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BRB No. 97-0555 BLA

DAVID ROGER ESTEP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order -- Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Barry H. Joyner (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Co-Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Benefits (95-BLA-1329) of Administrative Law Judge J. Michael O'Neill rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant is entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir.1989).

Claimant filed for benefits under the Act on August 11, 1994. Director's Exhibit 1. This claim was administratively denied by the district director on January 6, 1995, Director's Exhibit 27. Claimant requested a formal hearing, which was conducted on

February 8, 1996 before Administrative Law Judge J. Michael O'Neill. On December 30, 1996, Judge O'Neill issued his Decision and Order denying the claim. The administrative law judge credited claimant with 24 years of qualifying coal mine employment. Evaluating the evidence under the permanent criteria set forth at 20 C.F.R. Part 718, *see Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 BLR 2-376, 2-384 (6th Cir.1989), the administrative law judge found that claimant failed to establish either the existence of pneumoconiosis or the presence of a totally disabling pulmonary or respiratory impairment. Decision and Order at 7, 9. Benefits were denied and claimant brought this appeal.

On appeal, claimant generally challenges the administrative law judge's findings that he failed to establish either the existence of pneumoconiosis or the presence of a totally disabling pulmonary or respiratory impairment. The Director, Office of Workers' Compensation Programs (Director), responds, urging affirmance but noting that the administrative law judge erred in his finding that claimant failed to establish pneumoconiosis by medical opinion evidence, and also that he violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The Director urges that the Board affirm the denial of benefits on the grounds that there is no credible medical opinion sufficient to sustain claimant's burden of establishing that he suffers from a totally disabling pulmonary or respiratory impairment.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon consideration of the Decision and Order, the administrative record as a whole and the arguments raised on appeal, we conclude that the findings by the administrative law judge on this claim are supported by substantial evidence and contain no reversible error. We therefore affirm the Decision and Order denying benefits. Neither claimant nor the Director has demonstrated reversible error in the administrative law judge's consideration of the evidence under Section 718.204(c), 20 C.F.R. §718.204(c), to find that claimant failed to establish a totally disabling pulmonary or respiratory impairment.

Dr. Wright assessed disability but concluded that "[f]rom a strictly pulmonary point of view [claimant] can perform the work of a coal miner." Claimant's Exhibit 2; Director's Exhibit 13. This medical opinion is insufficient to carry claimant's burden under Section 718.204(c). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-21 (6th Cir. 1993); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-21 (1994), *modified on recon.* 20 BLR 1-64 (1996); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). Further, claimant does not explain why the administrative law judge is bound to accept the disability assessment by Dr. Baker, or how he erred in the consideration of Dr. Baker's reports. Claimant's arguments, without pointing to specific error by the administrative law judge simply request the Board to reweigh the medical opinion evidence *de novo*, a task beyond the Board's scope of review,

see Director, OWCP v. Rowe, 710 F.2d 251, 254, 5 BLR 2-99, 2-102 (6th Cir. 1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

We disagree with the Director that Dr. Baker's medical assessment is insufficient as a matter of law to demonstrate total respiratory disability. In his first report, Dr. Baker responded "no" to the query "[i]s the miner physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust free environment?" Claimant's Exhibit 1; Director's Exhibit 12 (medical report form ¶ I. d.). We also conclude that the administrative law judge sufficiently explained his determination that the medical opinion evidence did not demonstrate total respiratory disability. The administrative law judge observed that

> Dr. Glenn Baker examined the Claimant on April 7, 1993. He stated that the claimant was not able to perform gainful employment, from a pulmonary standpoint, due to pneumoconiosis and bronchitis. Dr. Baker examined claimant again on October 4, 1994, and stated that the claimant has a minimal impairment due to coal worker's pneumoconiosis. Contrary to his earlier opinion, Dr. Baker's report dated November 28, 1994, concluded that the claimant does not have a significant impairment.

Decision and Order at 5.

While "[the Board] may not supply a reasoned basis for the [administrative law judge's] action," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982), the Board "will uphold a decision of less than ideal clarity if the [administrative law judge's decisional] path may reasonably be discerned." *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). The administrative law judge's explanation could have been much clearer, but as the "context of the decision makes clear," *Sykes v. Director, OWCP*, 812 F.2d 890, 893, 10 BLR 2-95, 2-98 (4th Cir. 1987), he found, given Dr. Baker's progressive assessments,[1] which went from an opinion of total disability in 1993, Claimant's Exhibit 1; Director's Exhibit 12, "minimal [impairment] with Coal worker's pneumoconiosis and bronchitis" in October, 1994, Director's Exhibit 14, to "no significant impairment" the next month, Director's Exhibit 15, that Dr. Baker no longer thought that claimant suffered from a totally disabling pulmonary or respiratory impairment.

[1]Dr. Baker's conclusions are the only evidence which may have supported this claim under Section 718.204(c). None of the clinical tests of record produces qualifying results, *i.e.* meets the disability standards set forth in 20 C.F.R. Part 718, Appendices B & C. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 BLR 2-259, 2- 262 n. 5 (3d Cir. 1990). There is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(c)(3).

We affirm the Decision and Order denying benefits in this case. In view of our decision to affirm the administrative law judge's findings under Section 718.204(c), we need not address arguments with respect to whether claimant established pneumoconiosis by medical opinion evidence.[2]

[2]We affirm the administrative law judge's weighing of the x-ray evidence to find that claimant did not prove the existence of pneumoconiosis under Section 718.202(a)(1). The administrative law judge was entitled to defer to the negative interpretations by readers with superior qualifications and to cite as well the preponderance of the negative readings to make a "qualitative," as well as a quantitative evaluation of the x-ray readings. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-85 (6th Cir. 1993).

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge