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Office of Administrative Law Judges
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Issue Date: 16 October 2003

No. 2002-BLA-5095

In the Matter of:
DREWIE HERMAN MAY,
Claimant,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Robert J. Greene, Esq.
On behalf of Claimant

MaryBeth Bernui, Esq.
On behalf of Director, OWCP

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

On April 18, 2002, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (DX 9).[2] A formal

[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

hearing on this matter was conducted on April 15, 2003, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the person upon whose disability the claim is based is a miner;

2. Whether the miner worked as a miner after December 31, 1969;

3. Whether the miner worked at least 22 years in or around one or more coal mines;

4. Whether the miner has pneumoconiosis as defined by the Act and the regulations;

5. Whether the miner's pneumoconiosis arose out of coal mine employment;

6. Whether the miner is totally disabled; and

7. Whether the miner's disability is due to pneumoconiosis.

(DX 9).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Drewie May ("Claimant") was born on August 23, 1935; he was sixty-seven years-old at the time of the hearing. (DX 1). Claimant left school after the second or third grade to work in a "pony mine" with his father and brothers. (Tr. 11). He tried to return to school in the seventh grade. (Tr. 11). He served in the United States Air Force from 1950 until 1957. (Tr. 17). Claimant testified that he last worked in 1988 or 1989. (Tr. 39). He had been prescribed inhalers, nebulizers, and medication for his breathing problems, and was using supplemental oxygen at all times. (Tr. 39-42).

Procedural History

Claimant filed an initial claim for benefits under the Act on February 2, 2001. (DX 1). The District Director, Office of Workers' Compensation Programs ("OWCP") issued an "order to show cause as to why claim should not be denied – not a miner" on November 8, 2001. (DX

6). After receiving no response from Claimant, the OWCP issued a proposed decision and order denying claim – not a miner on December 19, 2001. (DX 7). The OWCP determined that Claimant did not work in or around a coal mine or coal preparation facility. Claimant requested a formal hearing on January 14, 2002. (DX 8). On April 18, 2002, this matter was transferred to the Office of the Administrative Law Judges for a formal hearing. (DX 9).

Length of Coal Mine Employment

At the hearing, the District Director contested the issue of whether Claimant was a miner. However, in the post-hearing brief submitted by the District Director, the District Director stated that Claimant had at most 2.75 years of coal mine employment. The District Director, based on Claimant's testimony at the hearing, seemingly withdrew Claimant's status as a miner as a contested issue. At the hearing, Claimant testified that he began working in "pony mines" with his father and brothers processing house coal to sell to their neighbors. (Tr. 11). Claimant began working with his father and brother after he finished second or third grade, and he continued to work with them for three years. (Tr. 11). Claimant also testified that he worked as a welder and pipe fitter for construction companies where he was engaged in constructing tipples while coal was being processed and extracted. (Tr. 18-39). A coal miner is defined as:

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent that such individual was exposed to coal mine dust as a result of such coal mine employment (see § 725.202).

§ 725.101(a)(19). Claimant engaged in the extraction of coal with his father. He also engaged in coal mine construction where he was exposed to coal mine dust. Based on Claimant's uncontroverted testimony as supported by his Social Security Earnings records, I find that Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations.

The length of coal mine employment must be computed as provided by § 725.101(a)(32). *See* § 718.301. Under § 725.101(a)(32), a year is defined as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days. § 725.101(a)(32) (internal quotation marks omitted). The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. If credible evidence establishes that the miner's coal mine employment lasted for a year, it shall be presumed, in the absence of contrary evidence, that the miner spent at least 125 working days in such employment. § 725.101(a)(32)(ii). However,

> [i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula:

> divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

§ 725.101(a)(32)(iii). The Board recently addressed the use of the BLS table in calculating the length of a miner's coal mine employment for the purposes of determining the proper responsible operator. *See Clark v. Barnwell Coal Company*, __ B.L.R. __, BRB Nos. 01-0876 BLA and 02-0280 BLA (April 30, 2003). After acknowledging that any reasonable method of calculation for determining the length of coal mine employment may be used, the Board found the use of the BLS table to find a period of coal mine employment of more than one year based on an aggregate calculation of days worked during a combination of four years to not be reasonable for the purposes of determining the responsible operator under prior version of § 725.493. *See id*. The Board specifically held, "that for the purposes of the threshold one-year requirement, proof that a miner's earnings exceeded the average 125-day earnings reported by BLS for a given year does not, in and of itself, establish that the miner worked for one calendar year." *See id*.

Previously, when determining the length of coal mine employment, an administrative law judge could apply any reasonable method of calculation. *See Croucher v. Director, OWCP*, 20 B.L.R. 1-67, 1-72. There are several sources of credible evidence. First, an administrative law judge may rely solely upon an uncorroborated history of coal mine employment form completed by the miner as the basis for a finding of length of coal mine employment. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's own testimony, if it is uncontradicted and credible, may also be the exclusive basis for a finding on the length of miner's coal mine employment, especially when the Social Security Earnings statement is incomplete. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is proper for an administrative law judge to credit the Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

At the hearing, regarding the three years he worked with his father and brothers (Frennie May Coal Company), Claimant testified that it was full-time work – he didn't go to school and they worked "from daylight to dark at the mine." (Tr. 15). He testified that he also worked on weekends. (Tr. 16). I credit Claimant with three years of coal mine employment for the work he performed with his father and brother.

After working for those three years, Claimant attempted to return to school at the seventh grade level, but the school stated that he would have to start in the fourth grade, so he did not return. (Tr. 16). Instead, he worked in the bakery of a Piggly-Wiggly. (Tr. 16). He worked there until he was fourteen. After his mother died, he went to live with his brother in Michigan for three years, where he worked for his brother in a grocery store. (Tr. 17). At seventeen, he joined the Air Force, serving for seven years. (Tr. 17). Claimant testified that he returned to working in coal mines in 1976 at Sydney Coal Company for Leslie Mines constructing a tipple. (Tr. 18). Claimant did not mine coal for Sydney Coal Company, but he installed belting and rollers for the hoppers while the mine was producing coal. (Tr. 18). Of the three years he worked for Sydney Coal constructing the tipple, he testified that coal was being produced for two

of his years, because it took one year to construct the first two floors of the tipple, with a total of four more floors being constructed. (Tr. 18-19). He stated that he worked full-time, eight hours per day. (Tr. 20).

Claimant testified that he next worked at Big Creek, Island Creek 25 Coal Company. (Tr. 20). When he started, two floors of the tipple had already been constructed. While Claimant worked there, he added three more floors to the top of the existing two floors, and then replaced the original two floors of the tipple. (Tr. 20). Coal was being produced at all times that Claimant was employed there. (Tr. 21). He testified that he worked there on a full-time basis for a little over three years. (Tr. 21). After he "topped" the tipple at Island Creek, he began constructing a $10 million tipple Marrowbone Development in Nagatuk, Kentucky. (Tr. 23, 24). Claimant testified that he worked there for about one and one-half years before the two floors were constructed and coal began to be processed. (Tr. 24,25). Claimant testified that he stayed there an additional year-and-one-half until two more floors were added. (Tr. 24). Claimant stated that he worked for Marrowbone for about three and one-half years, during which coal was being processed by the tipple for one and one-half years. (Tr. 26). At that point, Claimant began working for Huntington Pipefitters, where he was engaged in installing water pipes at the Marrowbone Development tipple for pressure washers to clean coal before it reached the belt lines. (tr. 26, 27). Claimant testified that he installed these pipes for one and one-half years, during which time coal was being processed by the tipple. (Tr. 26-28).

After completing his work for Huntington Pipefitters, Claimant began working in Man, West Virginia at a tipple that was already processing coal where he was redoing the pipes for the coal washer. (Tr. 28). He testified that he worked there for one year and nine months before he suffered a back injury. (Tr. 28). Claimant believes the name of the company was BFW & Company from Ahsville, Tennessee. (Tr. 29). After he injured his back, Claimant never engaged in work around a coal mine again. (Tr. 30). He started working for a mobile home company around 1988 or 1989. (Tr. 30). Upon further testimony, Claimant stated that the work for BFW Contractors from Nashville, Tennessee as it is listed on his Social Security Earnings records, which he started in 1978, was the last coal mine employment he had previously testified about. (Tr. 32). The earnings that appear from Appalachian Builders Corporation from Huntington is the Huntington Pipefitters work he testified about. (Tr. 32). He also testified that Langley & Morgan from Illinois was an out-of-state contractor for whom he engaged in construction work. (Tr. 33). Claimant then testified that the Alice, Inc. that appears on his Social Security Earnings records around 1979 and 1980 was the Island Creek work to which he previously testified. (Tr. 34, 35). He also stated that Massey and R&F refers to his work at Sidney Coal, which he started in 1976. (Tr. 35). Claimant further testified that his work for the Huntington Pipefitters would have been from 1978 and 1979. (Tr. 36).

Upon cross-examination regarding his last recorded earnings in 1982 from N.C. Mobile Homes, Claimant testified that he must have retired in 1982 from the mobile home company. (Tr. 45, 46). Claimant testified that his work for L.E. Myers Company in 1976 was a construction job for a tipple. (Tr. 46). He stated that his work for Diebold, Inc. in 1977 had to have been his work for Sidney Coal. (Tr. 46). He testified that his earnings of $450.00 for S.J. Groves & Sons in 1979 had to also have been construction work on a tipple. (Tr. 49, 50). Claimant stated that he would do a job for one company on the construction site, and then he

would do a job for a different company at the same site. (Tr. 50). He stated that all of his construction work was at a mine tipple. (Tr. 51). Claimant testified that his work for Fairquip Corporation in 1982 would have been work at the mine tipple in Man, West Virginia. (Tr. 52).

Claimant completed an employment history form on February 27, 2001. (DX 2). He alleged deep mining work with Frennie Coal Company from 1944 to 1948. He then worked as welder in deep mines for Octavia Coal Company. He then alleged that he worked as a welder in coal mine construction from 1971 through 1985 for Allis, Inc., R&F Construction, BFW Corp., SJ Grove & Sons, Fair Quip Co., Langley & Morgan Corp., and Appalachian Building Company.

Claimant's Social Security Earnings Records were submitted for the period of January 1951 through December 2000. (DX 4). From 1951 through 1976, Claimant's Social Security Earnings records do not reveal wages received from any coal mine employment. Claimant earned wages for the first three quarters of 1977 from Diebold, Inc., which he testified at the hearing was coal mine tipple construction work. Wages are reported by Langley & Morgan for the fourth quarter of 1977 and for the year of 1978 in an amount almost four times as much as the amount received in 1977. Claimant received wages in 1978 and 1979 from Appalachian Builders Corp. that are indicative of part-time employment. He received wages from B F W Contractors Inc. in an amount that was five and one-half times more than the wages he received in 1978 from Appalachian Builders. He received a small amount of wages in 1979 from S J. Groves & Sons. He received more substantial wages in 1979 from Allis Inc., followed by much smaller wages in 1980 from Allis Inc. Claimant earned a small amount of wages from R&F Cosntruction Company in 1979. In 1982 he received a small amount of wages from Fair-Quip Corporation. No wages were reported after 1982.

I have already credited Claimant with three years of coal mine employment for his work with his father and brothers. I do not credit Claimant with any coal mine employment with Octavia Coal Corporation from 1948 until 1950 because if conflicts with Claimant's testimony that he was working in the bakery of a Piggly-Wiggly after he stopped working for his father. I find the that the coal mine employment history form completed by Claimant is entitled to little probative weight, as it is conflict with Claimant's testimony at the hearing and his Social Security Earnings records.

At the hearing, Claimant conceded that he did not return to coal mine employment until 1976. The District Director asserted that Claimant worked for 2.75 years, at most, from 1976 through 1982 based on comparing the yearly earning standards with the amount of money earned according to Claimant's Social Security Earnings records. However, the Benefits Review Board has rejected this approach to defining length of coal mine employment. *See Clark v. Barnwell Coal Company*, __ B.L.R. __, BRB Nos. 01-0876 BLA and 02-0280 BLA (April 30, 2003). He also finally testified that he stopped working in coal mine employment, and employment all together in 1982 after being cross-examined with his Social Security Earnings records. During the years of 1976 and 1982, Claimant engaged in coal mine employment constructing tipples at mines and installing water pipes at mines at times while coal was being extracted from the mines and processed by the tipples. Claimant's Social Security Earnings records do not reflect full-time coal mine employment from 1976 through 1982. Additionally, Claimant testified that he

engaged in building tipples for a total of three years while coal was not being processed by the tipple or extracted from the mine. Thus, at most, Claimant could have only engaged in four years of coal mine employment from 1976 through 1982. Additionally, Claimant worked for a mobile home company in 1982.

Even though Claimant's Social Security Earnings records do not reflect full-time employment from 1976 through 1982, they do not contain any contradictory non-coal mine employment. Despite the inconsistencies in Claimant's testimony, his coal mine employment form, and his Social Security Earnings records, I find his testimony to be generally credible regarding his work from 1976 through 1982. Based on Claimant's testimony, three of the seven years do not constitute coal mine employment. Based on Claimant's Social Security Earnings records and testimony, it is not possible to determine when Claimant was or was not engaged in coal mine employment for that period of time. Accordingly, I will reduce the amount of coal mine employment attributable to this period by 42.8% (3/7).

Claimant's testimony and records shows one-half year of employment with L.E. Myers in 1976. Claimant worked for one year in 1977 with Diebold, Inc. and Langley & Morgan. Claimant also worked for one year in 1978 with Langley & Morgan, Appalachian Builders Corp. and B F W Contractors. Claimant's testimony and earnings records establish one-half year of employment in 1979 with Allis, Inc., S.J. Groves & Sons, and R & F Construction. Claimant established one-fourth of a year of employment in 1980 with Allis, Inc. and one-fourth of a year of employment in 1982 with Fair-Quip. In sum, Claimant's employment between 1976 and 1982 amounts to three and one-half years. After discounting Claimant's three and one-half years for the times when coal was not being processed or extracted, I find that Claimant established one and one-half years of coal mine employment between 1976 and 1982. Claimant has established four and one-half years of coal mine employment. Claimant has demonstrated one and one-half years of coal mine employment after December 31, 1969.

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director did not identify any putative responsible operator. Claimant did not spend a cumulative one year period of coal mine employment with any operator after December 31, 1969, therefore, no responsible operator can be identified. §§ 725.494 725.495. Therefore, any liability for payment of benefits under the Act rests with the Black Lung Disability Trust Fund.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §

725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or paragraph § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Imtiaz Hussain to conduct his Department of Labor provided complete pulmonary examination. (DX 5).

X-RAY REPORTS

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/Qualifications**	**Interpretation**
DX 5	5/23/01	5/23/01	Hussain	1/1; Film quality 1
DX 5	5/23/01	6/18/01	Sargent, BCR[3], B-reader[3]	Film quality 3

[3]A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia

[4]A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

PULMONARY FUNCTION STUDIES

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 5[4] 5/23/01	Fair/ Fair/ Yes	65 66”	.67	1.59	21	42%	Invalid
DX 5[5] 8/17/01	Fair/ Fair/ Yes	66 66”	.45	1.23	13	36%	Yes

*post-bronchodilator values

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 5[6]	5/23/01	35.9	70.0	No

*Results obtained with exercise

Narrative Medical Evidence

Imtiaz Hussain, M.D. examined Claimant on May 23, 2001 and completed a Department of Labor Medical History and Examination for Coal Workers’ Pneumoconiosis form. He reviewed Claimant’s employment history form that was completed on February 27, 2001. Dr. Hussain noted that Claimant had been hospitalized numerous times for severe breathlessness. He documented a smoking history of one pack a day beginning forty years ago and ending twenty years ago. Claimant complained of a daily cough productive of sputum, wheezing, severe dyspnea at rest, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea. Dr. Hussain noted that Claimant’s current treatments included oxygen, Proventil, and Theodur. Upon auscultation

[5] Dr. Hussain commented that Claimant was severely dyspneic, as well as wheezing and coughing during the pulmonary function test Dr. N.K. Burki opined that this test did not produce acceptable results within the quality standards of Part 718 due to an insufficient number of FVC, FEV1, or MVV tracings without explanation for deficiency and due to less than optimal effort, cooperation, and comprehension. Dr. Burki also wrote that the flow/volume curves were incomplete.

[6] Dr. Hussain noted that Claimant was unable to give prolonged effort due to his cough. He also wrote “severe airways obstruction with no response to bronchodilation.” Dr. N.K. Burki found this test to be of acceptable quality.

7 Dr. Hussain wrote on the arterial blood gas study results pages that this “resting ABG on O2 – 2 liter/[vol] moderately severe hypoxemia on O2.” On the Department of Labor form Dr. Hussain wrote under comments, “hypoxemia severe on oxygen severe dyspnea.”

of Claimant's lungs, Dr. Hussain detected rhonchi. Dr. Hussain conducted a chest x-ray, pulmonary function test, arterial blood gas study, and an EKG. He interpreted the chest x-ray as revealing pneumoconiosis and chronic obstructive pulmonary disease ("COPD"). He found the PFT to show severe airways obstruction. Dr. Hussain determined that Claimant suffered from hypoxemia from the ABG. The EKG showed tachycardia. Dr. Hussain's cardiopulmonary diagnosis was pneumoconiosis and COPD based on a history of exposure, hypoxemia, and a severe obstructive defect. He attributed the etiology of his cardiopulmonary diagnosis to coal dust exposure and smoking cigarettes. Dr. Hussain opined that Claimant suffered from a severe pulmonary impairment that was 40% due to pneumoconiosis and 60% due to COPD. Regarding the extent of Claimant's pulmonary impairment, Dr. Hussain marked totally disabled. Dr. Hussain attributed Claimant's pulmonary impairment to his COPD. He found that Claimant did not retain the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment due to Claimant's severe dyspnea and hypoxemia.

Smoking History

Claimant testified that he smoked for about twenty years, quitting twenty-two years ago. (Tr. 53). Upon further questioning, he stated that he quit when he was in his fifties, so he may have only quit fifteen years ago. (Tr. 54). Dr. Hussain documented a 20 year history of smoking one pack per day. Based on Claimant's testimony and Dr. Hussain's report, I find that Claimant smoked one pack of cigarettes per day for twenty years.

DISCUSSION AND APPLICABLE LAW

Mr. May's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record consists of one interpretation of one chest x-ray. Dr. Hussain interpreted the May 23, 2001 chest x-ray as positive for pneumoconiosis, classifying the film he interpreted as a quality one film. Dr. Sargent, who is dually-certified as a board-certified radiologist and B-reader, found the May 23, 2001 film to be film quality 3. Dr. Sargent did not render an opinion as to the presence or absence of pneumoconiosis. A film quality of 3 is defined as poor, with some technical defect but still acceptable for classification purposes. I find that the May 23, 2001 x-ray is of sufficient quality for classification purposes. Dr. Hussain rendered the only opinion, classifying the film as positive for the existence of pneumoconiosis. Therefore, I find that the Claimant has established the existence of pneumoconiosis by x-ray evidence under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. There is no biopsy evidence to consider.

Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Dr. Hussain opined that Claimant suffered from pneumoconiosis and COPD based on a history of exposure, hypoxemia, and a severe obstructive defect, which he found was caused by coal dust exposure and smoking cigarettes. Dr. Hussain's diagnosis of pneumoconiosis arising out of coal dust exposure is a diagnosis of clinical pneumoconiosis, and his diagnosis of COPD arising out of coal dust exposure and cigarette smoking is a diagnosis of legal pneumoconiosis. Dr. Hussain submitted Claimant to a physical examination, conducted objective testing, and he considered Claimant's subjective complaints. He considered an accurate account of Claimant's smoking history. He reviewed the employment history form completed by Claimant, which I determined to be unreliable, however, Dr. Hussain did not state the exact length of coal mine employment he considered Claimant to have engaged in. He set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. However, he reviewed an inaccurate account of Claimant's coal mine employment history. Even so, I find that Dr. Hussain's opinion is entitled to probative weight.

Dr. Hussain offered a reasoned medical opinion diagnosing the presence of clinical and legal pneumoconiosis. There are no opinions to the contrary. Therefore, I find that Claimant has established that he suffers from pneumoconiosis under subsection (a)(4).

Claimant has established the existence of pneumoconiosis by chest x-ray evidence and narrative medical opinion evidence. Accordingly, I find that Claimant has established that he suffers from pneumoconiosis.

Arising Out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established four and one-half years of coal mine employment, I find that Claimant may not rely upon the rebuttable presumption set forth in § 718.203(b). If a Miner who suffered from pneumoconiosis was employed for less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. *See* § 718.203(c). The Sixth Circuit Court of Appeals, under whose jurisdiction this claim arises, requires only that the miner establish that his pneumoconiosis arose in part from his coal mine employment. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984). The record must contain medical evidence establishing the relationship between pneumoconiosis and coal mine employment. *See Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986). An administrative law judge must consider whether the record contains any documentary or testimonial evidence to suggest that any causal factors other than coal dust exposure as a cause of the miner's pneumoconiosis. *See Barnes v. Director, OWCP*, 19 B.L.R. 1-71 (1995)(en banc on reconsideration).

Dr. Hussain found that Claimant suffered from pneumoconiosis and COPD arising out of coal dust exposure and cigarette smoking. He considered an accurate account of Claimant's smoking history, but he reviewed an inaccurate account of Claimant's coal mine employment history. On the form that Dr. Hussain reviewed, Claimant had reported a coal mine employment history lasting from 1944 to 1950 and from 1971 through 1985 – a 20 year history of coal mine employment. Based on the record, Claimant has established a four and one-half year history of coal mine employment. The history considered by Dr. Hussain is significantly greater than the amount that Claimant has established. The accuracy of Dr. Hussain's opinion is called into question. Additionally, Claimant smoked one pack of cigarettes per day for twenty years. In light of cigarette smoking as an additionally causative factor and Dr. Hussain's consideration of a greatly exaggerated coal mine employment history, I find that there is insufficient evidence to establish that Claimant's pneumoconiosis arose, at least in part, out of coal dust exposure. Dr. Hussain's opinion on the etiology of Claimant's pneumoconiosis is simply not reliable enough to establish that Claimant's pneumoconiosis arose, at least in part, out of his coal mine employment.

Total Disability

Assuming *arguendo* that Claimant had established that his pneumoconiosis arose out of coal mine employment, to prevail, Claimant would also have to demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I find that Claimant has not established that Miner suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The May 23, 2001 PFT cannot constitute evidence of total disability because it is not in substantial compliance with the applicable quality standards for PFTs. However, the August 17, 2001 PFT is in substantial compliance with applicable quality standards, and it produced values below the values listed in the regulatory tables found at Appendix B to Part 718. There were no non-qualifying PFTs. Therefore, I find that Claimant has established the existence of total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. The May 23, 2001 ABG did not produce values at or below the values listed in the regulatory tables found at Appendix B to Part 718. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment was that of a welder involved the construction of tipples as well as the installation of water pipes to service pressure washers in the mines. Claimant did not complete the Department of Labor form requesting the specific exertional requirements of his position as a welder constructing tipples. At the hearing, Claimant described his tipple construction as installing rollers and belting underneath the mines for the hoppers.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

At the time of the hearing, Claimant was a sixty-seven year old with a third grade education. His usual coal mine employment involved manual labor as a welder and pipe fitter at the tipple. Dr. Hussain opined that Claimant suffered from a totally disabling pulmonary impairment that prevented him from performing the work of a coal miner or comparable work in a dust-free environment due to severe obstructive defect diagnosed by PFT and moderate hypoxemia diagnosed by ABG. Dr. Hussain noted Claimant's complaints of severe dyspnea at rest. Dr. Hussain set forth clinicalobservations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. I find that Dr. Hussain's opinion on the extent of Claimant's pulmonary impairment is entitled to probative weight.

Claimant requires supplemental oxygen and his normal coal mine employment requires manual labor. Dr. Hussain opined that Claimant is totally disabled due to his severe pulmonary impairment. I find that Claimant has established the existence of a severe pulmonary impairment that prevents him from performing his usual coal mine employment.

Claimant has established the existence of total disability by pulmonary function test evidence and narrative opinion evidence. The arterial blood gas was insufficient to establish total disability, but Dr. Hussain opined that Claimant's ABG showed moderate hypoxemia. The cumulative weight of the PFT and narrative opinion evidence establishes that Claimant suffers from a totally disabling pulmonary impairment.

Total Disability Due to Pneumoconiosis

Assuming, arguendo, that Claimant established that his pneumoconiosis arose out of coal mine employment, he would then have to establish that his totally disabling pulmonary impairment was due to his pneumoconiosis arising out of coal mine employment. The amended regulations at § 718.204(c) contain the standard for determining whether a miner's total disability was caused by his pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or

exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof that the Miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. *Peabody Coal Co. v. Smith*, 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due 'at least in part' to his pneumoconiosis. *Cf*. 20 C.F.R. 718.203(a)." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's "impairment is due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history" is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk}*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that Miner was totally disabled are more reliable for assessing the etiology of Miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

Dr. Hussain opined that Claimant suffered from pneumoconiosis and that he was totally disabled. On one form, Dr. Hussain attributed Claimant's totally disabling pulmonary impairment 40 % to pneumoconiosis and 60% to COPD. On the second form, Dr. Hussain attributed the extent of Claimant's totally disabling respiratory impairment to Claimant's COPD. Dr. Hussain did not provide any reasoning or rationale to support his conclusions. His opinions on different forms are contradictory, yet there is not rationale provided to explain the conflict. Dr. Hussain's opinion is not reasoned and documented regarding the etiology of Claimant's totally disabling pulmonary impairment. Since there is no reasoned medical opinion attributing Claimant's totally disabling pulmonary impairment to his pneumoconiosis, I find that Claimant has not established that his totally disabling pulmonary impairment is due, at least in part, to his pneumoconiosis arising out of coal mine employment.

<u>Entitlement</u>

The Claimant, Drewie May, has failed to prove, by a preponderance of the evidence, that his pneumoconiosis arises out of coal mine employment, nor did Claimant establish that his totally disabling pulmonary impairment arose, at least in part, out of his pneumoconiosis. Therefore, Mr. May is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Drewie Herman May for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**