

BRB No. 96-0955 BLA

JAMES BUSKIRK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
ELKAY MINING COMPANY)	
)	
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 of Glenn Robert Lawrence, Administrative Law Judge, and Order Reaffirming Denial of Benefits of James Guill, Administrative Law Judge, United States Department of Labor.

Thomas P. Maroney, Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (93-BLA-0235) of Administrative

¹ Claimant is James Buskirk, the miner, whose application for benefits filed on April 3, 1992 was administratively denied on September 14, 1992. Director's Exhibits 1, 27.

Law Judge Glenn Robert Lawrence and the Order Reaffirming Denial of Benefits (93-BLA-0235) of Administrative Law Judge James Guill denying benefits 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). Initially, Judge Lawrence found that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, accordingly, denied benefits.

The parties moved for reconsideration, requesting that the

record be reopened for the submission of post-hearing evidence as had been agreed to at the hearing. In light of the motion for reconsideration, the Board dismissed claimant's appeal as premature by order dated March 25, 1994. See 20 C.F.R. §802.206(f). Subsequently, Judge Guill² granted reconsideration and reopened the record.

On reconsideration, Judge Guill admitted into the record the newly submitted evidence, which consisted of five x-ray readings and a deposition. Judge Guill found the x-ray readings to be irrelevant to his reconsideration of whether total respiratory disability was established, and considered the January 3, 1994 deposition of Dr. Zaldivar, which was based on his December 16, 1992 examination of claimant. Employer's Exhibit 16. Noting that Dr. Zaldivar opined that claimant has no respiratory impairment, the administrative law judge found that "Dr. Zaldivar's opinion supports the finding in the prior decision that Claimant has not established that he is totally disabled." Order Reaffirming Denial of Benefits at 2. Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judges' weighing of the evidence pursuant to Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² Because Judge Lawrence is no longer with the Office of Administrative Law Judges, the case was assigned on reconsideration, without objection, to Judge Guill.

³ We affirm as unchallenged on appeal Judge Lawrence's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.204(c)(4), claimant contends that the opinions of employer's experts are unreliable because employer's physicians are biased while claimant's physicians are impartial because "they [are] employed by the Department of Labor." Claimant's Brief at 4. The Board has held that, without specific evidence indicating that a report prepared for employer is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). Moreover, unless the opinions of the physicians retained by the parties are properly held to be biased, based on evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their impartiality. *Id.* Because claimant points to no specific evidence of bias on the part of employer's physicians, we reject claimant's contention.

We also reject claimant's contention that the administrative law judges should have applied the true-doubt rule,⁴ Claimant's Brief at 4, because the United States Supreme Court invalidated the true-doubt rule in *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Therefore, we reject claimant's contention and affirm the administrative law judges' findings pursuant to Section 718.204(c)(4).

Inasmuch as Judge Lawrence permissibly found that all the relevant evidence, weighed together, failed to establish total respiratory disability, Decision and Order at 4; see *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), and claimant raises no other specific legal or factual challenge to his finding or to that of Judge Guill on reconsideration, we affirm the administrative law judges' findings pursuant to Section 718.204(c).

Because claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, the denial of benefits is affirmed. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987);

⁴ The true doubt rule was an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" was said to arise only when equally probative but contradictory evidence was presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contrary set of facts would resolve the case for claimant. See *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Perry v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judges' Decision and Order denying benefits and Order Reaffirming Denial of Benefits are affirmed.

SO ORDERED.

_____JAMES F.
BROWN
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

_____REGINA C.
McGRANERY
Administrative Appeals Judge