

BRB No. 97-1846 BLA

ALFRED W. HILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KOCH CARBON	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Alfred Hill, Raven, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order Denying Benefits (97-BLA-0444) of Administrative Law Judge Thomas M. Burke 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). Claimant filed a claim in May, 1994. Director's Exhibit 1. The administrative law judge, in a Decision and Order Denying Benefits issued in August, 1997, found that the evidence was insufficient to establish the

---

<sup>1</sup> As stated in the Board's Order, issued October 6, 1997, Tim White, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, acting on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order Denying Benefits, but Mr. White is not representing claimant on appeal. *Hill v. Koch Carbon*, BRB No. 97-1846 BLA (Oct. 6, 1997)(unpub. Order); see *Shelton v. Claude V. Keen Trucking*, 19 BLR 1-88 (1995).

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(5). Accordingly, benefits were denied. Claimant appeals, contending generally that the administrative law judge erred in denying benefits. Employer responds, advocating affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the appeal or otherwise participate in the appeal, unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised 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 into the Act by 30 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 Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is a contributing cause of the miner's total disability. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).<sup>2</sup> Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

With regard to Section 718.204(c)(1), the administrative law judge properly found that none of the pulmonary function tests produced results evidencing total disability. Director's Exhibits 14, 40, 41, 43; Employer's Exhibits 1, 2. Similarly, the administrative law judge properly found that none of the arterial blood gas tests produced results evidencing total disability under Section 718.204(c)(2). Director's Exhibits 14, 17, 40, 41; Employer's Exhibit 1. We, therefore, affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1) and (c)(2).<sup>3</sup>

---

<sup>2</sup> We will apply the law set forth by the United States Court of Appeals for the Fourth Circuit inasmuch as the miner's most recent coal mine employment appears to have occurred in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3, 8, 10, 12, 23, 25, 36.

<sup>3</sup> The administrative law judge did not mention a blood gas test by Dr. Forehand dated September 23, 1993. Director's Exhibit 40. In addition, the administrative law judge did not mention exercise results for a blood gas test by Dr. Forehand dated June 6, 1994. Director's Exhibits 14, 17. These errors by the administrative law judge are harmless, inasmuch as the results for these tests were non-qualifying. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). 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, C. A “non-qualifying” study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

The administrative law judge also correctly found that Section 718.204(c)(3) is not applicable because there is no evidence that claimant suffers from cor pulmonale with right sided congestive heart failure. We, therefore, affirm the administrative law judge's finding that total disability was not established under Section 718.204(c)(3).

With regard to Section 718.204(c)(4), the administrative law judge stated that there "is not one physician's report of record that finds claimant to be totally disabled from a respiratory disease." Decision and Order at 11. The administrative law judge properly found that Dr. Mitchell's report does not address the issue of total disability.<sup>4</sup> Director's Exhibit 40. The administrative law judge also properly determined that Dr. Ranavaya found claimant not to be totally disabled, Director's Exhibit 33, and that Dr. Sargent found that claimant had the respiratory capacity to return to his last coal mine job as section foreman. Director's Exhibit 41. The administrative law judge further found that Dr. Fino's opinion was insufficient to establish total disability inasmuch as Dr. Fino stated that claimant has a mild, reversible respiratory impairment due to smoking, but is neither partially nor totally disabled. See *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); Employer's Exhibit 8. Moreover, the administrative law judge permissibly determined that Dr. Forehand's findings were insufficient to establish total disability under Section 718.204(c)(4).<sup>5</sup> See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Therefore, we affirm the administrative law judge's finding that claimant is unable to prove total disability pursuant to Section 718.204(c)(4) as supported by substantial evidence.

---

<sup>4</sup> Dr. Mitchell, under "impressions," stated merely that claimant had dyspnea on exertion, probably secondary to early chronic obstructive pulmonary disease. Director's Exhibit 40. Dr. Mitchell also found "obstructive component to airflow" from a pulmonary function study, with some improvement after bronchodilation. *Id.*

<sup>5</sup> In his report dated June 6, 1994, Dr. Forehand stated that: "claimant demonstrates a mild to moderate impairment. Exertional activities and dusty conditions may well aggravate his ventilatory status. A change in location is indicated." Director's Exhibit 15. In a follow-up letter dated July 16, 1994, Dr. Forehand stated, "[claimant's] respiratory impairment is not sufficient to keep him from working but may get worse if he does not change his work environment in the coal mines." Director's Exhibit 16.

Finally, we affirm the administrative law judge's finding that Section 718.204(c)(5) is not applicable because the administrative law judge correctly found that it is only available in a survivor's claim in the absence of medical evidence. 20 C.F.R. §718.204(c)(5).

Since we affirm the administrative law judge's findings that the evidence was not sufficient to establish total disability pursuant to Section 718.204(c), an essential element of entitlement, we decline to address the administrative law judge's findings at Section 718.202(a)(1)-(4), inasmuch as any errors therein would be harmless. See *Perry, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge