BRB Nos. 05-0107 BLA
and 05-0107 BLA-A

CLIFFORD JEFFREY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
C/O ACCORDIA EMPLOYERS SERVICE	)	
	)	
and	)	
	)	
ARCH COAL COMPANY	)	
C/O ACCORDIA EMPLOYER SERVICE	)	
	)	DATE ISSUED: 09/22/2005
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Sarah M. Hurley (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits (03-BLA-5623) of Administrative Law Judge Thomas F. Phalen, Jr., 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 claimant with twenty-eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 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 also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis or total disability. Claimant also contends that the Department of Labor has failed to provide him with a complete, credible pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, wherein it asserts that the administrative law judge erred in excluding several exhibits, and argues that the limitations on the admission of evidence are invalid. The Director, Office of Workers' Compensation Programs (the Director), has responded to both claimant's appeal and employer's cross-appeal, and urges the Board to reject the arguments in both appeals.[1]

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

[1] No party has challenged the administrative law judge's finding of twenty-eight years of coal mine employment, his finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3), or his finding that total disability is not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), or (iii). Because these findings have not been challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We first consider claimant's assertions regarding total disability. Claimant contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that the Board has held that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addresses invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has determined that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Claimant argues that the administrative law judge erred in rejecting Dr. Baker's opinion. Dr. Baker opined that claimant:

> has a Class II impairment with the FEV1 between 60 % and 79% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition . . . Patient has a second impairment, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Director's Exhibit 13. Because Dr. Baker did not explain the severity of such a diagnosis or address whether such an impairment would prevent claimant from performing his usual coal mine employment, his diagnosis of a Class II impairment is insufficient to support a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*). Moreover, since a physician's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), the administrative law judge permissibly found that this portion of Dr. Baker's opinion is insufficient to support a finding of total disability. Decision and Order at 16. Further, in view of our holding that the administrative law judge properly found Dr. Baker's opinion insufficient to support a finding of total disability, we reject claimant's assertion that the administrative law judge erred by not considering the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's opinion.

Claimant further contends that the administrative law judge "made no mention of claimant's age or work experience in conjunction with his assessment that the claimant is not totally disabled." Claimant's Brief at 8. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). In addition, claimant argues that inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that his pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected his ability to perform his usual coal mine work or comparable and gainful work. Claimant's Brief at 9. The revised regulation at 20 C.F.R. §718.201(c) recognizes that pneumoconiosis can be a latent and progressive disease. Claimant's assertion that he has pneumoconiosis that has worsened over time, however, is unsupported by the evidence, and we decline to address it further.

Inasmuch as claimant makes no other assertions regarding the administrative law judge's total disability findings, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement pursuant to 20 C.F.R. Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), and further affirm his denial of benefits. Therefore, we need not address claimant's allegations of error regarding the administrative law judge's findings pursuant to Section 718.202(a).

We now turn to claimant's assertion that the Director has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation. Specifically, claimant alleges that since the administrative law judge found that Dr. Hussain's opinion does not constitute a reasoned medical opinion for purposes of evaluating the presence or absence of clinical pneumoconiosis, the Director has not fulfilled his statutory duty. The Director responds, contending that "even if Dr. Hussain's finding regarding the existence of coal mine employment-related lung disease is questionable, the doctor's credible conclusion that claimant is not totally disabled provides a sound basis for denying the claim." Director's Letter at 1-2. We agree with the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc* order), that a remand of this case is not warranted. As the Director notes, the administrative law judge relied, in part, on Dr. Hussain's opinion in finding the evidence insufficient to establish total disability. As discussed, *supra*, we herein affirm the administrative law judge's denial of benefits in this case, based upon our affirmance of the finding that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Thus, claimant could not prevail, even if the case were remanded to the administrative law judge for further development of Dr. Hussain's opinion regarding the existence of

pneumoconiosis. Because it would be futile, we decline to order a remand of this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Inasmuch as claimant raises no other assertions of error on appeal, we affirm the administrative law judge's denial of benefits.

In its cross-appeal, employer contends that the limitations on the admissibility of evidence in the revised regulations are invalid. Consequently, employer challenges the administrative law judge's exclusion of Director's Exhibits 15 and 17 and Employer's Exhibits 5, 6, and 7. The Board has previously rejected the arguments made by employer, asserting that 20 C.F.R. §725.414 is invalid. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004). Therefore, we also reject employer's assertion that the administrative law judge erred by excluding Director's Exhibits 15 and 17 and Employer's Exhibits 5, 6, and 7 from the record.

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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JUDITH S. BOGGS
Administrative Appeals Judge