

BRB Nos. 04-0770 BLA
and 04-0770 BLA-A

RUBBLE MORGAN)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 05/26/2005
)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	Decision and Order

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (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 (03-BLA-5476) of Administrative Law Judge Stuart A. Levin 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). The administrative law judge credited claimant with nine 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)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and 718.204(b) overall. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer argues that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. Employer also argues that the administrative law judge erred in excluding Dr. Rosenberg's opinion from the record. Further, employer argues that the administrative law judge's error in failing to consider the July 30, 2003 x-ray by Dr. Broudy is harmless. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's assertion that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. The Director also contends that any error by the administrative law judge in excluding Dr. Rosenberg's opinion and in failing to consider employer's July 30, 2003 x-ray reading by Dr. Broudy is harmless. In addition, the Director urges the Board to reject claimant's contentions that he failed to provide claimant with a credible pulmonary evaluation. Further, the Director urges the Board to reject claimant's contentions that the administrative law judge failed to properly apply the evidentiary limitations set forth at 20 C.F.R. §725.414 and that the administrative law judge erred in denying benefits on the merits.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹Since the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, we will address employer's assertion, on cross-appeal, that the administrative law judge abused his discretion by excluding Dr. Rosenberg's medical report from the record. Employer submitted the medical reports of Drs. Dahhan and Rosenberg at a hearing on July 9, 2003. Transcript at 15; Director's Exhibit 12; Employer's Exhibit 1. During the hearing, the administrative law judge held the record open until September 1, 2003 so that Dr. Broudy could examine claimant.² Transcript at 9-14, 33. The administrative law judge also ruled that employer was to advise him of whatever evidence it was going to rely on and whatever evidence it was going to withdraw during that period of time in order to comply with the evidentiary limitations. *Id.* at 14. By cover letter dated August 21, 2003, employer submitted Dr. Broudy's medical report to the administrative law judge. Although employer stated that it wanted to make Dr. Broudy's opinion a part of the record, employer did not advise the administrative law judge as to what evidence it wanted to withdraw. In his Decision and Order, the administrative law judge noted that Dr. Rosenberg was a pulmonary specialist who reviewed the medical evidence. Decision and Order at 6. The administrative law judge nonetheless stated, "[a]t the hearing, however, [e]mployer's attorney noted that the preference was to get the examination report by Dr. B. Broudy." *Id.* Consequently, the administrative law judge excluded Dr. Rosenberg's opinion from the record.

Section 725.414, in conjunction with Section 725.456(b)(1), sets forth the limits on the amount of specific types of medical evidence that the parties can submit into the record. *See* 20 C.F.R. §§725.414 and 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the

²The administrative law judge also held the record open to afford employer an opportunity to submit Dr. Dahhan's deposition testimony into the record. Transcript at 33; Employer's Exhibit 5.

limitations of Section 725.414 “shall not be admitted into the hearing record in the absence of good cause.” 20 C.F.R. §725.456(b)(1).

At the outset, we reject employer’s assertion that Section 725.414 is an invalid regulation. The Board has rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Dempsey*, 23 BLR at 1-58.

Employer also asserts that Section 725.414(a)(3)(i) is an invalid regulation because it refers to the responsible operator’s “affirmative case.” Specifically, employer asserts that Section 725.414(a)(3)(i) imposes a burden of persuasion on the party opposing entitlement to benefits. Contrary to employer’s assertion, the reference to “affirmative case” in Section 725.414(a)(3)(i) does not shift the burden of persuasion from claimant to the responsible operator. As argued by the Director, Section 725.414(a)(3)(i) merely distinguishes the evidence submitted in the responsible operator’s case-in-chief from the evidence it submits to rebut evidence submitted in claimant’s case-in-chief. Thus, we reject employer’s assertion that Section 725.414(a)(3)(i) is an invalid regulation because it refers to the responsible operator’s “affirmative case.” Further, employer asserts that Section 725.414(a)(3)(ii) is an invalid regulation because it limits the right of the responsible operator to submit evidence in cases where there is a rebuttable presumption. Contrary to employer’s assertion, the evidentiary limitations set forth in Section 725.414(a)(3)(ii) are not limited to cases where there are rebuttable presumptions. Rather, “rebuttal” in Section 725.414(a)(3)(ii) refers to evidence submitted by the responsible operator to rebut evidence submitted in claimant’s case-in-chief. 20 C.F.R. §725.414(a)(3)(ii). Thus, we reject employer’s assertion that Section 725.414(a)(3)(ii) is an invalid regulation.

In addition, employer asserts that Dr. Rosenberg’s opinion constitutes admissible rebuttal evidence at 20 C.F.R. §725.414(a)(3)(ii) to the extent that it addressed claimant’s pulmonary function study and arterial blood gas study results. Employer’s Cross-Appeal Brief at 8-9. As argued by the Director, the administrative law judge found that the pulmonary function study and arterial blood gas study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (ii). None of the parties has challenged the administrative law judge’s findings at 20 C.F.R. §718.204(b)(2)(i) and (ii). Thus, we hold that any error by the administrative law judge in excluding the portion of Dr. Rosenberg’s opinion that rebuts claimant’s pulmonary function study and arterial blood gas study results at 20 C.F.R. §725.414(a)(3)(ii) is harmless since the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (ii). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As discussed *supra*, n.1, we have

affirmed the administrative law judge's unchallenged findings at 20 C.F.R. §718.204(b)(2)(i) and (ii).

Turning to claimant's appeal, claimant argues that the Director failed to fulfill his statutory obligation to provide claimant with a credible pulmonary evaluation. Specifically, claimant asserts that the administrative law judge discredited Dr. Hussain's opinion because the administrative law judge concluded that Dr. Hussain's diagnosis of pneumoconiosis was merely a restatement of an x-ray interpretation. As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete and credible pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Claimant selected Dr. Hussain to perform a pulmonary examination on him. Dr. Hussain diagnosed pneumoconiosis and opined that claimant suffers from a mild impairment. Director's Exhibit 9. Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* The administrative law judge gave less weight to Dr. Hussain's diagnosis of pneumoconiosis because Dr. Hussain's diagnosis is based, in part, on a positive x-ray reading that was reread as negative for pneumoconiosis by better qualified physicians. *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). However, the administrative law judge did not discredit Dr. Hussain's opinion as devoid of any weight at all. *See generally Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992). The Director's obligation to provide claimant with a complete and credible pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Thus, since the administrative law judge did not find that Dr. Hussain's opinion lacks credibility, we reject claimant's assertion that the Director failed to fulfill his statutory obligation to provide claimant with a credible pulmonary evaluation.

Next, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Dahhan, Fino, and Hussain. In a report dated April 4, 2001, Dr. Baker opined:

Patient has a Class II impairment based on the FEV1 being between 60% and 80% 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 occupation.

Director's Exhibit 11. In a report dated June 6, 2001, Dr. Hussain opined that claimant suffers from a mild impairment. Director's Exhibit 9. However, Dr. Hussain also opined that claimant has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* In a report dated August 23, 2001, Dr. Dahhan opined that claimant does not suffer from a pulmonary impairment or disability. Director's Exhibit 12; Employer's Exhibit 5. Dr. Dahhan further opined that, from a respiratory standpoint, claimant retains the physiological capacity to continue his previous coal mining work or job of comparable physical demand. *Id.* Similarly, Dr. Broudy opined that with the proper treatment claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Employer's Exhibit 6. After noting that Dr. Hussain's opinion supports the opinions of Drs. Broudy and Dahhan with regard to claimant's pulmonary capacity, the administrative law judge found that the opinions of Drs. Broudy and Dahhan outweigh Dr. Baker's contrary opinion because they are better reasoned and better supported by the objective test results.

Claimant asserts that the administrative law judge erred in finding that Dr. Baker's opinion is insufficient to establish total disability.³ Contrary to claimant's assertion, the administrative law judge properly discounted Dr. Baker's opinion because it is not supported by the underlying objective tests. *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 11. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion is also insufficient to support a finding of total disability. Thus, we reject claimant's assertion that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability. Furthermore, since Dr. Baker's opinion is insufficient to establish total disability, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), we reject claimant's assertion that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work with Dr. Baker's assessment

³Claimant asserts that a single medical opinion supportive of a finding of total disability is "sufficient for invoking the presumption of total disability." Claimant's Brief at 7. However, claimant has not identified any presumption of total disability that is applicable in this case, nor does one apply, given the facts and evidence in this Part 718 case.

of claimant's impairment, *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*).

Claimant also asserts that the administrative law judge erred in discounting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study. Contrary to claimant's assertion, the administrative law judge properly discounted Dr. Baker's opinion because it is not supported by the underlying objective tests. *Minnich*, 9 BLR at 1-90 n.1; *Wetzel*, 8 BLR at 1-141; *Pastva*, 7 BLR at 1-832. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion because it is based on a non-qualifying pulmonary function study.

We additionally hold that, contrary to claimant's suggestion, an administrative law judge is not required to consider claimant's age, education and work experience in determining whether claimant has established that he is totally disabled from his usual coal mine work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Further, we reject claimant's assertion that the administrative law judge erred in failing to conclude that his condition has worsened to the point that he is totally disabled since pneumoconiosis is a progressive and irreversible disease. The record contains no credible evidence that claimant is totally disabled from a respiratory impairment. 20 C.F.R. §718.204(b)(2)(iv).

As claimant has not put forth any additional assertions of error by the administrative law judge with respect to 20 C.F.R. §718.204(b)(2)(iv) or his weighing of the conflicting medical opinions of record therein, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.⁴ *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

⁴In view of our disposition of the case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions of error with regard to the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Furthermore, in view of our disposition of the case at 20 C.F.R. §718.204(b), we need not address claimant's assertion that the administrative law judge erred in admitting x-ray readings relevant to the issue of pneumoconiosis that exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.

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