance; and whether claimant has one dependent for purposes of augmentation. Transcript at 12-13, 39.

[2] Employer concedes that its arguments on cross-appeal need not be reached if the Board affirms the administrative law judge's denial of benefits. Employer's Brief at 8.

[3] Because no party challenges the administrative law judge's findings that the evidence was insufficient to establish complicated pneumoconiosis or total disability at 20 C.F.R. §§718.204(b)(2)(i)-(iii), 718.304, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

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 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Initially, claimant maintains that the administrative law judge failed to follow the mandates set out in Section 718.104(d) by discounting the opinion of Dr. Sikder, claimant's treating physician. We disagree. The mere fact that a physician is a miner's treating physician does not mandate assigning controlling weight to that medical opinion; rather, the administrative law judge must assess the credibility of a treating physician's opinion on its merits. 20 C.F.R. 718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In evaluating the opinion of Dr. Sikder, the administrative law judge noted her status as the miner's treating physician since March 2005, and stated that the factors found at Section 718.104(d) were helpful in determining the weight to apply to the opinion, but nonetheless, found the opinion not well reasoned. Decision and Order at 12-14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Claimant also contends that the administrative law judge erred in his analysis of Dr. Sikder's opinion, and in according it little weight on the issue of claimant's total disability. Claimant argues that in finding Dr. Sikder's opinion inadequately reasoned, the administrative law judge misrepresented Dr. Sikder's diagnosis that claimant would not be disabled from his obstructive airway disease, but that he would be disabled from a clinical standpoint and from the x-ray diagnosis. Thus, claimant states that, "the contradiction [in Dr. Sikder's testimony] is not as black-and-white as the administrative law judge would have it seem." Claimant's Brief at 3-4; Director's Exhibit 16; Employer's Exhibit 2. Claimant's argument lacks merit.

In finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge relied on the well reasoned and documented opinions of Drs. Ebeo, Jarboe, and Respsher, who all opined that, from a respiratory standpoint, claimant was able to perform his last coal mining job, Employer's Exhibits 1, 7 at 11, Director's Exhibit 21, along with the non-qualifying pulmonary function studies and non-qualifying arterial blood gas evidence. Decision and

Order at 21. The administrative law judge found Dr. Sikder's opinion to be unreasoned and internally inconsistent, as the physician initially diagnosed clinical pneumoconiosis with total disability, based on a pulmonary function test subsequently invalidated by Drs. Jarboe and Repsher, Director's Exhibit 16, Employer's Exhibits 8 at 16; 10 at 17, and later opined that claimant's disability was not caused by coal dust nor evidenced by pulmonary function test results, but was caused by complicated pneumoconiosis and evidenced by x-ray. Employer's Exhibit 2 at 15-16; *see* 20 C.F.R. §718.304. As the administrative law judge also determined that the weight of the medical evidence as a whole was insufficient to support a finding of complicated pneumoconiosis, the administrative law judge rationally determined that total disability had not been established through the regulatory presumption pursuant to Section 718.304 or pursuant to Section 718.204(b). Decision and Order at 19-21; *see Groves*, 277 F.3d at 836, 22 BLR at 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

We therefore affirm the administrative law judge's finding that the weight of the evidence was insufficient to meet claimant's burden of establishing total disability under Section 718.204(b)(2)(i)-(iv), as supported by substantial evidence, and further affirm his denial of benefits. *Anderson*, 12 BLR at 1-114. Consequently, we need not reach employer's arguments on cross-appeal.

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