BRB No. 93-0419 BLA

JOSEPH TEDESCO	)	
	)	
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 Denying Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Pasco L. Schiavo, Hazleton, Pennsylvania, for claimant.

Sarah M. Hurley (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (92-BLA-0176) of Administrative Law Judge Edward C. Burch 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 initially found that the evidence of record was sufficient to establish a

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

change in conditions pursuant to 20 C.F.R. §725.310.[1] The administrative law judge credited claimant with twenty-six years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). However, the administrative law judge further found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding that the medical opinion evidence of record was insufficient to establish total disability. In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 challenging the administrative law judge's finding that the evidence was insufficient to establish total disability

[1] Claimant originally filed an application for benefits on July 31, 1989. Director's Exhibit 1. Benefits were denied on December 12, 1989. Director's Exhibit 25. Claimant subsequently filed a request for modification on May 25, 1990. Director's Exhibit 27.

[2] The parties do not challenge the administrative law judge's crediting of claimant with twenty-six years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(c)(1)-(3). These findings are therefore affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pursuant to Section 718.204(c)(4), claimant asserts that the administrative law judge erred in not accordingly greater weight to the medical opinion of Dr. Karlavage as claimant's treating physician. Contrary to claimant's contention, however, the administrative law judge is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration in the administrative law judge's weighing of the medical evidence of record. *See Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant further contends that the administrative law judge erred in selectively analyzing the opinion of Dr. Karlavage in finding that the opinion was based on an unreliable pulmonary function study. We disagree. The administrative law judge properly discredited Dr. Karlavage's finding of total disability inasmuch as Dr. Karlavage relied upon a pulmonary function study, which the administrative law judge found unreliable.[3] *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984). In addition, the administrative law judge permissibly determined that Dr. Karlavage's opinion was brought into question as it was not adequately supported by the remaining two pulmonary function studies relied upon by the physician, a discrepancy which the administrative law judge found that Dr. Karlavage did not adequately explain. Decision and Order at 9. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Consequently, we reject claimant's contention that the administrative law judge erred in selectively analyzing Dr. Karlavage's opinion.

Furthermore, contrary to claimant's contention, it is not erroneous for the administrative law judge to weigh the various medical opinions of record. Rather, at Section 718.204(c)(4), the administrative law judge is required to weigh the relevant medical opinions of record, in order to initially determine whether total disability has been established. *See Fields v.*

[3] The administrative law judge properly found the June 3, 1991 qualifying pulmonary function study unreliable because claimant's effort was listed as poor and because the results were disparately low in comparison to the other studies of record. Decision and Order at 7; *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984).

Island Creek Coal Co., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). In the instant case, however, the administrative law judge has not, as claimant alleges, weighed the two medical opinions to determine which one to accept as more persuasive. Rather, the administrative law judge has considered the opinion of Dr. Corazza and properly found that the physician did not render a diagnosis relevant to total disability pursuant to Section 718.204(c)(4). *See Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); Director's Exhibits 20, 42. Finally, contrary to claimant's contention, claimant's lay testimony in this living miner's Part 718 claim is not sufficient, in and of itself, to establish total disability. 20 C.F.R. §718.204(d)(2); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985); *see also Salyers v. Director, OWCP*, 12 BLR 1-193 (1989). Consequently, we reject claimant's contentions and affirm the administrative law judge's weighing of the medical opinions of record pursuant to Section 718.204(c). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to Part 718, an award of benefits is precluded. *Trent*, *supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge