

BRB No. 03-0862 BLA

BRUCE ALLEN ROBERTS)	
)	
Claimant-Petitioner)	
v.)	DATE ISSUED:
09/09/2004))
EASTERN COAL CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Lois A. Kitts (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order- Denying Benefits (02-BLA-5096) of Administrative Law Rudolf L. Jansen (the administrative law judge) 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 found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a), and was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and asserts that the administrative law judge erred by discounting the opinions of Drs. Somasundaram and Hussain, who both opined that claimant suffers from pneumoconiosis. Claimant asserts further that the administrative law judge did not discuss Dr. Hussain's June 28, 2002 report. Claimant also contends that the administrative law judge failed to give appropriate weight to the opinions of Drs. Somasundaram and Hussain, as claimant's treating physicians, at Sections 718.202(a) and 718.204(b)(2). Claimant asserts that the new regulation at 20 C.F.R §718.104 requires that the administrative law judge consider the nature of the treating physician's relationship with claimant. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.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 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).

Claimant challenges the administrative law judge's finding that the evidence fails to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). Claimant asserts that the administrative law judge did not give deference to the opinions of Drs. Somasundaram and Hussain as claimant's treating physicians, at Section 718.204(b)(2)(iv). At Section 718.204(b)(2)(iv), the administrative law judge considered the five relevant opinions of record. Drs. Somasundaram and Hussain opined that claimant was totally disabled due to a respiratory impairment, while Drs. Vuskovich, Rosenberg and Broudy opined that claimant was not totally disabled due to a respiratory impairment. The administrative law judge found that Dr. Hussain provided two opinions, dated April 11, 2001 and June 28, 2002, stating that claimant was totally

¹ Because no party challenges the administrative law judge's findings that claimant established 21 years of qualifying coal mine employment, that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1)-(3), and fails to establish total respiratory disability pursuant to 20 C.F.R § 718.204(b)(2)(i)-(iii), we affirm these findings. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disabled. Claimant's Exhibits 1, 2. The administrative law judge found, however, that Dr. Hussain provided another opinion between those opinions, dated September 1, 2001, wherein he stated both that claimant had the respiratory capacity to perform coal mine employment, and that claimant's impairment was only partial. Director's Exhibit 8. The administrative law judge discounted Dr. Hussain's opinion as internally inconsistent, a finding we affirm as within his discretion. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

Claimant also contends that Dr. Somasundaram was one of claimant's treating physicians and, therefore, his opinion is entitled to greater weight. However, there is no indication in the record that Dr. Somasundaram treated claimant.² Section 718.104(d)(5) states that the administrative law judge "shall accept the **statement of a physician**" with regard to the four factors. 20 C.F.R. §718.104(d)(5) (emphasis added).³ We reject claimant's argument that the administrative law judge erred by failing to consider Dr. Somasundaram as claimant's treating physician.

Having rejected claimant's specific arguments, we next consider the administrative law judge's treatment of the remainder of the evidence. The administrative law judge weighed the opinions of Drs. Rosenberg and Vuskovich, who opined that claimant did not suffer from a totally disabling respiratory impairment, against Dr. Somasundaram's opinion that claimant is totally disabled. Decision and Order at 13. The administrative law judge properly found that the opinions of Drs. Rosenberg and Vuskovich were entitled to greater weight because they provided more reasoning and explanation. Decision and Order at 11; *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring). In addition, the administrative law judge permissibly found that the opinions of Drs. Rosenberg and Vuskovich were based

² Dr. Somasundaram's opinion, itself, does not contain any information to support a finding that Dr. Somasundaram was claimant's treating physician. Claimant's Exhibit 3. Statements made by counsel do not constitute evidence. *See generally Mills v. Redington*, 736 S.W. 2d 522 (Mo. App. 1987).

³ 20 C.F.R. §718.104(d) sets forth four factors for the administrative law judge to consider, should he find that a particular doctor is a treating physician. Specifically, they are: the nature of the relationship between the doctor and the miner, the duration of the relationship, the frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4).

upon more extensive documentation and that the doctors had the benefit of additional objective evidence, including the pulmonary function studies that included both before and after bronchodilator tests. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Therefore, we affirm the administrative law judge's findings that the evidence fails to establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv).

We further affirm the administrative law judge's finding that the evidence fails to establish a total respiratory disability pursuant to Section 718.204(b)(2) overall. As this finding precludes an award of benefits under Part 718, we affirm the administrative law judge's denial of benefits in the instant claim. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).⁴

⁴ In light of the foregoing, we need not address claimant's contentions with respect to 20 C.F.R. §718.202(a). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge