

BRB No. 00-0175 BLA

BURBON GIBSON)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
MOUNTAIN CLAY, INCORPORATED)	
)	
and)	
)	
TRANSCO ENERGY COMPANY)	
)	
Employers-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for
employer Mountain Clay Incorporated.

Before: SMITH and McGRANERY, Administrative Appeals Judges and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-BLA-0099) of
Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits on 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 This is the second time this case is before the Board. By Decision and Order of April 28, 1999, the Board affirmed the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3), and his finding of at least eighteen years of coal mine employment, but vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(b) and (c)(4). On remand, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204. Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 718.202(a)(4), 718.203(b) and 718.204. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief in this case.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Remand, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's award of benefits under 20 C.F.R. Part 718. Contrary to employer's assertion the administrative law judge did not assign less weight to Dr. Fino's opinion on the existence of pneumoconiosis at Section 718.202(a)(4) because the physician never examined or treated claimant. The administrative law judge found that Dr. Fino's opinion stated that claimant's moderate obstructive lung impairment was not caused by pneumoconiosis because there was no significant fibrosis present.² Decision and Order on Remand at 4; Employer's Exhibit 3. The administrative law judge subsequently assigned less weight to Dr. Fino's opinion because he found that the regulations do not define pneumoconiosis that "narrowly." Decision and Order on Remand at 4. The administrative law judge rationally concluded that Dr. Fino's opinion was not well reasoned since he found

¹This claim was filed on November 4, 1996. Director's Exhibit 1.

²Dr. Fino also opined that "[o]bstructive lung disease may... arise from coal workers' pneumoconiosis when significant fibrosis is present." Employer's Exhibit 3.

Dr. Fino's attempt to eliminate coal dust exposure as a contributing factor to claimant's pulmonary condition was not based on the broader definition of pneumoconiosis pursuant to 20 C.F.R. §718.201.

Employer further asserts that Dr. Powell, as well as Dr. Baker, diagnosed pneumoconiosis based on an x-ray that had been interpreted by Drs. Sargent, Barrett, Scott and Wheeler as negative for pneumoconiosis. The administrative law judge, however, acknowledged that Dr. Powell's opinion was a restatement of his positive x-ray reading, and did not rely on Dr. Powell's opinion in finding pneumoconiosis established at Section 718.202(a)(4). Decision and Order on Remand at 5; Director's Exhibit 13. In addition to noting the positive readings considered by Dr. Baker, the administrative law judge permissibly found Dr. Baker's opinion that claimant suffers from pneumoconiosis reasoned, based on his analysis of findings on two physical examinations, symptoms and coal mine employment history. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Remand at 5; Director's Exhibits 12, 14. The administrative law judge is not compelled to discredit Dr. Baker's opinion because of the conflicting x-ray evidence of record. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n. 2 (1986). In light of the aforementioned, we conclude that employer has failed to identify reversible error with respect to the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(4), and therefore, we affirm the finding.

Under Section 718.203(b), employer merely asserts that the administrative law judge erred in determining that claimant's pneumoconiosis arose, at least in part, out of his coal mine employment. Because the parties' stipulation to at least eighteen years of coal mine employment was accepted by the administrative law judge and affirmed by the Board, *see Gibson v. Mountain Clay, Inc.*, BRB No. 98-1232 BLA (April 28, 1999)(unpublished), the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) is applicable in this case. Inasmuch as employer has not identified any error in the administrative law judge's finding that "no rebuttal evidence was presented," under Section 718.203(b), we affirm this finding. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Moreover, contrary to employer's contention under Section 718.204(c)(4), the administrative law judge acknowledged that Drs. Broudy and Fino concluded that claimant had the respiratory and pulmonary capacity to perform his coal mine work, operating the haul grader and cleaning coal. Decision and Order at 7. However, we affirm as unchallenged, the administrative law judge's finding that the exertional requirements of claimant's coal mine work would require "appreciable exertion." *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As a result, the administrative law judge's determination that evidence of Dr. Broudy's diagnosis of "pulmonary impairment-moderately severe obstructive disease"

considered together with Dr. Fino's diagnosis of "a moderate lung impairmentweighs in favor of total disability" is a proper exercise of his discretion and supported by substantial evidence. Decision and Order at 7. *Ward, Cross Mountain Coal, Inc. v.* 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). We, again reject employer's erroneous allegation that the administrative law judge gave less weight to Dr. Fino's opinion pursuant to Section 718.204(c) because he did not examine claimant.

Under Section 718.204(b), employer argues that the administrative law judge erred in relying on *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), to give minimal probative value to the opinions of Drs. Broudy and Fino because they did not diagnose pneumoconiosis.³ Employer further argues that the administrative law judge "ignored" the opinions of Drs. Broudy, Fino and Powell that any respiratory impairment is related to cigarette smoking and not to coal mine employment and that the opinions of Drs. Broudy and Fino should be given more weight because they reviewed all the physicians' opinions. This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's last coal mine employment occurred in the Commonwealth of Kentucky. The Sixth Circuit, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), held that under Section 718.204(b), a claimant must prove that his disability arises at least in part from his pneumoconiosis. In this case, the administrative law judge credited Dr. Baker's opinion that claimant suffers from pneumoconiosis over the opinions of Drs. Fino and Broudy which disputed both the existence of an occupationally acquired pulmonary condition as a result of coal mine employment and total disability. The Board has held that where the administrative law judge had properly credited a physician's diagnosis of pneumoconiosis, the administrative law judge did not err in rejecting another's physician's opinion on causation because its underlying premise, that the miner did not have pneumoconiosis, was inaccurate. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Inasmuch as we have affirmed the administrative law judge's findings regarding the opinions of Drs. Broudy and Fino under Sections 718.202(a)(4) and 718.204(c), *see* discussion *supra* at 4, 5, employer has failed to allege reversible error by the administrative law judge in according minimal probative value to their opinions. *Trujillo, supra*. Further, the administrative law judge, within a proper exercise of his discretion, found not well reasoned Dr. Powell's opinion relevant to causation because he failed to explain how he attributed claimant's impairment solely to cigarette smoking. *Clark*

³Employer argues that *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), may be the standard applied in cases that arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, but that in the Sixth Circuit, the opinion of a doctor regarding causation does not "lose its strength" because the doctor did not diagnose pneumoconiosis. Employer, however, has failed to cite the Sixth Circuit cases on which he is relying.

v. Karsts-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*). We, therefore, affirm the administrative law judge's finding of total disability due to pneumoconiosis under Section 718.204(b).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge