BRB Nos. 97-1829 BLA
and 97-1829 BLA-A

CONLEY J. BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
LITTLE BEAR MINING COMPANY	)	
	)	DATE ISSUED:
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
Cross-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Virginia Thornsbury, Iaeger, West Virginia, for claimant.

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

Michelle S. Gerdano (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and claimant cross-appeals the Decision and Order (96-BLA-1420) of Administrative Law Judge Richard D. Mills 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).[1] The administrative law judge accepted the parties' stipulation to eighteen years of coal mine employment and considered the claim, filed on December 30, 1993, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the x-ray evidence did not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1). The administrative law judge further found, however, that the medical opinions of record were sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also concluded that the presumption set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment, was invoked and was not rebutted. With respect to the issue of total disability under 20 C.F.R. §718.204(c)(1) and (c)(2), the administrative law judge determined that the objective studies of record did not establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment. The administrative law judge also concluded that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(c)(3), as the record did not contain any evidence of cor pulmonale with right sided congestive heart failure. Under 20 C.F.R. §718.204(c)(4), the administrative law judge determined that the medical opinions of record were insufficient to support a finding of total disability. In light of these findings, the administrative law judge declined to consider the issue of whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Concerning the issue of the appropriately designated responsible operator, the administrative law judge found that inasmuch as the Director failed to

[1]Virginia Thornsbury, a lay representative, appeared on claimant's behalf at the hearing conducted by the administrative law judge and filed the Petition for Review and a brief in support of the Petition for Review on claimant's behalf before the Board. Inasmuch as Ms. Thornsbury is acting as a *bona fide* lay representative in this case, we will use the standard of review applicable when a claimant is represented by counsel. *See Burkholder v. Director, OWCP*, 8 BLR 1-58 (1985); *see also Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

demonstrate conclusively that claimant did not work for at least 125 days for Rock E Coal Company, he was required to dismiss Little Bear Mining Company and its carrier, the West Virginia Coal Workers' Pneumoconiosis Fund, from the case.

The Director argues on appeal that the administrative law judge erred in determining that the evidence of record was inconclusive as to the identity of the last employer for whom claimant worked at least one year. In his cross-appeal, claimant contends that the administrative law judge erred in admitting certain items of evidence relating to a chest x-ray taken on February 4, 1994 and in allowing claimant only one day in which to identify a facility to which the Director could send the original film. Claimant also alleges that the administrative law judge did not properly weigh the medical opinion evidence under Section 718.204. The Director and carrier have responded and urge affirmance of the administrative law judge's Decision and Order.[2]

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 applicable 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 20 C.F.R. Part 718, claimant must prove that he suffers from 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 establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Concerning the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), claimant argues that the administrative law judge erred in declining to order the Director to provide the original chest x-ray dated February 4, 1994, to claimant and in giving claimant only one day following the hearing to identify a medical provider to whom the Director could send the film. Claimant further asserts that the administrative law judge should have excluded all of the readings of this film. We decline to address claimant's allegations of error with respect to this issue. Inasmuch as the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and this finding has been affirmed as unchallenged on appeal, *see n.2, supra*, error, if any, in the administrative law judge's consideration of the x-ray evidence under Section 718.202(a)(1) is harmless. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-

[2]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(c)(2) and (c)(3), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

344 (1985); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

With respect to Section 718.204(c)(1), claimant asserts that the administrative law judge should have considered the fact that claimant's use of bronchodilator medication on a regular basis precluded Drs. Vasudevan and Jabour from obtaining true pre-bronchodilator values. This contention is without merit. The administrative law judge is not required to ascertain whether a miner's ongoing use of a prescription bronchodilator has affected the values reported by a physician who did not administer a bronchodilator prior to conducting the miner's pulmonary function study. *See* 20 C.F.R. §§718.103(b)(8), 718.204(c)(1); Appendix B to 20 C.F.R. Part 718. The administrative law judge is merely charged with assessing whether the reported values are qualifying according to the figures set forth in Appendix B to Part 718 and resolving any conflicts between qualifying and nonqualifying studies. *Id.*; *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Thus, the administrative law judge rationally determined that the pulmonary function study that claimant performed for Dr. Vasudevan on November 8, 1994, did not produce qualifying values and, therefore, did not support a finding of total disability under Section 718.204(c)(1). Decision and Order at 14; Director's Exhibit 32. With respect to the pulmonary function study obtained by Dr. Jabour in conjunction with his examination of claimant on December 13, 1994, the administrative law judge noted correctly that inasmuch as the doctor did not report claimant's FVC, FEV1, or MVV, the administrative law judge could not weigh this study under Section 718.204(c)(1). Decision and Order at 14; *see* Director's Exhibit 40; 20 C.F.R. §§718.103(b), 718.204(c)(1).

Regarding the administrative law judge's consideration of the medical opinions of record pursuant to Section 718.204(c)(4), claimant asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Fino and Castle than he accorded to the opinion of Dr. Boutros, one of claimant's treating physicians. We reject this contention. Dr. Boutros determined that claimant is suffering from a moderately severe impairment, as revealed by the pulmonary function study that he obtained during his examination of claimant, and is totally disabled by this impairment. Director's Exhibit 29. Although the administrative law judge stated incorrectly that Dr. Boutros did not provide a copy of the pulmonary function study that formed the basis of his opinion, the administrative law judge rationally determined, under Section 718.204(c)(1), that the pulmonary function study obtained by Dr. Boutros on September 6, 1994, is not valid. Decision and Order at 14; Director's Exhibit 29. The administrative law judge acted within his discretion in relying upon the reviewing opinions of Drs. Castle and Fino, in light of their superior qualifications as physicians who are Board certified in Internal Medicine and Pulmonary Disease, and in light of the fact that they provided detailed explanations of their determinations that claimant did not perform the requisite maneuvers correctly during the September 6, 1994 study.[3] Director's Exhibits 29, 45; *see Clark v. Karst-*

[3]Dr. Boutros's qualifications are not contained in the record. Decision and Order at 10, n.3.

Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Thus, the administrative law judge's determination, under Section 718.204(c)(4), that Dr. Boutros's opinion is not properly documented is rational and supported by substantial evidence. The administrative law judge did not, therefore, commit reversible error in according diminished weight to Dr. Boutros's diagnosis of total disability despite his status as a treating physician. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Claimant also maintains that the administrative law judge should have disregarded the opinion of Dr. Ranavaya on the ground that his two medical reports present conflicting diagnoses. This contention is without merit. Dr. Ranavaya conducted a physical examination of claimant on June 10, 1993 and also reviewed claimant's medical records. Director's Exhibit 40. He noted that claimant received a state workers' compensation award of 15% for permanent partial disability related to occupational pneumoconiosis. *Id.*. Dr. Ranavaya concluded that as a result of this impairment, claimant is unable to perform any activity which requires sustained physical exertion. *Id.*. Dr. Ranavaya then examined claimant at the request of the Department of Labor on February 4, 1994, obtaining a blood gas study, pulmonary function study, chest x-ray, and EKG. Director's Exhibit 9. Dr. Ranavaya determined that claimant had pneumoconiosis and a mild impairment. *Id.*.

The administrative law judge acted within his discretion in finding that Dr. Ranavaya's initial report, which supported a finding of total disability, was entitled to little weight, as the doctor did not base his diagnosis of a disabling impairment upon any medical evidence before him, but rather accepted the West Virginia Occupational Pneumoconiosis Board's finding of a 15% permanent partial disability. Decision and Order at 15; Director's Exhibit 40; *see Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge rationally determined that Dr. Ranavaya's second report was insufficient to establish total disability pursuant to Section 718.204(c)(4), as the doctor characterized claimant's impairment as "mild."[4] Decision and Order at 15; Director's Exhibit 9; *see King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). Accordingly, the administrative law judge did not err in considering Dr. Ranavaya's reports under Section 718.204(c)(4) and concluding that they do not support a finding of total disability.

Finally, claimant asserts that in addressing the issue of total disability under Section 718.204(b) and (c), the administrative law judge should have considered the fact that claimant's last years of coal mine work were for companies that did not require pre-employment physical examinations and that claimant performed jobs that required less effort than the jobs he typically performed. We reject these arguments. The

[4]The administrative law judge found that in his last position as a section boss, claimant filled in for absentee workers and that he operated the miner, lifted belts, carried timbers, and shoveled belts, among other duties. Decision and Order at 3.

administrative law judge did not err in declining to perform an analysis regarding whether claimant's last coal mine jobs constituted comparable and gainful employment pursuant to Section 718.204(b)(2), inasmuch as claimant was not employed as of the time of the hearing, which is the relevant date for determining whether claimant is totally disabled. *See Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Moreover, there is no evidence in the record to support claimant's assertion that the jobs that he performed at the end of his career as a miner differed in a significant manner from the jobs that he previously held. To the contrary, claimant testified at the hearing that in his last year of coal mine employment, he frequently had to perform heavy manual labor with minimal assistance. Hearing Transcript at 14-16.

In addition, claimant's alleged inability to obtain a job with larger, better established mining companies near his residence due to medical findings of pneumoconiosis and impairment does not establish that claimant is totally disabled pursuant to Section 718.204(c). A finding of total disability under Section 718.204 in a living miner's claim must be premised upon medical evidence that establishes the existence of a totally disabling respiratory or pulmonary impairment in accordance with the criteria set forth in Section 718.204(c). Claimant's testimony regarding the nature of his last coal mine jobs cannot, therefore, establish total disability in light of the administrative law judge's appropriate finding that the medical evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(d)(2); *see generally Pekala v. Director, OWCP*, 13 BLR 1-1 (1989).

Inasmuch as the administrative law judge's finding that claimant did not establish total disability under Section 718.204(c) is rational and supported by substantial evidence, we affirm this finding. Because we have affirmed the administrative law judge's determination that claimant failed to demonstrate that he is totally disabled, an essential element of entitlement, we must also affirm the denial of benefits under Part 718. *See Trent*, *supra*; *Gee*, *supra*. In addition, in light of our decision to affirm the denial of benefits, we decline to consider the arguments raised in the Director's cross-appeal concerning the administrative law judge's dismissal of Little Bear Mining Company as the responsible operator. *See Johnson*, *supra*; *Larioni*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge