

BRB No. 98-1174 BLA

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

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

Danny Roberts, Smilax , Virginia, *pro se*.

Gary K. Stearman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN,
Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the benefit of counsel, appeals the Decision and Order Denying Benefits (97-BLA-1395) of Administrative Law Judge Thomas F. Phalen, Jr. 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 administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

¹ Claimant is Danny Roberts, the miner, who filed a living miner's claim with the Department of Labor on June 12, 1996. Director's Exhibit 1.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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). The Director, Office of Workers' Compensation Programs, in response, asserts that the administrative law judge's findings that the evidence fails to establish entitlement are supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits.

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that the miner has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With respect to the administrative law judge's finding at Section 718.204(c)(1), the administrative law judge correctly found that neither of the two pulmonary function studies of record produced qualifying values. Director's Exhibits 6, 16. Accordingly, as these pulmonary function studies are insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1), we affirm the administrative law judge's finding thereunder. 20 C.F.R. §718.204(c)(1).

The administrative law judge also correctly found that the only blood gas study of record produced non-qualifying values. Director's Exhibits 7, 8. He therefore found that this study was insufficient to establish total disability pursuant to Section 718.204(c)(2), and accordingly, we affirm this finding. 20 C.F.R. §718.204(c)(2).

With respect to Section 718.204(c)(3), the record contains no evidence of cor pulmonale with right-sided congestive heart disease. Total disability cannot therefore be established at Section 718.204(c)(3). *See Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

The administrative law judge also found that the medical opinions of record were insufficient to carry claimant's burden of establishing total disability at Section 718.204(c)(4). The administrative law judge correctly concluded that while Dr. Clarke opined that claimant was totally disabled, Director's Exhibit 16, Dr. Wicker concluded that

he was not totally disabled, but was able to perform his usual coal mine employment. Director's Exhibit 7; Decision and Order at 8-9. The administrative law judge found that both opinions were documented and well-reasoned, and he then concluded that the conflicting evidence was equally probative, and thus found that claimant failed to sustain his burden. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730; 17 BLR 2-64 (3d Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'g on recon.*, 9 BLR 1-104(1986)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 9. The administrative law judge then permissibly found that "[t]aking all the evidence on total disability as a whole, I find that Claimant (sic) has not established by a preponderance of the evidence that he is totally disabled..." Decision and Order at 9; see *Fields, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987). As this finding is within the administrative law judge's discretion as fact-finder and is supported by the evidence of record, we affirm the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4). In conclusion, therefore, the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4) is affirmed. As this finding precludes entitlement pursuant to the Part 718 regulations, see *Trent, supra*; *Perry, supra*, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge