BRB No. 00-0963 BLA

JOSEPH J. MOYLE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Jennifer U. Toth and Mary Forrest-Doyle (Howard M. Radzely, Acting 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: SMITH and DOLDER, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1998-BLA-00811) of Administrative Law Judge Robert D. Kaplan 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).[1] This case is before the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-

Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with five and one-half years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge accepted the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant suffers from pneumoconiosis. The administrative law judge, however, found that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(2000) or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Accordingly, benefits were denied.

Claimant appealed and in *Moyle v. Director, OWCP*, BRB No. 99-0631 (Mar. 20, 2000)(unpub.), the Board affirmed in part, vacated in part, and remanded the case for further consideration of the evidence pursuant to Sections 718.203(c) and 718.204(c)(1), (4)(2000).

On remand, the administrative law judge found that claimant established that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c) (2000), but that the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary condition pursuant to Section 718.204(c)(2000). Accordingly, benefits were denied.

On appeal, claimant alleges that the administrative law judge erred in finding five and one-half years of coal mine employment.[2] Claimant also alleges that the

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80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] In our prior Decision and Order, we noted that since claimant is only alleging that he has seven and one-half years of qualifying coal mine employment and because the only presumption available to claimant requires a minimum of ten years of coal mine employment, any error in the administrative law judge's length of coal

administrative law judge erred in his evaluation of the pulmonary function study evidence pursuant to Section 718.204(c)(1)(2000) and his evaluation of the medical opinions pursuant to Section 718.204(c)(4)(2000). The Director responds, contending that the administrative law judge's decision is supported by substantial evidence and should be affirmed.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which both claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 this Board and may not be disturbed. 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 order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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mine employment finding would be harmless. 20 C.F.R. §718.203(b) (2000); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, decline to address claimant's contentions with respect to this issue herein.

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 contains no reversible error therein.

Turning to the merits, claimant contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment based on the pulmonary function study evidence. We disagree. On remand, the administrative law judge, as instructed by the Board, reconsidered the pulmonary function study evidence which consists of the nonqualifying study performed by Dr. Rashid on January 29, 1998 and the qualifying study performed by Dr. Kraynak on July 1, 1998. Director's Exhibit 6; Claimant's Exhibit 2.[3] The administrative law judge found that the January 1998 nonqualifying study was valid and that the July 1998 qualifying study was not valid. Decision and Order on Remand at 3-4. On the basis of this determination, the administrative law judge concluded that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1) (2000). Decision and Order at 4.

In making this determination, the administrative law judge permissibly relied on the superior qualifications of Dr. Rashid, the administering physician, in rejecting the invalidation of the January 1998 study by Dr. Kraynak. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). As noted by the administrative law judge, Dr. Rashid is Board-certified in internal medicine, attended the Institute of Diseases of the Chest at Brompton University of London from October 1967 to December 1967 and was medical superintendent of the Chest and Tuberculosis Hospital, Falsalabad, Pakistan, from April 1969 to November 1970, while Dr. Kraynak is Board-eligible in family practice. Decision and Order on Remand at 3.

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

Moreover, contrary to claimant's assertion that he coughed during the testing, the administrative law judge acted within his discretion to find claimant's testimony not credible since Dr. Rashid did not provide any "indication that anything unusual occurred during testing." 1999 Decision and Order at 7. The administrative law judge therefore made a reasonable inference that the study was valid based on the fact that the administering physician specifically listed the results on his medical report and referred to them in making his diagnosis and assessing the level of claimant's impairment.[4] *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order on Remand at 3. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1) (2000).[5]

In considering whether total disability was established under Section 718.204(c)(4) (2000), the administrative law judge permissibly credited the opinion of Dr. Rashid, who concluded that claimant was not totally disabled, because his conclusion was better supported by the credible objective medical evidence than Dr. Kraynak's opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 4. Furthermore, the administrative law judge reasonably found that the opinion of Dr. Kraynak, on the issue of total pulmonary disability, was based at least in part on the qualifying

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[4] In this case arising within the jurisdiction of the United States Court of Appeals for the Third Circuit, the quality standards at Section 718.102-107 are mandatory and where the objective tests do *not* strictly conform to the applicable standard, the administrative law judge may, nevertheless, consider the objective test if the test is found to be in substantial compliance with the quality standard. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Nevertheless, Dr. Rashid certified that "these ventilatory studies were conducted and reported in compliance with specifications and instructions provided by the Department of Labor" on the first page of his pulmonary function study report. Director's Exhibit 6. The administrative law judge did not err, therefore, in treating the pulmonary function study as in substantial compliance with the relevant quality standard. *See Sewiec*, *supra*; *Mangifest*, *supra*.

[5] In light of our affirmance of the administrative law judge's credibility determination on the basis of his reliance on the relative qualifications of Drs. Rashid and Kraynak, we need not address claimant's contentions with respect to the administrative law judge's alternative basis for resolving the conflict between the two pulmonary function studies with reference to the their "effort-dependent" nature.

pulmonary function study , which the administrative law judge found to be invalid, thus undermining his diagnosis. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 4. 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). Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4). Moreover, since the administrative law judge rationally found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields*, *supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish total respiratory disability pursuant to Section 718.204(c) (2000), an essential element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson*, *supra*; *Trent*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge