BRB No. 00-0144 BLA

LEVI HOWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:_____
	)	
HOOPWOOD MINING, INCORPORATED	)	
	)	
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.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Gretchen Nunn Gullett (Boehl Stopher & Graves), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (99-BLA-0272) 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 instant claim, filed on November 12, 1997, was properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718. After crediting claimant with eighteen years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the evidence insufficient to establish both 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). Consequently, he denied benefits. On appeal, claimant challenges the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c)(4). Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does

not intend presently to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance 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 challenging the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c)(4), claimant contends that the administrative law judge erred in discounting the medical opinions of Drs. Mettu and Younes. Claimant's sole contention regarding Dr. Mettu's opinion is a suggestion that the administrative law judge should have credited the opinion on the ground that Dr. Mettu was claimant's treating physician. Claimant's only contention concerning Dr. Younes's opinion is that the administrative law judge should have credited it in light of Dr. Younes's credentials. Claimant's contentions lack merit.

[1]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), and total disability under 20 C.F.R. §718.204(c)(1)-(3), as well as the administrative law judge's finding that claimant established eighteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 9-13.

First, the administrative law judge properly stated that Dr. Mettu gave no opinion on the presence or absence of pneumoconiosis, as the doctor neither diagnosed pneumoconiosis nor indicated that claimant has a chronic dust disease of the lung arising out of coal mine employment which would meet the regulatory definition of pneumoconiosis. *See* 20 C.F.R. §718.201; Decision and Order at 10; Director's Exhibit 26. Thus, the administrative law judge properly found Dr. Mettu's opinion insufficient to establish the presence of pneumoconiosis at Section 718.202(a)(4). Furthermore, the administrative law judge was not required, as claimant suggests, to credit Dr. Mettu's opinion that claimant has a totally disabling pulmonary impairment partly or totally due to coal dust exposure on the ground that the doctor was claimant's treating physician. *See* Director's Exhibit 26. While the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises,[2] has held in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16, 24 (6th Cir. 1993), that the opinions of treating physicians are entitled to greater weight than opinions of non-treating physicians, the court subsequently held that its opinion in *Tussey* does not require an administrative law judge to credit the opinion of a physician that is flawed. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the administrative law judge properly discounted Dr. Mettu's opinion under Section 718.204(c)(4) because Dr. Mettu relied upon a pulmonary function study that was invalidated. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 13; Director's Exhibit 26. The administrative law judge further properly discounted Dr. Mettu's opinion because Dr. Mettu did not indicate that he was aware of the requirements of claimant's last usual coal mine employment, while Drs. Jarboe and Fino, who found that claimant does not have pneumoconiosis and retains the respiratory capacity for his usual coal mine employment, indicated that they were aware of the requirements of claimant's last job drilling and shooting coal at the face, and working around and occasionally operating a cutting machine.[3] *See Cornett v. Benham Coal Co.*, F.3d , 2000 WL 1262464 (6th Cir. Sep. 7, 2000); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 13-14; Director's Exhibits 28, 35.

Additionally, claimant's suggestion that Dr. Younes's opinion should have been credited in light of the doctor's credentials amounts merely to a request to reweigh the evidence, which is beyond the scope of the Board's power. *See Anderson v. Valley Camp*

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[3]While it was improper for the administrative law judge to reject Dr. Mettu's opinion for the additional reason that the doctor relied on a non-qualifying arterial blood gas study, *see Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984), the administrative law judge's error was harmless in light of his otherwise valid reasons for discounting the doctor's opinion and crediting the contrary opinions of Drs. Jarboe and Fino. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Decision and Order at 13.

of Utah, Inc., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In the instant case, the administrative law judge duly noted that Dr. Younes is Board-certified in internal medicine and pulmonary diseases, Decision and Order at 8; Director's Exhibit 29, but also correctly noted that Drs. Jarboe and Fino are likewise Board-certified in both specialties. Decision and Order at 7, 10; Director's Exhibits 28, 35. The administrative law judge properly accorded greatest weight to the opinions of Drs. Jarboe and Fino under Sections 718.202(a)(4) and 718.204(c)(4) on the basis that they were well supported by the objective evidence of record, and well-reasoned and documented, since Drs. Jarboe and Fino relied on their reviews of the evidence of record and examinations of claimant in formulating their opinions.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Island Creek Coal Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 10, 14; Director's Exhibits 28, 35. Furthermore, as discussed *supra*, the administrative law judge properly credited the opinions of Drs. Jarboe and Fino on the basis that both physicians indicated that they were aware of the requirements of claimant's coal mine employment. *See Cornett, supra; Kozele, supra*; Decision and Order at 13-14; Director's Exhibits 28, 35. We affirm, therefore, the administrative law judge's findings that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) and total disability under Section 718.204(c)(4).

Inasmuch as we herein affirm the administrative law judge's findings that claimant has failed to establish the existence of pneumoconiosis under Section 718.202(a) and total disability under Section 718.204(c), requisite elements of entitlement under Part 718, we affirm the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]The administrative law judge correctly found that Dr. Younes did not review the evidence of record in addition to examining claimant on November 21, 1997. Decision and Order at 7-8, 10, 14.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge