

BRB Nos. 00-1067 BLA  
and 00-1067 BLA-A

BILLY JOE WHITT )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 KREST COAL COMPANY, )  
 INCORPORATED )  
 )  
 PEGGY O COAL COMPANY )  
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 )  
 PMC COAL COMPANY )  
 )  
 )  
 POPLAR CREEK COAL COMPANY )  
 )  
 Employers-Respondents )  
 ) DATE ISSUED: \_\_\_\_\_  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge,  
United States Department of Labor.

Billy Joe Whitt, Hurley, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for Peggy O  
Coal Company.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for PMC Coal  
Company.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for Poplar Creek  
Coal Company.

Sarah M. Hurley (Howard M. Radzely, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel,<sup>2</sup> appeals, and Peggy O Coal Company cross-appeals the Decision and Order (99-BLA-0289) of Administrative Law Judge Pamela Lakes Wood denying benefits on a miner's 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).<sup>3</sup> Initially, the administrative law judge found Krest Coal Company, Incorporated (Krest) to be the responsible operator and, alternatively, Peggy O Coal Company, Incorporated to be liable, if Krest were found to be uninsured or insolvent.<sup>4</sup> Decision and Order at 14. The administrative law judge credited the miner with twenty-one years of coal mine employment. Decision and Order at 10. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), but insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Decision and Order at 17-21. Accordingly, benefits were denied.

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<sup>1</sup>Claimant is Billy Joe Whitt, the miner, who filed his claim for benefits on August 27, 1993. Director's Exhibit 1.

<sup>2</sup>Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>3</sup>The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>4</sup>The administrative law judge dismissed Lassie Coal Corporation and Baker Coal Company at the hearing, 1999 Hearing Transcript at 66-67. Decision and Order at 1 n.1. In her Decision and Order, the administrative law judge found that claimant was not employed for at least one year with PMC Coal Company or Poplar Creek Coal Company. Decision and Order at 11-13.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Peggy O Coal Company has filed a combined response brief and cross-appeal. In its response brief, Peggy O Coal Company urges affirmance of the administrative law judge's denial of benefits. Peggy O Coal Company's Brief at 9-17. In its cross-appeal, Peggy O Coal Company asserts that the administrative law judge erred in finding Peggy O Coal Company to be secondarily liable for benefits and in determining that claimant's employment with PMC Coal Company did not equal one year. Peggy O Coal Company's Brief at 18-24. PMC Coal Company has filed a response brief to Peggy O Coal Company's Cross-Appeal asserting that the administrative law judge properly denied benefits in this case and properly dismissed PMC Coal Company as a potentially responsible operator. PMC Coal Company's Response Brief at 2-8. Poplar Creek Coal Company has also filed a response brief urging affirmance of the administrative law judge's denial of benefits. Poplar Creek Coal Company's Response Brief at 13-17. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, requesting that the Board reverse the administrative law judge's determination that Peggy O Coal Company is secondarily liable for benefits and affirm the administrative law judge's finding that PMC Coal did not employ claimant for at least one year. Director's Brief at 4-5.<sup>5</sup>

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<sup>5</sup>We affirm the administrative law judge's length of coal mine employment finding inasmuch as it is not adverse to claimant and is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 21, 2001, to which Peggy O Coal Company, PMC Coal Company, Poplar Creek Coal Company, and the Director have responded.<sup>6</sup> Claimant has not filed a response.<sup>7</sup> Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). 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).

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<sup>6</sup>The Director, Office of Workers' Compensation Programs, Peggy O Coal Company, PMC Coal Company, and Poplar Creek Coal Company have indicated that the instant case would not be affected by application of the regulations which are the subject of litigation.

<sup>7</sup>Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

Regarding the issue of total respiratory disability,<sup>8</sup> the administrative law judge considered all the pulmonary function studies and blood gas studies in the record and permissibly found that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) (2000) inasmuch as none of the tests yielded qualifying<sup>9</sup> values. Decision and Order at 19; *see* 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(ii); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Similarly, the administrative law judge permissibly found that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(c)(3) (2000) inasmuch as the record does not contain any evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 19; *see* 20 C.F.R. §718.204(b)(2)(iii). Therefore, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3) (2000). *See* 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii).

Relevant to the issue of total respiratory disability, Dr. Forehand<sup>10</sup> found claimant to have a disabling respiratory impairment whereas Drs. Dahhan, Castle, Broudy, and Fino did not find claimant to have such an impairment. Director's Exhibits 15, 16, 118, 126, 129; Employer's Exhibit 18. Reviewing the medical opinion evidence pursuant to Section 718.204(c)(4) (2000), the administrative law judge found the qualifications of Drs. Dahhan, Castle, Broudy, and Fino, who are all Board-certified in internal medicine and pulmonary disease, Director's Exhibits 34, 79, 128, to be superior to the qualifications of Dr. Forehand, who is a B-reader,<sup>11</sup> Director's Exhibit 161. Decision and Order at 20. Therefore, the

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<sup>8</sup>The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

<sup>9</sup>A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

<sup>10</sup>The administrative law judge noted that while Dr. Forehand is currently claimant's treating physician, it is unclear whether Dr. Forehand was claimant's treating physician prior to rendering his opinion. Decision and Order at 20. The administrative law judge reasoned that although claimant testified that Dr. Forehand was his treating physician, 1999 Hearing Transcript at 41, Dr. Forehand noted on his report in 1993 that Dr. Modi was claimant's "personal physician," Director's Exhibit 15. Decision and Order at 20 n.25. Therefore, the administrative law judge surmised that while Dr. Forehand may have become claimant's treating physician, Dr. Forehand was not claimant's treating physician in 1993 when he submitted his report.

<sup>11</sup>The record reveals that Dr. Forehand is not Board-certified in internal medicine and

administrative law judge properly found that claimant failed to demonstrate total respiratory disability by the medical opinion evidence based on the qualifications of Drs. Dahhan, Castle, Broudy, and Fino. *Id*; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); see also *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as the administrative law judge permissibly found that claimant has failed to demonstrate total respiratory disability by a preponderance of the medical opinion evidence, we affirm the administrative law judge's Section 718.204(c)(4) (2000) finding. See 20 C.F.R. §718.204(b)(2)(iv); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 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); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Considering "the evidence as a whole," the administrative law judge found that claimant failed to establish total respiratory disability pursuant to Section 718.204(c) (2000). Decision and Order at 20. We affirm the administrative law judge's finding that claimant failed to establish total respiratory disability because she permissibly weighed all the relevant evidence pursuant to Section 718.204(c) (2000), see 20 C.F.R. §718.204(b)(2); see also *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*), and her finding is supported by substantial evidence, see *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985). Inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, a requisite element of entitlement under Part 718, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we also affirm her denial of benefits. We need not address, therefore, the arguments regarding the responsible operator issue raised in Peggy O Coal Company's cross-appeal.

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

SO ORDERED.

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pulmonary disease. Director's Exhibit 161.

ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge