BRB Nos. 03-0759 BLA
and 03-0759 BLA-A

GORDON LOONEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIDNEY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 07/28/2004
A. T. MASSEY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order--Denying Benefits (2002-BLA-5392) of Administrative Law Judge Joseph E. Kane rendered 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).[1] Claimant filed his application for benefits on May 3, 2001.[2] Director's Exhibit 3. The district director denied benefits and claimant requested a hearing, Director's Exhibits 26, 27, which was held before the administrative law judge on February 12, 2003.

In a Decision and Order--Denying Benefits issued on July 31, 2003, the administrative law judge credited claimant with 19.72 years of coal mine employment[3] and accepted employer's stipulation that claimant suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge found that claimant failed to establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Specifically, the administrative law judge found that none of the pulmonary function studies or blood gas studies of record supported a finding of total disability, and he determined that a preponderance of the better reasoned medical opinion evidence did not establish that claimant suffers from any respiratory or pulmonary impairment. Because claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish total disability. Employer responds, urging affirmance. Employer also cross-appeals, challenging the administrative law judge's exclusion of evidence submitted by employer

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] A previous application that claimant filed on March 14, 1994 was denied as abandoned on March 31, 1994. Director's Exhibit 1.

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

that the administrative law judge found to be in excess of the limitations set forth at 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, arguing that the administrative law judge misapplied revised Section 725.414 in excluding employer's evidence.[4]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge should have accorded determinative weight to the opinion of Dr. Sundaram based on his status as claimant's "family and treating physician." Claimant's Brief at 3. We disagree. Revised 20 C.F.R. §718.104(d) requires the administrative law judge to consider "the relationship between the miner and any treating physician whose report is admitted into the record," by evaluating the nature and duration of the doctor-patient relationship, and the frequency and extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although revised Section 718.104(d) permits the administrative law judge to find that the treatment relationship merits according "controlling weight" to the treating physician's opinion "[i]n appropriate cases," the regulation requires the administrative law judge to weigh the treating opinion "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Additionally, the United States Court of Appeals for the Sixth Circuit has held that "in black lung litigation, the opinions of treating physicians get the

[4] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has 19.72 years of coal mine employment, that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

In this case, the administrative law judge permissibly found that Dr. Sundaram did not render a persuasive opinion. Dr. Sundaram, whose credentials are not of record, diagnosed claimant with a moderate impairment based upon a February 25, 2002 examination and pulmonary function testing. Claimant's Exhibit 2. But because Dr. Sundaram offered no explanation for how claimant's examination and test results supported the diagnosis of moderate impairment, the administrative law judge rationally found Dr. Sundaram's opinion "poorly reasoned" compared to the contrary opinions of Drs. Jarboe, Fino, and Hussain. Decision and Order at 15; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)(requiring the administrative law judge to examine the "validity of the reasoning of a medical opinion"). The administrative law judge also permissibly found Dr. Sundaram's evaluation to be less thorough than those of the other physicians because Dr. Sundaram did not administer a blood gas study. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993)(holding that administrative law judges must consider the quality of the evidence). Finally, the administrative law judge properly gave Dr. Sundaram's opinion less weight because his credentials were not established, while Drs. Fino and Jarboe are Board-certified in Internal Medicine. *Cf. Williams*, 338 F.3d at 518, 22 BLR at 2-655 (holding that an administrative law judge erred by ignoring a treating doctor's lack of credentials). In sum, although the administrative law judge in this case did not specifically consider Dr. Sundaram's opinion under the criteria listed at revised Section 718.104(d), any error by the administrative law judge is harmless because he permissibly found Dr. Sundaram's opinion inadequately reasoned and less persuasive, a finding consistent with the regulatory requirement that the treating opinion be weighed based on its own reasoning and credibility. *See* 20 C.F.R. §718.104(d)(5); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)(applying the rule that "error which does not affect the disposition of a case is harmless"). Consequently, we reject claimant's argument that the administrative law judge erred by not according determinative weight to Dr. Sundaram's opinion.

Claimant next asserts that the administrative law judge "erred by not relying on the medical report of Dr. Hussain." Claimant's Brief at 2. Claimant's contention lacks merit. Dr. Hussain examined and tested claimant on behalf of the Department of Labor on July 20, 2001. In his report, Dr. Hussain noted that claimant's pulmonary function study was "[n]ormal," but that his resting blood gas study, which was non-qualifying,[5]

[5] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

revealed "[h]ypoxemia." Director's Exhibit 9 at 3. Based on the finding of hypoxemia, Dr. Hussain diagnosed a "severe impairment" and stated that claimant was totally disabled. Director's Exhibit 9 at 4, 5. Subsequently, Dr. Hussain was deposed by employer and reviewed the blood gas study results obtained by Dr. Fino in his August 29, 2002 evaluation of claimant. Employer's Exhibit 8. Dr. Hussain testified that Dr. Fino's "arterial blood gas study is normal," and stated that, based on his own July 20, 2001 pulmonary function study and Dr. Fino's blood gas study, he found no objective evidence of a totally disabling respiratory impairment and would not diagnose claimant totally disabled. Employer's Exhibit 8 at 7-8.

The administrative law judge must weigh any contrary probative evidence in determining whether total disability is established. *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991). Consequently, he did not err in considering both Dr. Hussain's initial report and subsequent deposition testimony in finding that Dr. Hussain's opinion weighed against a finding of total disability. Moreover, the administrative law judge properly found that even assuming that Dr. Hussain's blood gas study were qualifying and that Dr. Hussain continued to diagnose some level of impairment despite Dr. Fino's test results, Dr. Hussain's opinion was outweighed by a preponderance of all the contrary evidence establishing no impairment. Decision and Order at 16; *see Collins*, 21 BLR at 1-191; *Beatty*, 16 BLR at 1-13-14. Therefore, we reject claimant's allegation that the administrative law judge erred in his analysis of Dr. Hussain's opinion, and we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).[6]

We affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b). Because claimant has failed to establish total disability, a necessary element of entitlement in a miner's claim under Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Because we affirm the denial of benefits, we need not address employer's cross-appeal.

[6] The administrative law judge did erroneously state that Dr. Hussain's "credentials are not known," Decision and Order at 15, when Dr. Hussain testified that he is a Board-certified pulmonologist. Employer's Exhibit 8 at 4. The administrative law judge's error is harmless in light of his overall weighing of Dr. Hussain's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order--Denying 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