BRB Nos. 00-0261 BLA
and 00-0261 BLA-A

VERNON JOHNSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
WILGAR LAND COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-	)	
Cross-Respondents	)	
	)	
and	)	
	)	
TROJAN MINING AND PROCESSING/ SUNGLO D/B/A TROJAN MINING	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Cross-Respondents	)	
	)	
and	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

Cross-Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner, Chafin, Heaberlin & Patton), Prestonsburg, Kentucky, for employer Wilgar Land Company.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer Trojan Mining & Processing/Sun Glo d/b/a Trojan Mining.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer BethEnergy Mines, Incorporated.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer BethEnergy Mines, Incorporated cross-appeals, the Decision and Order (1999-BLA-0160) of Administrative Law Judge Robert L. Hillyard 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 credited claimant with twenty-three years of coal mine employment based on a stipulation by the parties and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his weighing of the x-ray, pulmonary function study and medical opinion evidence. *See* 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(1), (4). Employer BethEnergy Mines, Inc. responds, urging affirmance of the denial of benefits and also contends, on cross-appeal, that the administrative law judge erred in finding that it was the properly designated responsible operator. Employers

[1] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Wilgar Land Co. and Trojan Mining & Processing/Sun Glo d/b/a Trojan Mining, respond, urging affirmance of the administrative law judge's denial of benefits and his designation of the responsible operator. The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge's denial of benefits is supported by substantial evidence and also urges affirmance of the administrative law judge's designation of the responsible operator.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act 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 Part 718 in a living miner's claim, 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. 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*).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. With regard to total disability, claimant contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) based on the pulmonary function study evidence. We disagree. The administrative law judge noted that the April 18, 1996, February 19, 1997 and October 14, 1997 pulmonary function studies were qualifying, but rationally found that since the administering doctors noted claimant's effort was poor on all of these studies, the results were invalid and of no probative value. *Runco v. Director, OWCP*, 6 BLR 1-945 (1984); Decision and Order at 27; Director's Exhibits 73, 79. The administrative law judge further found that the January 25, 1999 non-qualifying pulmonary function study, the most recent of record, was the most probative pulmonary function study and therefore rationally concluded that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1). Decision and Order at 27; TMX 1. In making this determination, the administrative law judge noted that the studies were "effort-dependent." Moreover, contrary to claimant's assertion, the administrative law judge permissibly rejected the October 9, 1997, study by Dr. Sundaram since the physician failed to note claimant's effort and because the study was invalidated by Drs. Fino and Iosif. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 27; Director's Exhibit 79. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1).

In considering whether total disability was established under Section 718.204(c)(4), the administrative law judge rationally found the opinions of Drs. Fino, Dahhan, Broudy, Fritzhand, Iosif, Jarboe and Wright, which all stated that claimant was not totally disabled from a respiratory standpoint, reasoned and documented and supported by the credible, objective

medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 28. In addition, the administrative law judge reasonably found that the opinion of Dr. Sundaram regarding total disability was entitled to less weight based on his reliance on discredited pulmonary function studies and his failure to explain his conclusions. *See Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see also Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 4. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, since the administrative law judge rationally found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish total respiratory disability pursuant to Section 718.204(c), an essential element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 and we need not address claimant's and employers' other arguments on appeal. *Anderson, supra*; *Trent, supra*.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

[2] Inasmuch as claimant has failed to establish he is totally disabled, we need not address claimant's contention that the administrative law judge erred in failing to find the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) as well as employers' arguments regarding the responsible operator issue.

Administrative Appeals Judge