

BRB No. 99-0409 BLA

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| HOBERT J. McCOY |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: |
| |) | |
| LAUREL RUN MINING COMPANY/ ISLAND CREEK COAL COMPANY |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR |) |) |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

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

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0222) 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).¹ The administrative law judge credited

¹This claim was filed on April 15, 1997. Director's Exhibit 1. Claimant previously filed for benefits on March 1, 1997 and November 19, 1986. Director's Exhibits 21, 26. The administrative law judge found that claimant withdrew his first two applications for benefits prior to the rendering of any decision. We affirm as

claimant with nineteen years of coal mine employment and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c)(4). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. See *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

unchallenged the administrative law judge's determination to treat the 1997 application for benefits as an original claim pursuant to 20 C.F.R. §725.306. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11.

²Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of nineteen years of coal mine employment or his findings under 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3), these findings are affirmed. *Skrack, supra*.

Under Section 718.204(c)(4), claimant argues that the administrative law judge “failed to give proper weight” to the opinion of claimant’s treating physician, Dr. deGuzman.³ The administrative law judge noted that Dr. deGuzman examined claimant several times but did not acknowledge Dr. deGuzman’s status as a treating physician. Decision and Order at 7. The administrative law judge’s failure to acknowledge Dr. deGuzman’s opinion as that of a treating physician is harmless error, however, as the administrative law judge properly declined to give substantial weight to Dr. deGuzman’s opinion because, *inter alia*, the administrative law judge found it was unclear whether the limitations set out by Dr. deGuzman were due to claimant’s back problems or his respiratory problems. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91(1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); Decision and Order at 16; Claimant’s Exhibit 1. Moreover, the administrative law judge properly found that the opinions of Drs. Castle, Younes, Dahhan, Mettu, Iosif, and Fino that claimant was not totally disabled were better explained and outweigh the opinions of Drs. deGuzman and Sundaram.⁴ Decision and Order at 16; Employer’s

³Because claimant only recites Dr. Sundaram’s favorable opinion and does not identify any error in the administrative law judge’s consideration of it, there is no basis to review the administrative law judge’s evaluation of Dr. Sundaram’s opinion. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

⁴The administrative law judge properly noted that the opinions of Drs. Castle, Dahhan, Mettu, Iosif and Fino are based on physical examination, symptoms, claimant’s medical, working and smoking histories, x-rays and non-qualifying pulmonary function studies and blood gas studies. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 7-11, 15; Director’s Exhibits 7, 9-12, 25, 27; Claimant’s Exhibit 2; Employer’s Exhibits 1-11.

Exhibits 1, 4, 5, 8, 11. Inasmuch as claimant does not otherwise challenge the administrative law judge's findings at Section 718.204(c), the administrative law judge's finding that claimant does not suffer from a totally disabling pulmonary or respiratory impairment pursuant to Section 718.204(c) is affirmed. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); Decision and Order at 16.

Inasmuch as the administrative law judge properly found that claimant failed to establish total disability pursuant to Section 718.204(c), a requisite element of entitlement, an award of benefits under 20 C.F.R. Part 718 is precluded. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111(1989); *Perry, supra*. Therefore, we need not consider claimant's arguments under Section 718.202(a)(4).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge