

BRB No. 99-0277 BLA

HERL BURKE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	DATE ISSUED:
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence R. Webster, Pikeville, Kentucky, for claimant.

Dorothy L. Page (Henry L. Solano, Solicitor of Labor; 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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-0888) of Administrative Law Judge Daniel J. Roketenetz 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 the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c). Specifically, claimant asserts that the administrative law judge erred in finding that the pulmonary function studies of record do not support a finding of total respiratory disability. In addition, claimant asserts that the medical opinion of Dr. Sundaram supports a finding of total respiratory disability at Section 718.204(c)(4). The Director, Office of Workers' Compensation Programs, in response, asserts that the administrative law judge's finding that the evidence fails to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c) is supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the administrative law judge's finding at Section 718.204(c)(1), the administrative law judge correctly found that the four pulmonary function studies of record produced non-qualifying values. Director's Exhibits 12, 13, 14, 48. As they are insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1), we affirm the administrative law judge's finding thereunder. 20 C.F.R. §718.204(c)(1). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Winchester v. Director v. OWCP*, 9 BLR 1-177 (1986).

Next, the administrative law judge also correctly found neither of the two blood gas studies were qualifying. Director's Exhibits 9, 48. Moreover, claimant does not challenge this finding. As the evidence is, thus, insufficient to establish total disability pursuant to Section 718.204(c)(2), we affirm the administrative law judge's finding at Section 718.204(c)(2). *See Clark, supra; Fields, supra; Tucker v Director v. OWCP*, 10 BLR 1-35 (1987).

With respect to Section 718.204(c)(3), the administrative law judge found that as the record contains no evidence of cor pulmonale with right-sided congestive heart disease, total disability could not be established a matter of law under this Section. 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

With respect to the administrative law judge's finding at Section 718.204(c)(4), the administrative law judge correctly found that the record contains four relevant medical

opinions by Drs. Myers, Director's Exhibit 15, Sundaram, Director's Exhibit 16, Mettu, Director's Exhibit 18, and Younes, Director's Exhibit 48. The administrative law judge properly found that the opinions of Drs. Myers, Mettu and Younes were insufficient to establish total disability at Section 718.204(c)(4) as they respectively found that claimant could work in a "dust free environment," had only a mild pulmonary impairment, and had only a mild pulmonary impairment which would not prevent him from performing his usual coal mine employment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985), and that only Dr. Sundaram found that claimant was totally disabled. Decision and Order at 6. The administrative law judge permissibly credited the opinion of Dr. Younes that claimant could perform his usual coal mine employment over the opinion of Dr. Sundaram because Dr. Younes's opinion was better supported by the objective evidence of record. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Fields, supra*. As the administrative law judge's finding that these opinions do not sustain claimant's burden of establishing total respiratory disability at Section 718.204(c)(4) is supported by substantial evidence, we affirm this finding. *See Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986); *see also Rafferty v. Jones & Laughlin Steel Corp*, 9 BLR 1-231 (1987). We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1) - (4), as it is supported by substantial evidence and is in accordance with applicable law. As this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra*; *Rafferty, supra*; *Gee, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge