

BRB No. 00-0384 BLA

ROY C. BENTLEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RATLIFF ELKHORN COAL COMPANY, INCORPORATED)	DATE ISSUED:
)	
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 - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Roy C. Bentley, Shelbiana, Kentucky, *pro se*.

Eileen M. O'Brien (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (99-BLA-0057) 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). The administrative law judge found that claimant established twenty-one years of coal mine employment and, based on the filing date of the claim, applied the regulations found at 20 C.F.R. Part 718. The administrative law

¹ We affirm the administrative law judge's finding of twenty-one years of coal mine

judge found that claimant failed to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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 Part 718, 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. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *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*).

The administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(c). Of the numerous pulmonary function studies of record, only the test of August 22, 1995, administered by Dr. Sundaram, yielded qualifying results. Director's Exhibit 10. However, the administrative law judge properly found that this test was found invalid by Dr. Burki, "due to less than optimal effort, cooperation and comprehension, and because the study was improperly performed," by claimant. Director's Exhibit 11. The administrative law judge therefore permissibly found it insufficient to

employment as it is unchallenged by employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

² A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

³ In Director's Exhibit 10, Dr. Sundaram provides the results of a pulmonary function study which yielded qualifying results, yet his report neither mentions claimant's cooperation

establish total disability at Section 718.204(c)(1). Director's Exhibit 11; Decision and Order at 12, *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). As the remaining pulmonary function studies were non-qualifying, the administrative law judge properly found that total disability was not established at Section 718.204(c)(1). Employer's Exhibit 4; Director's Exhibits 9, 31-33; 20 C.F.R. §718.204(c)(1); see *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

The administrative law judge next found that as none of the blood gas studies yielded qualifying results, total disability was not established at Section 718.204(c)(2), Employer's Exhibit 4; Director's Exhibits 9, 32, 33; *Schetroma, supra*, and that as the record was devoid of any evidence of cor pulmonale with right sided congestive heart failure, total disability could not be established at Section 718.204(c)(3). Decision and Order at 12; 20 C.F.R. §718.204(c)(2), (3).

The administrative law judge then considered the medical opinions of record pursuant to Section 718.204(c)(4). The record contains the opinions of six physicians, of which only Dr. Sundaram's found that claimant was not physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust-free environment due to shortness of breath. Director's Exhibit 10. The administrative law judge noted that Dr. Sundaram based his finding on a pulmonary function study which was later found invalid by Dr. Burki and, therefore, permissibly found that because Dr. Sundaram relied on an invalid study, his opinion was entitled to little weight. Decision and Order at 13; *Peabody v. Hill*, 123 F.2d 412, 21 BLR 1-192 (6th Cir. 1997); *Tedesco, supra*; *Street, supra*. The administrative law judge also found that although Dr. Baker found minimal impairment, he failed to opine whether claimant's impairment "was so severe as to render him unable to perform his usual coal mine work or similar gainful employment," and failed to "clearly state the degree of the Claimant's impairment and its effect on his ability to work...." Decision and Order at 13. Further, the administrative law judge found Dr. Baker noted that the results of claimant's pulmonary function and blood gas studies were within normal limits. Decision and Order at 13; Director's Exhibit 9. Accordingly, the administrative law judge permissibly found Dr. Baker's opinion insufficient to establish total disability. See *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.* 9 BLR 1-104 (1986); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985).

Of the remaining physicians, Drs. Fino, Jarboe, Dineen and Mettu, all stated that claimant retains the respiratory capacity to do his previous coal mine employment or a job of comparable physical demand. Director's Exhibits 31-33; Employer's Exhibit 4. The

or comprehension on the test. Dr. Burki invalidated this test on reviewing the tracings. Director's Exhibit 11.

administrative law judge found that as these opinions were better supported by the objective evidence and better explained, they were entitled to greater weight. This was rational. Decision and Order at 13; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Hill, supra*. We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c)(4).

In concluding, the administrative law judge found that on “[w]eighing the pulmonary function study, blood gas study, and medical opinion evidence as a whole,..[c]laimant has failed to establish by a preponderance of the evidence that he is totally disabled from a pulmonary or respiratory standpoint.” Decision and Order at 13. This was proper. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987). We, therefore, affirm the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c). As claimant failed to establish total disability, an essential element of entitlement, we need not address the administrative law judge's finding at Section 718.202(a). *See Adams, supra; Trent, supra; Gee, supra; Perry, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge