BRB Nos. 01-0690 BLA
and 01-0690 BLA-A

JOSEPH A. MAYNARD Claimant-Petitioner Cross-Respondent v. LODESTAR ENERGY, INCORPORATED Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Thomas G. Polites (Wilson, Sowards, Polites & McQueen), Lexington, Kentucky, for claimant.

Stanley S. Dawson (Corporation Counsel, Lodestar Energy, Incorporated), Lexington, Kentucky, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denial of Benefits (2000-BLA-0158) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Initially, the administrative law judge found the instant claim to be

[1] The Department of Labor has 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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently

timely filed pursuant to 20 C.F.R. §725.308. Adjudicating the claim pursuant to 20 C.F.R. Part 718, based on claimant's January 26, 1999 filing date, the administrative law judge credited claimant with twenty-five years of coal mine employment, finding that the issue was not contested by employer. In addition, the administrative law judge found Lodestar Energy, Incorporated to be the properly designated responsible operator. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). However, he found the weight of the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). In addition, the administrative law judge found that the evidence failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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issued an Order on April 9, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001).

On appeal, claimant contends that the administrative law judge erred in finding that the medical evidence was insufficient to establish entitlement to benefits. In particular, claimant contends that the administrative law judge erred in failing to adequately explain the rationale for his determination that the medical evidence as a whole was insufficient to establish a total respiratory disability pursuant to Section 718.204(b). In addition, claimant contends that the administrative law judge erred in failing to apply the rebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[2] The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

In a cross-appeal, employer contends that the administrative law judge erred in finding that the medical evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In addition, employer contends that the administrative law judge erred in failing to render a specific finding regarding whether claimant's pneumoconiosis was due to his coal

[2] In its response brief, employer also notes its disagreement with the Board's denial of its Motion to Place Appeal in Abeyance, *see Maynard v. Lodestar Energy, Inc.*, BRB Nos. 01-0690 BLA and 01-0690 BLA-A (June 15, 2001)(Order)(unpub.), thus, preserving the issue for future appeal. Employer's Response Brief at 4-5 (unpaged).

[3] The parties do not challenge the administrative law judge's decision to credit the miner with twenty-five years of coal mine employment or his finding that Lodestar Energy, Inc. was the properly name responsible operator. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

dust exposure pursuant to 20 C.F.R. §718.203. Neither claimant nor the Director has submitted a response to employer's cross-appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is 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)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

On appeal, claimant contends that the administrative law judge erred in failing to adequately discuss his rationale for finding that the medical evidence of record was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). We disagree.

In considering whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge considered all of the relevant medical evidence and rationally found that the weight of the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b). Decision and Order at 10-12. Initially, the administrative law judge properly found that the pulmonary function studies of record were insufficient to demonstrate total respiratory disability inasmuch as none of the studies produced qualifying values.[4] Decision and Order at 10-11; Director's Exhibits 15, 21, 31; Claimant's Exhibit 3; 20 C.F.R. §718.204(b)(2)(i). Likewise, the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, total respiratory disability was not demonstrated pursuant to Section 718.204(b)(2)(iii). Decision and Order at 11; 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other*

[4] 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(b)(2)(i), (b)(2)(ii).

grounds, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). Furthermore, total respiratory disability was not demonstrated at Section 718.204(b)(2)(iv), as the administrative law judge properly found that none of the medical opinions of record included a diagnosis of total respiratory disability.[5] Decision and Order at 11-12; 20 C.F.R. §718.204(b)(2)(iv); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v.*
W. G. Moore & Sons, 9 BLR 1-4 (1986)(*en banc*).

With regard to the blood gas study evidence of record, the administrative law judge found that it was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(ii), based on his determination that the most recent study, dated June 30, 1999, yielded qualifying values.[6] Decision and Order at 12; Director's Exhibit 31; Claimant's Exhibit 3; 20 C.F.R. §718.204(b)(2)(ii). However, as the administrative law judge properly stated, in order to establish the existence of a totally disabling respiratory or pulmonary disability pursuant to Section 718.204(b), he must now weigh the evidence which

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[5] Within his Section 718.202(a)(4) discussion, the administrative law judge set forth the medical opinions of record, *i.e.*, the reports of Drs. Mettu, Templin, Younes, Powell, Branscomb, Chandler and Westerfield, including the professional qualifications of the physicians, the evidence relied upon by the physicians in rendering their diagnoses and their diagnoses regarding the existence of pneumoconiosis as well as whether claimant was suffering from a respiratory impairment. Decision and Order at 7-9; Director's Exhibits 15, 21, 31; Claimant's Exhibits 3, 4; Employer's Exhibits 4, 9, 10-12, 14, 17.

[6] The record also contains three non-qualifying blood gas studies dated August 4, 1993, November 10, 1993 and February 17, 1999. Decision and Order at 12; Director's Exhibits 15, 21, 26.

demonstrates total respiratory disability against the contrary probative evidence of record, like and unlike. Decision and Order at 12; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

In weighing this evidence, the administrative law judge rationally found that the contrary probative evidence of record, consisting of the medical opinions of Drs. Powell, Younes, Chandler, Branscomb and Mettu, none of which included a diagnosis of total respiratory disability, as well as the pulmonary function studies of record, none of which produced qualifying results, outweighed the evidence supportive of a finding of total respiratory disability, *i.e.*, the June 30, 1999 blood gas study. Decision and Order at 12; *Fields, supra; Shedlock, supra*. Therefore, since the administrative law judge properly considered all of the relevant evidence of record, we affirm the administrative law judge's finding that the medical evidence as a whole is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b) as supported by substantial evidence.[7] Decision and Order at 12; 20 C.F.R. §718.204(b); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields, supra*; *Shedlock, supra*.

In light of our affirmance of the administrative law judge's finding that the evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment, thus precluding an award of benefits, we decline to address the issues raised by employer in its cross-appeal.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

[7] In addition, contrary to claimant's contention, the presumption of total disability due to pneumoconiosis set forth at Section 718.305 is not applicable in this claim inasmuch as the instant claim was not filed prior to January 1, 1982. *See* 20 C.F.R. §718.305(e).

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge