

BRB No. 97-1506 BLA

BILLY MARCUM)
)
 Claimant-Petitioner)
)
 v.)
)
 ROCK RUN MINING, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL-WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Mollie W. Neal,
Administrative Law Judge, United States Department of Labor.

Billy Marcum, Holden, West Virginia, *pro se*.

Stephen E. Crist (West Virginia Coal-Workers' Pneumoconiosis Fund),
Charleston, West Virginia, for carrier.

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, BROWN and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (96-BLA-1205) of Administrative Law Judge Mollie W. Neal 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 fifteen and three-quarters years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that Rock Run Mining, Incorporated (employer) was the responsible operator. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found the evidence insufficient to establish that claimant is totally disabled from a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, she denied benefits.

Carrier responds to claimant's appeal. Carrier asserts that the administrative law judge correctly determined that claimant did not establish total disability pursuant to Section 718.204(c). However, carrier maintains that the administrative law judge erred in finding the evidence sufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4). In addition, carrier contends that the administrative law judge erred in her responsible operator determination, asserting that employer is not the proper responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds by letter. The Director indicates that he is not responding to the administrative law judge's finding on the merits. However, he urges affirmance of the administrative law judge's responsible operator determination.¹

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

¹ Inasmuch as the administrative law judge's length of coal mine employment finding is not challenged on appeal and is not adverse to claimant, this finding is affirmed. See *generally Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the evidence insufficient to establish total disability pursuant to Section 718.204(c), the administrative law judge determined that subsections 718.204(c)(3) and (c)(5) were not applicable because there was no evidence of cor pulmonale with right sided congestive heart failure, and this is a living miner's claim. The administrative law judge found the evidence insufficient to demonstrate total disability pursuant to subsections 718.204(c)(1) and (c)(2) because the only pulmonary function study yielded non-qualifying results and the only blood gas study yielded non-qualifying results. The administrative law judge also determined that the two medical opinions were insufficient to demonstrate a totally disabling respiratory or pulmonary impairment pursuant to subsection 718.204(c)(4).

Inasmuch as the administrative law judge correctly found that the results of the only pulmonary function study and the only blood gas study were non-qualifying,² see Director's Exhibits 10, 13, we affirm her finding that total disability is not demonstrated pursuant to subsections 718.204(c)(1) or (c)(2). See 20 C.F.R. §718.204(c)(1), (c)(2). Further, we affirm the administrative law judge's finding that total disability is not demonstrated pursuant to subsections 718.204(c)(3) and (c)(5), inasmuch as the administrative law judge correctly determined that there is no evidence of cor pulmonale with right sided congestive heart failure in this living miner's case. See 20 C.F.R. §718.204(c)(3), (c)(5).

² 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).

In addition, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).³ We hold that the administrative law judge properly found that Dr. Pritchard's recommendation that claimant "avoid working in any dusty situation" is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. See *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87-88 (1988). We also affirm the administrative law judge's finding that Dr. Carrillo's diagnosis of a mild respiratory impairment does not support claimant's burden of establishing that he is totally disabled from a respiratory or pulmonary impairment. The administrative law judge is charged with comparing the exertional demands of claimant's usual coal mine employment with the medical assessments of his abilities in determining whether claimant is totally disabled pursuant to Section 718.204(c). See *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge found that claimant's usual coal mine job was that of a roof bolter which involved "supplying mining machines and placing bolts in the top of the mine," Decision and Order - Denying Benefits at 3, and referred to claimant's testimony that this job "occasionally required [claimant] to lift more than 50 pounds." Decision and Order - Denying Benefits at 3. We affirm the administrative law judge's finding that the "mild impairment" diagnosed by Dr. Carrillo does not support a finding that claimant is unable to perform his usual coal mine employment, see *Budash, supra*; *Mazgaj, supra*, as a reasonable and permissible finding made by the administrative law judge, who is charged with evaluating and weighing the evidence, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to demonstrate total disability pursuant to Section 718.204(c)(4), and her finding that claimant has failed to satisfy his burden of establishing total disability pursuant to Section 718.204(c).

Consequently, we affirm the administrative law judge's finding that claimant has failed to establish total disability pursuant to Section 718.204(c), one of the essential elements of entitlement pursuant to Part 718, see *Trent v. Director, OWCP*,

³ The record contains two medical opinions. Dr. Pritchard, claimant's treating physician, stated that claimant has "been diagnosed as having coal workers' pneumoconiosis. It is my opinion that this patient should avoid working in any dusty situation." Director's Exhibit 11. Dr. Carrillo examined claimant, and administered an x-ray, a pulmonary function study, a blood gas study, and an EKG. Dr. Carrillo diagnosed simple coal workers' pneumoconiosis due to claimant's exposure to coal dust. Dr. Carrillo opined that claimant suffered a mild respiratory impairment which he opined was "100%" due to his coal workers' pneumoconiosis. Director's Exhibit 12.

11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), and we affirm the administrative law judge's denial of benefits. In view of this holding, we need not address carrier's assertion regarding the administrative law judge's findings pursuant to Section 718.202(a)(4) as any errors therein would be harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, carrier, in its response brief, contends that the administrative law judge erred in finding that employer is the responsible operator. Arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief or those in support of the decision below. 20 C.F.R. §802.212(b). Inasmuch as the naming of the responsible operator is not adverse to claimant, and since carrier's responsible operator argument is not supportive of the administrative law judge's ultimate disposition, we decline to address carrier's contention as it has not been properly raised in an appeal or cross-appeal to the Board. See *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

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