BRB No. 97-1303 BLA

CHARLES E. HORN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOK CARRIER CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Charles E. Horn, Rosedale, Virginia, *pro se*.

Frederick T. Schubert, II (Midkiff & Hiner, P.C.), Richmond, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (95-BLA-2080) of Administrative Law Judge Edith Barnett 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). The administrative law judge credited claimant with more than thirty-two years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The

[1] Tim White of Stone Mountain Health Services in Vansant, Virginia, assisted claimant in filing his appeal. The Board, in an Order dated June 24, 1997, informed the parties that claimant would be treated as a *pro se* claimant. *See* 20 C.F.R. §§802.211(e) 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

administrative law judge found that Cook Carrier Corporation was the responsible operator and dismissed Knox Creek Coal Corporation as the responsible operator. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.[2]

Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not submit a brief on appeal.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. 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).

Initially, we address the administrative law judge's finding that the evidence does not establish total disability pursuant to Section 718.204(c). As the administrative law judge found, the record contains the results of three pulmonary function studies, the two studies administered in 1994 and 1995 which yielded non-qualifying values, and the study administered in 1996 which yielded qualifying values.[3] Director's Exhibits 11, 29; Claimant's Exhibit 1. The administrative law judge also noted that both Drs. Castle and Fino invalidated the 1996 pulmonary function study. Employer's Exhibits 6-7. The administrative law judge stated:

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[2] Inasmuch as the administrative law judge's length of coal mine employment finding and her responsible operator determination are not challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] 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), (c)(2).

> Although the administering technician noted "Good Cooperation" and "Good Effort" on the Spirograph Chart (CX 1), I note that Dr. Castle and Dr. Fino, who are both Board-certified pulmonary specialists, each found that the March 21, 1996 pulmonary function study was not valid, because it does not reflect Claimant's maximum effort. (EX 6, 7). In view of the superior credentials of Drs. Castle and Fino, and the unexplained precipitous drop in the 1996 pulmonary function results, I find that the pulmonary function studies conducted in 1994 and 1995 (before and after bronchodilator) more accurately reflect Claimant's actual pulmonary function. Therefore, I find that the Claimant has not established total disability under §718.204(c)(1).

Decision and Order Denying Benefits at 4-5.

We affirm the administrative law judge's findings pursuant to Section 718.204(c)(1). The administrative law judge may properly credit the opinions of the highly qualified physicians regarding the validity of a pulmonary function study over the comments of the administering technician, *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *see also Peabody Coal Co. v. Brinkley,* 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992). We, therefore, affirm the administrative law judge's reliance on the invalidation reports of Drs. Fino and Castle to find that the 1996 pulmonary function study is entitled to little weight. Inasmuch as we affirm the administrative law judge's finding that the 1996 pulmonary function study is not reflective of claimant's pulmonary condition, and since the two other pulmonary function studies of record yielded non-qualifying results, we affirm the administrative law judge's finding that total disability is not demonstrated pursuant to Section 718.204(c)(1), as this finding is supported by substantial evidence. *See* 20 C.F.R. §718.204(c)(1).

The administrative law judge also found that total disability was not demonstrated pursuant to Section 718.204(c)(2). As the administrative law judge noted, the record contains the results of two blood gas studies, neither of which yielded qualifying values. Director's Exhibits 12, 29. Inasmuch as the administrative law judge accurately found that none of the blood gas studies of record yielded qualifying values, we affirm her finding that the evidence does not demonstrate total disability at Section 718.204(c)(2). *See* 20 C.F.R. §718.204(c)(2); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge also determined that the evidence fails to establish that claimant has cor pulmonale with right sided congestive heart failure, and therefore, that claimant failed to demonstrate total disability pursuant to Section 718.204(c)(3). Inasmuch as the administrative law judge correctly determined that the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we affirm the administrative law judge's Section 718.204(c)(3) finding as supported by substantial evidence. *See* 20 C.F.R. §718.204(c)(3).

The administrative law judge also found that the medical opinion evidence is

insufficient to establish total disability pursuant to Section 718.204(c)(4). The administrative law judge stated:

> [N]one of the examining or reviewing physicians found that the Claimant suffers from a totally disabling respiratory or pulmonary impairment. To the contrary, the consensus among the physicians is that he does not suffer from any significant respiratory or pulmonary impairment, and that he can perform his last usual coal mine employment. Therefore, I find that the Claimant has failed to establish total disability under §718.204(c)(4).

Decision and Order Denying Benefits at 8. As the administrative law judge described, none of the medical opinions diagnoses claimant as suffering from a respiratory or pulmonary impairment.[4] Inasmuch as the administrative law judge accurately described the medical opinion evidence as containing no evidence that claimant suffers from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the evidence does not demonstrate total disability pursuant to Section 718.204(c)(4). *See* 20 C.F.R. §718.204(c)(4); *Kuchwara, supra*.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to carry claimant's burden of establishing that he is totally disabled pursuant to Section 718.204(c), one of the essential elements of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm the administrative law judge's denial of benefits.

[4] Dr. Forehand examined claimant in 1994 and opined that claimant had no respiratory impairment. Director's Exhibit 13. Dr. Castle examined claimant and later reviewed the evidence of record and opined that there is no evidence of any respiratory impairment. Director's Exhibit 29; Employer's Exhibits 4, 6. Dr. Fino reviewed the evidence of record and opined that there is no respiratory impairment present. Employer's Exhibits 2, 7.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge