BRB No. 98-1415 BLA

EDWARD J. VELASQUEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
WYOMING FUEL COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL 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 on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

M. Paula Ashen (Baroway, Dawson & Ashen, P.C.), Englewood, Colorado, for claimant.

Scott M. Busser (Zarlengo, Mott, Zarlengo and Winbourn, P.C.), Denver, Colorado, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (93-BLA-165) of Administrative Law Judge Daniel J. Roketenetz 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). This case is on appeal to the Board for the third time. In the original Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr., credited claimant with twenty-six and three-quarters years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant and the Director, Office of Workers' Compensation Programs (the Director), appealed and in *Velasquez v. Wyoming Fuel Co.*, BRB Nos. 95-1590 BLA and 95-1590 BLA-A (Jan. 30, 1996) (unpub.), the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), but held that the administrative law judge had mischaracterized Dr. Slonim's statements and erroneously found that the physician's opinion was biased and hostile to the Act. Thus, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4) and remanded for further consideration thereunder.

On remand, the case was reassigned to Administrative Law Judge Gilday who considered the evidence of record and determined that claimant established totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b), (c)(2), (4). Accordingly, benefits were awarded. Employer appealed and in *Velasquez v. Wyoming Fuel Co.*, BRB No. 97-0293 BLA (Oct. 29, 1997) (unpub.), the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1), (3). The Board also held that the administrative law judge had mischaracterized the blood gas study evidence and thus erred in finding that all of the blood gas study evidence was qualifying and indicated that claimant was totally disabled. Thus, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(2) and remanded for further consideration thereunder. In light of the Board's remand for reconsideration of the blood gas study evidence, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b), (c)(4) as well. The Board also approved claimant's counsel's fee request, contingent upon successful prosecution of the claim.

On remand, the administrative law judge reconsidered the evidence of record and found that the preponderance of the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(c)(2) and that the medical opinions of Drs. Scmidt-Nowara and Slonim established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c)(4). Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in his consideration of the blood gas study and medical opinion evidence and in finding total disability

established pursuant to 20 C.F.R. §718.204(c)(2), (4). Claimant responds, urging affirmance of the denial of benefits. The Director has not participated in this appeal.

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 the 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 to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In challenging the administrative law judge's determination that the blood gas study evidence was sufficient to establish a totally disabling respiratory impairment, employer contends that the administrative law judge erred in failing to consider the sequence of the testing and in finding that the three qualifying resting blood gas studies outweighed the single nonqualifying exercise blood gas study. We disagree. The administrative law judge initially noted that the resting blood gas studies administered on January 13, 1992, June 8, 1992 and January 18, 1994 were qualifying, but that the after exercise blood gas study of January 18, 1994, was non qualifying. Decision and Order on Remand at 3. The administrative law judge rationally found that the preponderance of this evidence established total disability in light of the consistency of the qualifying values of the resting blood gas studies and the margin by which the exercise blood gas study was nonqualifying. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order on Remand at 3-4. Moreover, blood gas and pulmonary function studies measure different types of impairment, *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984), and we reject employer's contention that the administrative law judge was required to give determinative weight to the nonqualifying pulmonary function studies. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In addition, with respect to employer's contentions regarding the relative qualifications of the physicians, as we stated in our prior decision, although an administrative law judge may assign greater weight to a physician's report based on that physician's superior qualifications, he is not required to do so. *Clark, supra*; *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Worley, supra*. We, therefore, also reject employer's arguments with respect to the administrative law judge's finding of total

disability pursuant to Section 718.204(c)(4) as employer's contentions are based primarily on the administrative law judge's findings regarding the blood gas study evidence. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.* 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley, supra*. Consequently, we affirm the administrative law judge's finding that the evidence in the record as a whole establishes total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) and affirm the award of benefits pursuant to 20 C.F.R. Part 718. *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order on Remand at 4-5.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge