

BRB Nos. 05-0202 BLA  
and 05-0202 BLA-A

BOBBY W. CROWELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 10/26/2005
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Bobby W. Crowell, Providence, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order – Denial of Benefits (03-BLA-6112) of Administrative Law Judge Robert L. Hillyard 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).<sup>1</sup> The administrative law judge credited claimant with twenty-seven years of coal mine employment. Considering the merits of the claim under 20 C.F.R. Part 718, the administrative law judge found that the evidence is insufficient to establish both the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. Employer responds to claimant’s appeal, and urges the Board to affirm the administrative law judge’s denial of benefits based on his findings at 20 C.F.R. §§718.202(a) and 718.204(b)(2). Employer has also filed a cross-appeal of the decision below. Therein, employer challenges the validity of the evidentiary limitations provision at 20 C.F.R. §725.414, and argues that the administrative law judge erroneously excluded several of employer’s submissions pursuant to the evidentiary limitations. The Director, Office of Workers’ Compensation Programs (the Director), has filed a brief in response to employer’s cross-appeal. The Director urges the Board to reject employer’s challenge to the validity of the regulation at 20 C.F.R. §725.414 for the reasons the Board set forth in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The Director also argues that the administrative law judge properly applied the evidentiary limitations in this case, and urges the Board to decline to address employer’s “good cause” arguments for the submission of excessive evidence, where employer did not make these arguments when the case was pending before the administrative law judge.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge’s Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner’s claim, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled due

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<sup>1</sup>Claimant filed the instant claim on February 25, 2002. Director’s Exhibit 2.

to a respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will preclude a finding of entitlement to benefits.

In the instant case, the administrative law judge found that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). At 20 C.F.R. §718.204(b)(2)(i), the administrative law judge correctly noted that all three pulmonary function studies of record resulted in non-qualifying values. *See* Director's Exhibits 11, 12; Employer's Exhibit 2. At 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge likewise properly found that all three blood gas studies of record resulted in non-qualifying values. *See* Director's Exhibits 11, 12; Employer's Exhibit 2. The administrative law judge also corrected noted that the record contains no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that there are four relevant medical opinions of record. Dr. Simpao alone opined that claimant is totally disabled due to a respiratory or pulmonary impairment.<sup>2</sup> *See* Director's Exhibit 11. In contrast, Drs. Jarboe, Repsher, and Ghio each opined that claimant is not totally disabled due to a respiratory or pulmonary impairment.<sup>3</sup> *See* Director's Exhibits 6, 12;

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<sup>2</sup>By a report and questionnaire dated September 30, 2002, Dr. Simpao diagnosed a mild respiratory impairment due to pneumoconiosis arising out of claimant's coal mine employment. Director's Exhibit 11. Dr. Simpao also indicated that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment, explaining that this opinion is based on "objective findings on the chest x-ray and pulmonary function test along with symptomatology [and] physical findings as noted in the report." *Id.*

<sup>3</sup>By report dated October 1, 2002, Dr. Jarboe diagnosed a mild respiratory impairment. Director's Exhibit 12. Dr. Jarboe opined that claimant is not totally and permanently disabled from a pulmonary standpoint and "retains the functional respiratory capacity to do his last coal mining job of working as a supervisor or to perform similar work in a dust free environment." *Id.*; *see also* Employer's Exhibit 5.

By report dated July 24, 2003, Dr. Repsher noted claimant's usual coal mine employment as a "section foreman at the face" of the mine, and indicated that he found no evidence of coal workers' pneumoconiosis or "any other pulmonary or respiratory disease or condition, either caused by or aggravated by [claimant's] employment as a coal miner with exposure to coal mine dust." Employer's Exhibit 2. On deposition, Dr. Repsher testified that claimant does not have a totally disabling respiratory impairment. Employer's Exhibit 4 at 14.

Employer's Exhibits 2, 4, 5. The administrative law judge, within his discretion, accorded less weight to Dr. Simpao's report as he found that it is unexplained and thus not well reasoned. *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Specifically, the administrative law judge properly determined that Dr. Simpao fails to explain how the mild impairment he diagnosed "causes disability in this Claimant." Decision and Order at 15. The administrative law judge found that while Dr. Simpao indicates that he relied on symptomatology and physical findings, the physician "fails to explain how those items support his diagnosis of total respiratory disability." *Id.*; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

The administrative law judge further properly accorded greater weight to the contrary opinions of Drs. Jarboe, Repsher, and Ghio that claimant is not totally disabled due to a respiratory or pulmonary impairment, as he found that they are supported by their underlying objective evidence and consistent with the record as a whole. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge also found that Drs. Jarboe, Repsher, and Ghio, as pulmonologists, possess credentials superior to those of Dr. Simpao who, the administrative law judge indicated, "presents no medical specialty credentials." Decision and Order at 15, 16; *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because substantial evidence in the record supports the administrative law judge's findings at 20 C.F.R. §718.204(b)(iv), we affirm those findings.

Based on the non-qualifying nature of the pulmonary function studies and blood gas studies and the "well-reasoned" opinions of Drs. Jarboe, Repsher, and Ghio, the administrative law judge properly found that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 16. Because the evidence of record fails to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative

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By report dated May 29, 2004, Dr. Ghio opined that claimant has no respiratory impairment. Director's Exhibit 6. Dr. Ghio added that there is no evidence that claimant's capacity to perform work was "diminished" and that claimant "should be able to do his regular coal mining work or work requiring a similar effort." *Id.* Dr. Ghio's report reflects his consideration of claimant's usual coal mine employment as a supervisor at the face of the mine. *Id.*

law judge's denial of benefits as a finding of entitlement is precluded in this case. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-5. We, therefore, decline to address the administrative law judge's findings at 20 C.F.R. §718.202(a) or employer's arguments raised on cross-appeal.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS  
Administrative Appeals Judge