BRB No. 89-1127 BLA

HAROLD JUSTICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Harold Justice, Roderfield, West Virginia, pro se.

Edward O. Falkowski (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without legal representation, the Decision and Order (86-

BLA-1474) of Administrative Law Judge Edward Terhune Miller denying benefits on a claim filed pursuant to the provisions

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §90l et seq. (the Act). The administrative law judge reviewed this claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with approximately eleven and one-half years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), but further found that the evidence established rebuttal of the presumption that pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), and that claimant failed to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204. Accordingly, the administrative law judge denied benefits, and therefore did not reach the contested issue of whether employer was properly designated as the responsible operator herein. Claimant appeals, contending that the evidence establishes entitlement under Part 718. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Employer has not participated in this

appeal.[1]

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. 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. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Turning first to the issue of the length of claimant's coal mine employment, the alj credited claimant with approximately forty-six quarters or eleven and one-half

[1] The administrative law judge's findings under §718.202(a)(1), which are not adverse to claimant, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

years of qualifying coal mine employment based on claimant's testimony, the Social Security Administration (SSA) records, and other documentary evidence of record. Decision and Order at 2; Hearing Transcript at 16-21, 26-33; Director's Exhibits 1, 2, 10, 12, 13. Claimant contends that the evidence of record establishes more than eleven and one-half years of coal mine employment. However, this claim was filed after January 1, 1982, thus claimant would not benefit from the inclusion of any additional periods of coal mine employment, inasmuch as claimant has already received the benefit of all presumptions to which he is entitled under Part 718. Director's Exhibit 1; see generally Langerud v. Director, OWCP, 9 BLR 1-101 (1986). A review of the SSA records reflects a total of more than ten years of qualifying coal mine employment. See Director's Exhibits 12, 13. We therefore affirm the administrative law judge's findings with respect to length of coal mine employment, as the parties have not been prejudiced thereby. See generally Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988); Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

Turning next to the issue of total disability, the administrative law judge found that all of the pulmonary function study results of record were non-qualifying,[2] and

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

that there was no evidence of cor pulmonale with right-sided congestive heart failure, thus claimant failed to establish total disability under 20 C.F.R. §718.204(c)(1) or (c)(3). Although the administrative law judge found that the earliest blood gas study of record produced qualifying results, he acted within his discretion in according greater weight to the three more recent non-qualifying blood gas studies of record, and consequently determined that the preponderance of the evidence precluded a finding of total disability under 20 C.F.R. §718.204(c)(2). See generally Sexton v. Southern Ohio Coal Co., 7 BLR 1-411 (1984); Keen v. Jewell Ridge Coal Corp., 6 BLR 1-454 (1983). In evaluating the medical opinions of record under 20 C.F.R. §718.204(c)(4), the administrative law judge reasonably found that the opinion of Dr. Ketron, whose report did not mention any respiratory disability, and the opinion of Dr. Craft, who diagnosed mild smoker's bronchitis, failed to establish the existence of a totally disabling respiratory or pulmonary impairment. The administrative law judge also permissibly accorded less weight to the opinion of Dr. Modi, who determined that claimant was totally disabled due to both respiratory and non-respiratory conditions, as the physician did not indicate that claimant's respiratory condition alone was totally disabling, see generally York v. Jewell Ridge Coal Corp, 7 BLR 1-766, 1-769 (1985), Centak v. Director, OWCP, 6 BLR 1-1073 (1984); and failed to analyze the effects of claimant's smoking history and his arteriosclerotic heart disease. See generally Spradlin v. Island Creek Coal Co., 6 BLR 1-716, 1-719

(1984). Further, the administrative law judge reasonably found Dr. Modi's assessment of claimant's working ability was ambiguous and inconsistent with the objective evidence of record, see generally Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); and that it was unclear as to how much of his opinion regarding the extent of claimant's disability depended upon the need for claimant to avoid coal dust and other pollutants. See generally Taylor v. Evans and Gambrel Company, Inc., 12 BLR 1-83, 1-88 (1988). Decision and Order at 7, 8. Additionally, the administrative law judge acted within his discretion in according greater weight to the opinion of Dr. Keeley, who diagnosed chronic bronchitis with at most a mild obstructive ventilatory defect which improved to normal with bronchodilators and which would not cause claimant any symptoms with his work, as it was corroborated by the earlier evaluation of Dr. Craft, was better supported by the objective evidence of record, see Wetzel v. Director, OWCP, 8 BLR 1-139, 1-141 (1985); Lucostic, supra; and was more detailed, better explicated and more comprehensive than the opinion of Dr. Modi, see generally Hall v. Director, OWCP, 8 BLR 1-193, 1-195 (1985). Consequently, the administrative law judge found that claimant failed to establish total disability under Section 718.204(c)(4). The administrative law judge's findings under Section 718.204(c) are supported by substantial evidence and we hereby affirm them. Inasmuch as claimant has failed to establish a requisite element of entitlement, i.e. total disability, claimant is precluded from entitlement to benefits under Part 718, and we need not address the remaining issues of etiology and

causation. See Trent, supra.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge