BRB No. 98-0772 BLA

CERO BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS 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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Cero Baker, Oakwood, Virginia, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order

[1] Tim White, a counselor employed by Stone Mountain Health Services, appeared on claimant's behalf at the administrative hearing. Claimant's Notice of Appeal regarding the denial of benefits in the present case was accompanied by a letter written by Mr. White. In a letter dated February 27, 1998, the Board informed Mr. White that claimant's appeal would be considered under the standard applicable to claimants who file appeals without the assistance of counsel. *See Shelton v.*

(97-BLA-1742) of Administrative Law Judge John C. Holmes 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). The administrative law judge found that claimant failed to establish the existence of either pneumoconiosis or a totally disabling respiratory impairment. Accordingly, the administrative law judge denied benefits.[2]

Claimant appeals, without the assistance of counsel, contending generally that the administrative law judge erred in denying benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not participated in 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). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claude V. Keene Trucking Co., 19 BLR 1-88 (1995)(Order).

[2] The Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is not applicable to this claim which was filed after January 1, 1982. *See* Director's Exhibit 1; 20 C.F.R. §718.305(a), (e).

We affirm the administrative law judge's finding that total disability was not demonstrated pursuant to Section 718.204(c)(1)-(2) as none of the pulmonary function studies and blood gas studies of record was qualifying.[3] *See* 20 C.F.R. §718.204(c)(1)-(2). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge also properly found that total disability was not demonstrated pursuant to Section 718.204(c)(3) inasmuch as there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(c)(3). We finally affirm the administrative law judge's finding that total disability was not demonstrated pursuant to Section 718.204(c)(4) as neither Dr. Forehand nor Dr. Hippensteel diagnosed a totally disabling pulmonary or respiratory impairment. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Beatty v. Danri Corporation*, 16 BLR 1-11 (1991); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). As claimant has failed to establish the existence of a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(c), a requisite element of entitlement under Part 718, entitlement thereunder is precluded.[4] *See*

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the table 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).

[4] The administrative law judge also properly found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Relying on the numerically superior negative interpretations by the physicians with the superior qualifications, the administrative law rationally found that the weight of the x-ray evidence was negative. 20 C.F.R. §718.202(a)(1); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995)*; Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). The administrative law judge properly stated that the record is devoid of biopsy evidence and that none of the presumptions is applicable. 20 C.F.R. §718.202(a)(2)-(3). With respect to the medical opinions pursuant to Section 718.202(a)(4), the administrative law judge properly concluded that neither Dr. Forehand nor Dr. Hippensteel diagnosed the existence of pneumoconiosis or a chronic pulmonary disease significantly related to, or aggravated by, dust exposure in coal mine employment, and, thus, there are no

Trent v. Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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opinions sufficient to establish the existence of pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, pursuant to Section 718.202(a)(4). *See Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Handy v. Director, OWCP,* 16 BLR 1-73 (1992); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge