BRB Nos. 08-0711 BLA
and 08-0711 BLA-B

R.A.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LAUREL CREEK COMPANY, INCORPORATED	)	DATE ISSUED: 06/11/2009
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

R.A., Omar, West Virginia, *pro se*.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals and employer cross-appeals the Decision and Order – Denying Benefits (2007-BLA-05474) of Administrative Law Judge Janice K. Bullard on a claim filed on April 24, 2006 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] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-seven years of coal mine employment, based on claimant's Social Security earnings records and claimant's testimony. Addressing the merits of entitlement, the administrative law judge found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not submit a substantive brief unless requested to do so by the Board.[2]

In its cross-appeal, employer contends that the administrative law judge erred in excluding employer's submission of Dr. Rasmussen's deposition testimony, based on her determination that the doctor's deposition testimony exceeded the evidentiary limitations pursuant to 20 C.F.R. §725.414.[3] Specifically, employer states that if the denial of benefits is vacated, then the administrative law judge's exclusion of Dr. Rasmussen's deposition testimony should be reversed and the case remanded to the administrative law judge for further consideration of the evidence. Claimant has not responded to employer's cross-appeal. The Director has submitted a letter stating that he will not submit a substantive response brief unless requested to do so by the Board.

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[1] The Director, Office of Workers' Compensation Programs (the Director), also filed a cross-appeal of the administrative law judge's Decision and Order, BRB No. 08-0711 BLA-A. However, by Order dated August 27, 2008, the Board accepted the Director's Motion to Dismiss and dismissed the Director's cross-appeal. *R.A. v. Laurel Creek Company, Inc.*, BRB No. 08-0711 BLA-A (Aug. 27, 2008)(unpub.)(Order).

[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-seven years of coal mine employment. Because this finding is not adverse to claimant, it is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Employer contends that Dr. Rasmussen's deposition testimony constituted its cross-examination of claimant's witness and that the administrative law judge's exclusion of Dr. Rasmussen's deposition testimony deprived it of its due process right to a full and fair hearing, by depriving it of the right to confront and cross-examine an opposing party's witness.

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 Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. 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; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After reviewing the administrative law judge's Decision and Order, and the evidence of record, we affirm the administrative law judge's denial of benefits as supported by substantial evidence. We specifically affirm her finding that claimant failed to establish total respiratory disability.

Pursuant to Section 718.204(b)(2)(i), the administrative law judge properly found that the three pulmonary function studies of record, administered on July 26, 2006, February 19, 2007 and August 8, 2007, all yielded non-qualifying results.[5] Decision and Order at 10; Director's Exhibit 10; Employer's Exhibits 5, 10. Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to Section 718.204(b)(2)(i). 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

The administrative law judge also accurately noted that the record contains three arterial blood gas studies conducted on July 26, 2006, February 19, 2007 and August 8,

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mining employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[5] A "qualifying" objective study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

2007, all of which yielded non-qualifying results. Decision and Order at 11; Director's Exhibit 10; Employer's Exhibits 5, 10. Therefore, we affirm her finding that the arterial blood gas study evidence did not establish total disability pursuant to Section 718.204(b)(2)(ii). 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 11.

Moreover, because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was precluded from establishing total disability pursuant to Section 718.204(b)(2)(iii).[6] 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 11.

In considering whether the medical opinions established total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen, Crisalli and Castle. Decision and Order at 6-8, 11. Dr. Rasmussen examined claimant and opined that claimant does not retain the respiratory capacity to perform very heavy manual labor because he has a "minimal to moderate loss of lung function as reflected by his ventilatory impairment and his reduced single breath carbon monoxide diffusing capacity."[7] Director's Exhibits 11, 12. Dr. Crisalli examined claimant and reviewed the medical evidence of record, and opined that while claimant had a mild degree of respiratory impairment, due to his history of cigarette smoking, he is not disabled in any way due to his pulmonary functional impairment. Employer's Exhibit 5. In his deposition testimony, Dr. Crisalli reiterated these conclusions. Employer's Exhibit 14. In addition, Dr. Crisalli noted his disagreement with Dr. Rasmussen's interpretation of various medical journal articles regarding the impact of cigarette smoking and coal dust exposure on the respiratory system. *Id*. Dr. Castle examined claimant, as well as reviewed the medical evidence of record, and opined that claimant, from a purely pulmonary standpoint, retained the respiratory capacity to perform his usual coal mine employment. Employer's Exhibit 10. Dr. Castle further stated that he found no disabling abnormality of ventilatory function from any cause. *Id*. In a subsequent deposition, Dr.

[6] The administrative law judge further found that there is no evidence of complicated pneumoconiosis is this case. Decision and Order at 6. Consequently, claimant is not entitled to the benefit of the irrebuttable presumption of total disability due to pneumoconiosis, as set forth at 20 C.F.R. §718.304.

[7] In his July 26, 2006 medical report, Dr. Rasmussen stated claimant does not retain the respiratory capacity to perform heavy manual labor. Director's Exhibit 11. In a supplemental report, Dr. Rasmussen further explained, because claimant's coal mine employment requires heavy manual labor, claimant does not retain the pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 12.

Castle testified that claimant's usual coal mine employment required intermittent heavy manual labor, but reiterated his opinion that claimant retained the respiratory capacity to perform his last coal mine employment. Employer's Exhibit 12.

Weighing the medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Crisalli and Castle, finding their opinions to be better documented and reasoned than the opinion of Dr. Rasmussen, which the administrative law judge found less persuasive. Decision and Order at 11; Director's Exhibits 11, 12; Employer's Exhibits 5, 10, 12, 14. In particular, the administrative law judge found Dr. Rasmussen's opinion, the only opinion supportive of claimant's burden of proof, less persuasive because Dr. Rasmussen failed to provide an adequate explanation of his conclusions, in light of the underlying objective medical evidence of record.[8] Decision and Order at 11. Consequently, she found that she was unable to accord substantial weight to Dr. Rasmussen's opinion and, therefore, found that the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 11-12.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1994), and to determine whether an opinion is reasoned, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Based on a review of the record, substantial evidence supports the administrative law judge's finding that the preponderance of the medical opinion evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge rationally addressed the credentials of the physicians, the documentation underlying their medical opinions, and the explanations for their conclusions, in according greater weight to the opinions of Drs. Crisalli and Castle over the opinion of Dr. Rasmussen. The administrative law judge properly found the opinion of Dr. Rasmussen was not sufficiently reasoned because Dr. Rasmussen failed to provide an adequate explanation for his conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 6-8, 11. Because the administrative law judge has considered all of the relevant evidence and

[8] Specifically, the administrative law judge noted that Dr. Rasmussen: relied on pulmonary function studies that were non-qualifying; failed to consider the effects of claimant's obesity, which was noted by the other doctors, on his respiratory impairment; and failed to perform "lung volumes" during his pulmonary function testing of claimant, which were performed by Dr. Castle. Decision and Order at 11.

substantial evidence supports her conclusions, we affirm the finding that the medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12. Moreover, we affirm the administrative law judge's finding that the medical evidence, when weighed together, is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). 20 C.F.R. §718.204(b)(2); *see Fields*, 10 BLR at 1-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 12.

Since claimant has not established total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Akers*, 131 F.3d at 441, 21 BLR at 2-275; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Moreover in light of our affirmance of the denial of benefits, we need not address the argument raised by employer in its cross-appeal.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge