BRB No. 94-2183 BLA

DONALD L. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CLINCHFIELD COAL COMPANY	)	
	)	
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 of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (United Mine Workers of America), Castlewood, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-BLA-0233) of Administrative Law Judge Robert J. Shea denying 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 this claim to be a duplicate claim, determined that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d), and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with twenty-three years of coal mine employment pursuant to the parties' stipulation and

found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. However, the administrative law judge found the evidence insufficient to establish total respiratory disability pursuant to Section 718.204(c) and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge

erred by finding the evidence insufficient to establish total respiratory disability. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined 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 supported by substantial evidence, is rational, and is in accordance with 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).

Pursuant to Section 718.202(c)(2), claimant contends that the administrative law judge erred by crediting the later non-qualifying[2] blood gas studies to conclude that claimant was not totally disabled. Claimant's Brief at 4. We reject claimant's contention. The administrative law judge permissibly credited the two later non-qualifying blood gas studies over the two earlier qualifying studies, one of which was invalidated, as more reflective of claimant's condition, noting that the results of the later tests indicated that any impairment found in 1992 was "temporary and reversible." Decision and Order at 7; *see Sexton v. Southern Ohio Coal Co*., 7 BLR 1-411 (1984); *Keen v. Jewell Ridge Coal Corp*., 6 BLR 1-454 (1983).

Claimant also contends that the administrative law judge erred at Section 718.204(c)(2) by failing to apply the true-doubt rule to the blood gas study evidence. Claimant's Brief at 4. The true-doubt rule has been invalidated by the United States

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 725.309, 718.202(a)(1)-(4), and 718.204(c)(1) and (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(2).

Supreme Court, *see Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and we must apply the law in effect at the time of this decision. *See Lynn v. Island Creek Coal Co*., 12 BLR 1-146 (1989). Therefore, we reject claimant's contention.

Claimant contends that the administrative law judge erred at Section 718.204(c)(4) by considering irrelevant evidence in violation of Rule 402 of the Federal Rules of Evidence. Claimant's Brief at 4. Specifically, claimant contends that the administrative law judge considered a medical opinion regarding the condition of another miner, not claimant.[3] *Id*. Claimant stipulates that this report was not quoted in support of any of the administrative law judge's findings, but states that remand is nonetheless required because the report was "noted as additional inconclusive evidence of pneumoconiosis disability." *Id*. Employer responds that it withdrew this report at the hearing, and since the administrative law judge did not rely on it, his mention of the report is harmless error. Employer's Brief at 2.

We agree with employer. Because the administrative law judge did not rely on this report in finding no total respiratory disability, his brief statement pointing out that it was of no consequence in resolving this claim, though made in the mistaken belief that the report concerned claimant, is harmless error.[4] *See Larioni v. Director,*

[3] Dr. McKnight performed a psychological evaluation of another miner, diagnosing depression and anxiety. Employer's Exhibit 19. In reviewing the evidence, the administrative law judge, apparently unaware that claimant was not the subject of the report, stated that it did not concern claimant's pulmonary or respiratory condition but dealt only with his depression and back pain. Decision and Order at 4.

[4] Regarding claimant's reliance on the Federal Rules of Evidence, we note that an administrative law judge is not bound by common law or statutory rules of evidence. *See* Section 725.455(b).

OWCP, 6 BLR 1-1276 (1984). Thus, we reject claimant's contention and affirm the administrative law judge's findings at Section 718.204(c)(2) and (4).

Since claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), *see n.1*, a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge