

BRB No. 97-1191 BLA

JOHN B. HORN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

John B. Horn, North Tazewell, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order (95-BLA-1616) of Administrative Law Judge Edward Terhune Miller denying benefits 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).<sup>1</sup> The administrative law judge found that the parties stipulated

<sup>1</sup>Claimant’s appeal was filed on claimant’s behalf by Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

that claimant had twenty-five years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4), that pneumoconiosis arising out of coal mine employment was not established pursuant to 20 C.F.R. §718.203(b) and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant's appeal, herein, followed. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to his appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, see *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 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).<sup>3</sup> Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, see *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

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<sup>2</sup>Claimant filed a claim on July 20, 1994, Director's Exhibit 1.

<sup>3</sup>The presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, see 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

After consideration of the administrative law judge's Decision and Order and the evidence of record, the Decision and Order of the administrative law judge is supported by substantial evidence, contains no reversible error, and, therefore, is affirmed. The administrative law judge properly found pursuant to Section 718.204(c) that all of the relevant pulmonary function study evidence under Section 718.204(c)(1), see Director's Exhibit 9; Employer's Exhibit 5, and blood gas study evidence of record under Section 718.204(c)(2), Director's Exhibit 13; Employer's Exhibit 5, was non-qualifying.<sup>4</sup> Decision and Order at 7. Furthermore, as the administrative law judge found, there was no evidence in the record of cor pulmonale with right-sided congestive heart failure, see 20 C.F.R. §718.204(c)(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of the four physicians who provided medical reports of record. Dr. Rasmussen found that claimant retains the pulmonary capacity to perform and/or resume his last regular coal mine job, Director's Exhibit 10. Dr. Michos found that claimant was not totally disabled from a respiratory standpoint, Director's Exhibit 12. Dr. Hippensteel found that claimant has no pulmonary impairment and has the pulmonary capacity to continue at his regular job in the mines, Employer's Exhibit 5. Finally, Dr. Piracha did not provide an opinion as to impairment or disability, Employer's Exhibit 1.

The administrative law judge properly found that there was no medical opinion evidence of any totally disabling respiratory or pulmonary impairment, see 20 C.F.R. §718.204(c)(4). Thus, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1)-(4) as supported by substantial evidence, see *Budash, supra; Fields, supra; Rafferty, supra; Shedlock, supra*. Consequently, inasmuch as total disability, a requisite element of entitlement, was not established, entitlement under Part 718 is precluded, see *Trent, supra; Perry, supra*.<sup>5</sup>

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<sup>4</sup>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, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (2).

<sup>5</sup>Inasmuch as the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c) is affirmed, we need not address the administrative law judge's findings pursuant to Section 718.202(a), see *Trent, supra*.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge