BRB Nos. 08-0400 BLA
and 08-0400 BLA-A

C.D.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WILLIAMS MOUNTAIN COAL COMPANY	)	DATE ISSUED: 02/04/2009
	)	
	)	
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 – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denying Benefits (2006-BLA-6100) of Administrative Law Judge Richard A. Morgan rendered on a subsequent 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 at least twenty-three years of coal mine

employment, and adjudicated this subsequent claim,[1] filed on November 1, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence of record sufficient to establish both the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence of record was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). According, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established at Section 718.204(b)(2)(iv). Claimant additionally maintains that the administrative law judge incorrectly found only clinical pneumoconiosis established at Section 718.202(a), rather than both clinical and legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing that the administrative law judge inappropriately weighed the x-ray evidence at Section 718.202(a)(1) to find the existence of clinical pneumoconiosis established. Claimant responds, urging affirmance of the administrative law judge's finding of clinical pneumoconiosis pursuant to Section 718.202(a)(1). The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant's first application for benefits was filed on July 1, 1999, and was denied by Administrative Law Judge Daniel L. Leland for failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibits 1-1, 1-53. The Board affirmed the denial of benefits on January 30, 2002. Director's Exhibit 1-58. Following claimant's timely modification request, Judge Leland issued a Decision and Order-Denying Benefits on February 12, 2004. Director's Exhibits 1-59, 1. Claimant took no further action until the filing of the instant subsequent claim on November 1, 2005. Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), but failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, 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).

Turning to the issue of total disability at Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in crediting the opinions of Drs. Castle and Crisalli, that claimant retains the respiratory capacity to perform his usual coal mine employment as a roof bolting machine operator, over the contrary opinion of Dr. Rasmussen, that claimant's moderate loss of lung function is totally disabling. Specifically, claimant maintains that Dr. Rasmussen's opinion is better reasoned, and that it was error for the administrative law judge to accord greater weight to the opinions of Drs. Castle and Crisalli on the ground that they were more consistent with the non-qualifying objective tests of record. Noting that Section 718.204(b)(2)(iv) provides that total disability may be found in the absence of qualifying objective tests where a physician, exercising reasoned medical judgment, concludes that a miner's respiratory condition prevents him from engaging in relevant employment, claimant asserts that Dr. Rasmussen is the only physician of record who has complied with the provisions thereunder by comparing claimant's physical condition with the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 9-11. Claimant's arguments lack merit.

In evaluating the conflicting medical opinions of record, the administrative law judge accurately summarized the physicians' respective qualifications, as well as their findings, the explanations provided for their conclusions, and the underlying documentation. Decision and Order at 7-11. The administrative law judge determined that the relative pulmonary credentials of the physicians were comparable, and thus the qualifications of the physicians were not determinative in weighing the opinions. Decision and Order at 14. Based upon claimant's testimony, the administrative law judge rationally found that claimant's primary duties as a roof bolter involved moderately heavy exertion and that "he periodically performed heavier work about once every two weeks," when he performed "dead work," such as shoveling the belt and ribs, rock dusting and making belt moves. Decision and Order at 4; Hearing Transcript at 16-17; Director's Exhibit 1-52 at 13. While Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job, the administrative law judge thoroughly analyzed the opinion and permissibly found that it was insufficiently reasoned because Dr. Rasmussen characterized the work as more arduous than the

administrative law judge found it to be, and he failed to specify which aspect of claimant's last coal mine job he could not perform. Decision and Order at 4, 14; *cf. Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). The administrative law judge additionally determined that Dr. Rasmussen's opinion was based upon limited medical data obtained in conjunction with his own evaluation of claimant, whereas Drs. Castle and Crisalli took into account the evaluations and testing of multiple physicians, including Dr. Rasmussen, in concluding that claimant retained the respiratory capacity to perform his previous coal mine duties.[4] Decision and Order at 14; Director's Exhibit 1; Employer's Exhibits 1, 2, 8; *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Noting that the opinions of Drs. Castle and Crisalli were more consistent with the uniformly non-qualifying objective evidence of record, the administrative law judge acted within his discretion in finding that the opinions of Drs. Castle and Crisalli were better reasoned and documented than that of Dr. Rasmussen, and that the weight of the medical opinions of record was insufficient to establish total disability. Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). As substantial evidence supports the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), they are affirmed.

Because claimant failed to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits, and need not reach claimant's and employer's remaining arguments on the issue of the existence of pneumoconiosis at Section 718.202(a). *See Anderson*, 12 BLR at 1-112.

[4] Contrary to claimant's assertion, Drs. Castle and Crisalli demonstrated an awareness of the exertional requirements of claimant's duties as a roof bolting machine operator. Employer's Exhibits 1, 2, 8; Director's Exhibit 1. Specifically, Dr. Castle testified that claimant had to unload supplies onto his machine, which required some heavy labor, especially when they had to do timbering, Director's Exhibit 1; and Dr. Crisalli reported that claimant described his job as putting up roof bolts in the top of the mine, requiring him to stand for 8 hours a day and to lift 30 to 50 pounds of materials throughout the day. Employer's Exhibit 1; Decision and Order at 9.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge