

BRB No. 97-0796 BLA

DONALD L. WILLIAMS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	
and)	DATE ISSUED:
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

George P. Surmaitis (Crandall, Pyles & Haviland), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-1506) of Administrative Law Judge Thomas M. Burke awarding 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 found that claimant¹ established forty-four and three-quarter years of qualifying coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(b), (c)(1), (4). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in admitting Dr. Istfan's opinion and in weighing the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(b). Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining 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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3,

¹ Claimant is Donald L. Williams, the miner, who filed a claim for benefits on May 16, 1994. Director's Exhibit 1.

²We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment and pursuant to 20 C.F.R. §§718.203(b) and 718.204(c)(1), (4) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. See *Anderson, supra*; *Baumgartner, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer initially contends that the administrative law judge erred in relying upon Dr. Istfan's report because it was submitted in violation of the administrative law judge's order holding the record open for employer to submit rebuttal evidence. Employer's Brief at 14-16. Dr. Istfan's report, dated May 24, 1996, was submitted with a cover letter dated June 3, 1996. The administrative law judge relied upon this opinion in making his findings pursuant to Sections 718.202(a)(4) and 718.204(b). Decision and Order at 7, 10.

As employer contends, the record was not held open for claimant to submit additional evidence. At the hearing on April 26, 1996, after admitting Dr. Rasmussen's report as Claimant's Exhibit 1, the administrative law judge entertained employer's motion to have the record held open for employer to respond to Dr. Rasmussen's report. Hearing Transcript at 8. After hearing employer's motion, and claimant's statement that there was no objection to the record being held open for claimant to be examined, the administrative law judge stated that the law, "under the Shedlock decision" requires that the record be held open. Hearing Transcript at 11. The administrative law judge then stated:

Since the Rasmussen examination was made, and the evaluation, two years after the earlier examination by yourself and also by OWCP, I would be required then to hold the record open then to allow the Employer to have Mr.

Williams examined post hearing. So we'll hold the record open for 60 days.

Hearing Transcript at 11.

Because the administrative law judge specifically stated that the record was being held open to allow employer to have claimant examined post hearing, claimant's submission of Dr. Istfan's report on June 3, 1996 was untimely. 20 C.F.R. §725.456(b)(1); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987). While the administrative law judge may admit Dr. Istfan's report, he would then have to re-open the record to allow employer the opportunity to respond to that report. 20 C.F.R. §725.456(b)(3); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) and 718.204(b) and the award of benefits. Thus, we remand the case for the administrative law judge to determine whether or not to admit Dr. Istfan's opinion, and if so, to allow employer the opportunity to submit rebuttal evidence.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge