BRB Nos. 07-0238 BLA
and 07-0238 BLA-A

A.W.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 11/29/2007
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (04-BLA-6535) of Administrative Law Judge Richard K. Malamphy rendered 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). Claimant filed his claim for benefits on November 25, 2002. Director's Exhibit 2. The administrative law judge determined that employer was the responsible operator,[1] that claimant worked fourteen years and nine months in coal mine employment, and that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge also determined that the evidence was insufficient to establish that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

Claimant appeals, challenging the administrative law judge's finding that he failed to establish total respiratory disability based on the opinions of Drs. Baker and Simpao. Employer responds to claimant's appeal, urging affirmance of the denial of benefits. As grounds for its cross-appeal, employer contends that it is not the responsible operator, and that liability for benefits should transfer to the Black Lung Disability Trust Fund. Employer also argues that the administrative law judge erred in determining that claimant has pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that employer was properly designated as the responsible operator. The Director takes no position on the merits of claimant's entitlement to benefits.

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. 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).

[1] The district director initially notified five operators of their potential liability for benefits: Eastover Mining Company (employer), Gordon Sams (Sams), Benham Coal Company (Benham), M&M Coal Company (M&M), and Walter Hoskins (Hoskins). The district director ultimately dismissed Benham because claimant worked for that company for less than one year. Director's Exhibit 22. In the Schedule for Admission of Evidence, the district director named employer as the responsible operator because he determined that Sams, M&M and Hoskins were financially incapable of assuming liability. The district director specifically stated that his search of pertinent records for the Office of Workers' Compensation Programs showed that neither Sams, nor M&M, nor Hoskins, was insured for the claim or carried self-insurance to pay liability for any benefits awarded to claimant. Director's Exhibits 21, 23, 24. In his Decision and Order – Denial of Benefits (Decision and Order) issued on October 26, 2006, which is the subject of this appeal, the administrative law judge rejected employer's argument that the district director failed to adequately investigate whether M&M or its owners were financially capable of paying benefits. Decision and Order at 3-4.

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant contends that the administrative law judge erred in his weighing of the medical opinions of record pursuant to Section 718.204(b)(2)(iv). Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant asserts that, taking into consideration his respiratory condition, the exertional requirements of his usual coal mine employment as an assistant mining engineer, and the medical opinions of Drs. Baker and Simpao, "it is rational to conclude that [his] condition prevents him from engaging in his usual coal mine employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant Brief at 5. Claimant adds that the administrative law judge failed to address the exertional requirements of his usual coal mine job prior to finding that claimant was not totally disabled. *Id*.

Claimant's contentions of error have no merit. With respect to Section 718.204(b)(2)(iv), the administrative law judge considered five medical reports by Drs. Baker, Simpao, Vuskovich, Dahhan, and Rosenberg.[2] Dr. Baker opined that claimant had "a Class II impairment with the FEV1 between 60 [percent] and 79 [percent] of predicted . . . based on Section 5.8, Page 106, Chapter Five, [*Guides to the Evaluation of Permanent Impairment*], Fifth Edition." Director's Exhibit 15. Dr. Baker specifically described claimant's respiratory impairment as a mild obstructive defect. *Id*. Although Dr. Baker opined that claimant should avoid further dust exposure, he did not discuss whether claimant was totally disabled from his usual coal mine work as a result of his mild respiratory impairment. *Id*. Dr. Simpao also diagnosed a mild respiratory impairment and check-marked a box on a Department of Labor examination form indicating that that claimant should avoid further dust exposure. Director's Exhibit 14. He further opined claimant did not have the respiratory capacity to perform "the work of a coal miner." *Id*. In contrast, Drs. Vuskovich, Dahhan, and Rosenberg opined that

[2] The administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as none of the pulmonary function or arterial blood gas studies was qualifying for total disability, and there is no evidence of record to establish that claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 9-10. We affirm the administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii) as they are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

clamant had a mild respiratory impairment but that he was not totally disabled. Director's Exhibits 14, 15; Employer's Exhibits 1, 6-8.

Contrary to claimant's assertion, the administrative law judge specifically considered whether claimant was totally disabled by his mild respiratory impairment, taking into account his work requirements. In so doing, the administrative law judge was persuaded by the weight of the opinions of Drs. Vuskovich, Dahhan, and Rosenberg, over Drs. Baker and Simpao, that claimant was not totally disabled. As noted by the administrative law judge, Drs. Vuskovich, Dahhan, and Rosenberg were apprised of claimant's last coal mine job and they specifically opined that claimant's mild respiratory impairment would not preclude the performance of his usual coal mine duties. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Decision and Order at 10. Because substantial evidence supports the administrative law judge's determination that claimant failed to establish total disability by a preponderance of the credible medical opinion evidence, we affirm the administrative law judge's finding at Section 718.204(b)(2)(iv). We also affirm, as supported by substantial evidence, the administrative law judge's overall determination that claimant failed to prove total respiratory disability pursuant to 718.204(b)(2).[3]

We also reject claimant's assertion that, since pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant's Brief at 5. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988);

[3] Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant asserts that the opinions of Drs. Baker and Simpao "may be sufficient to invoke a presumption of total disability." Claimant's Brief at 3. Claimant's reliance on *Meadows* is misplaced. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a) (2000). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even if the Part 727 regulations were applicable, the United States Supreme Court has held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method. *Mullins Coal Co. of Va. v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Oggero v. Director, OWCP, 7 BLR 1-860, 1-865 (1985). Because claimant failed to establish that he is totally disabled, a requisite element of entitlement, benefits are precluded. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). As we affirm the administrative law judge's denial of benefits, it is not necessary that we address employer's arguments on cross-appeal. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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