BRB No. 00-1024 BLA

JAMES E. BARNETT	)	
	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	DATE ISSUED:
ISLAND CREEK 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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (Virginia Black Lung Association), Richlands, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Dorothy L. Page (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 Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denial of Benefits (99-BLA-0101) of Administrative Law Judge Daniel J. Roketenetz 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 credited claimant with thirty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's March 23, 1998 filing date. Addressing the merits of entitlement, the administrative law judge found the medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a) (2000). In addition, he found the medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(c) (2000). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence of record. In addition, claimant contends that the administrative law judge erred in crediting the September 16, 1998 pulmonary function study inasmuch as it was performed by an uncertified and unlicensed technician. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.

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[1] Claimant is represented on appeal by Sparkle Bonds, a lay representative. 20 C.F.R. '802.202(d) (2000).

. In a Motion dated November 8, 1999, claimant requested that his claim be decided on the record. By Order dated November 18, 1999, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) canceled the hearing.

, 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. 80,045-80,107 (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.

. The parties do not challenge the administrative law judge's decision to credit claimant with thirty years of coal mine employment, his determination that employer is the properly named responsible operator, or his findings pursuant to 20 C.F.R. ''718.202(a)(1)-(3) and 718.204(c)(2)-(3) (2000). Therefore, these findings are

affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 amended regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n 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 April 23, 2001, to which all the parties have responded. The Director asserts that the amended regulations do not affect the outcome of this case. Employer responds, arguing initially that the amended regulations should not be applied retroactively to claims presently before the Board. Employer further argues that the amendments to 20 C.F.R. ''718.201(c) and 718.204(a) Acould possibly@ affect the outcome of this case, inasmuch as they reflect substantial changes to the previous regulations and are not merely codification of established circuit court law and, therefore, may have an impact on the outcome of this claim. In his response, claimant argues that it is not clear that the amended regulations, particularly the amendments to 20 C.F.R. ''718.104(d) and 718.201(c), will not affect the outcome of this case and, therefore, the case should not go forward. Based on the briefs submitted by the parties, and our review of the record, 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 case.

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 order to establish entitlement to benefits under Part 718, 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); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in crediting the September 16, 1998 pulmonary function study associated with the medical report of Dr. Hippensteel. Specifically, claimant contends that this pulmonary function study was administered by Roderick Pritchard, who is not licensed as a respiratory care

practitioner in the Commonwealth of Virginia and, therefore, is Aillegally@ acting as a pulmonary technician. Claimant argues that because Mr. Pritchard is not licensed by the Commonwealth of Virginia, Ait does not appear that the tests at issue here met the minimum standard, [and, therefore] the information developed by Dr. Hippensteel's exam and used in subsequent reviews should be excluded.@ Claimant's Brief at 10. We disagree.

In determining that the medical evidence of record is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000), the administrative law judge found that claimant did not demonstrate total respiratory disability pursuant to Section 718.204(c)(1) (2000) as a preponderance of the pulmonary function study evidence, as well as the most recent study, produced non-qualifying results[·] Decision and Order at 12; Director's Exhibits 11, 30; Employer's Exhibit 2; 20 C.F.R. '718.204(c)(1) (2000). The administrative law judge, in weighing the relevant evidence, correctly stated that the record contains three pulmonary function studies, of which, the studies dated December 12, 1990 and September 16, 1998 yielded non-qualifying results whereas the April 30, 1998 study yielded qualifying results. Decision and Order at 12; *compare* Director's Exhibit 30; Employer's Exhibit 2 with Director's Exhibit 11. However, within a reasonable exercise of his discretion, the administrative law judge determined that the qualifying April 30, 1998 study was invalid, finding that the preponderance of the well-qualified reviewing physicians found the study to be invalid[·] Decision and Order at 12;

[·] A Aqualifying@ pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B (2000). A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. '718.204(c)(1) (2000).

[·] Dr. Michos, Board-certified in Internal Medicine and Pulmonary Diseases, determined that the April 30, 1998 pulmonary function study was valid, although the AMVV@ showed sub optimal effort. Director's Exhibit 11. Dr. Zaldivar, also Board-certified in Internal Medicine and Pulmonary Diseases, opined that because two curves are almost identical, the study is technically valid. However, he further stated that the curves suggest that the effort was sub optimal and interrupted. In conclusion, Dr. Zaldivar stated that this pulmonary function was invalid because it was difficult to analyze visually the study because the graphics of the curves are very small in size. Employer's Exhibit 5. The record also contains the reports of Drs. Dahhan and Vest, both of whom are Board-certified in Internal Medicine and Pulmonary Diseases, in which the physicians determined that the April 30, 1998 pulmonary function study was invalid because of inconsistent effort and also that the tracings contain excessive hesitancy. Employer's Exhibits 9, 12. In addition, Drs. Hippensteel, Fino, Morgan and Spagnolo, in their general review of the medical

Director's Exhibit 11; Employer's Exhibits 5, 9, 12; 20 C.F.R. '718.204(c)(1) (2000); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J. dissenting).

With respect to the September 16, 1998 pulmonary function study, the administrative law judge found the fact that Mr. Pritchard, who administered the study, is not certified or licensed as a respiratory care practitioner in the Commonwealth of Virginia, did not necessarily result in this pulmonary function study being an invalid study. Rather, the administrative law judge found that the physicians who reviewed the study determined that it was a valid study. The administrative law judge also found that there is no report in the record, from any physician, that the study was invalid. Decision and Order at 12-13. Consequently, the administrative law judge found that the September 16, 1998 is a valid study, yielding non-qualifying values. *Id.*

As the administrative law judge correctly states, the regulations governing the administration and interpretation of pulmonary function studies as set forth at 20 C.F.R. '718.103 (2000) and Part 718, Appendix B (2000), do not include a requirement governing the qualifications required of the person administering the study. Rather, the regulations, in addition to setting forth the technical requirements to which the pulmonary function study must conform, state that the report must include the name of the technician as well as the name and signature of the physician supervising the study, but provide no further requirements of the technician. 20 C.F.R. '718.103(b) (2000); Part 718, Appendix B (2000). Moreover, Section 718.103(a) provides that it is presumed, in the absence of evidence to the contrary, that the stated requirements for administering a pulmonary function study have been met and, thus, that the study is valid. *See* 20 C.F.R. '718.103(a).

Herein, the administrative law judge considered claimant's challenge to the September 16, 1998 pulmonary function study based on the allegation that Mr. Pritchard is not licensed by the Commonwealth of Virginia as a respiratory care practitioner and, therefore, claimant's September 16, 1998 pulmonary function study administered by Mr. Pritchard is not a valid study. The administrative law judge found that there is no evidence in the record that the study was not administered and reported in accordance with the requisite regulations or determined to be invalid by a physician of record. Decision and Order 12-13. Thus, the administrative law judge, within a reasonable of his discretion as trier of fact, concluded that solely because the technician who administered the study may not have complied with local law regarding licensure

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evidence of record, stated that the April 30, 1998 pulmonary function study was not valid. *See* Employer's Exhibits 2, 6, 10, 14.

did not necessarily render the results of the study invalid. Decision and Order at 12. Specifically, the administrative law judge found that the physician who reviewed the study determined that the study was valid. Decision and Order at 12; Employer's Exhibit 2. Inasmuch as a pulmonary function study is presumed to be valid and conforming, absent the presence in the record of evidence to the contrary, we hold that it was not irrational for the administrative law judge to determine that the September 16, 1998 pulmonary function study was valid. Decision and Order at 12-13; Employer's Exhibit 2; 20 C.F.R. ''718.103, 718.204(c)(1) (2000); Part 718, Appendix B (2000); *Schetroma, supra; Inman, supra*; *see also* Claimant's Exhibit 2; Employer's Exhibits 17-21. Moreover, since the administrative law judge has considered all of the relevant evidence, we affirm his finding that the preponderance of the pulmonary function study evidence was non-qualifying and, therefore, insufficient to demonstrate a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) (2000). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

With respect to Section 718.204(c)(4) (2000), we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment. Decision and Order at 13-14. The administrative law judge determined that the record contains the relevant medical reports of five physicians, Drs. Hippensteel, Fino, Morgan, Spagnolo, which included the opinion that claimant was not totally disabled and was capable of performing his previous coal mine employment, and the contrary medical opinion of Dr. Forehand. Decision and Order at 7-10, 13-14; Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibits 2, 6, 10, 13-21.

In weighing the medical opinion evidence, the administrative law judge found Dr. Forehand's opinion, as to the existence or extent of claimant's disability, to be Aquestionable at best.@ Decision and Order at 14. In particular, the administrative law judge found that Dr. Forehand, in his April 30, 1998 report, determined that claimant was totally disabled from performing his usual coal mine employment based on the results of his April 30, 1998 examination of claimant. Director's Exhibit 12. However, after reviewing the more recent September 16, 1998 pulmonary function study, which produced non-qualifying values, Dr. Forehand revised his opinion, stating that Awhile [Mr. Barnett is] not totally and permanently disabled, I also believe that his respiratory disease arose, at least in part from his employment in coal mining (32 total years) and would be aggravated by returning to his last job.@ Employer's Exhibit 13. Based on the totality of Dr. Forehand's opinions, the administrative law judge acted within his discretion as fact-finder in declining to credit Dr. Forehand's April 1998 opinion, the sole opinion supportive of claimant's burden of showing that claimant was unable to perform his usual coal mine employment, in light of Dr. Forehand's subsequent opinion in February 1999 that claimant was not totally disabled. Decision and

Order at 14; *compare* Director's Exhibit 12 with Employer's Exhibit 13; *see Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp*., 7 BLR 1-12 (1984); *see also Puleo v. Florence Mining Co*., 8 BLR 1-198 (1984). Moreover, the administrative law judge reasonably found the opinion of Dr. Forehand, that claimant should avoid continued coal mine dust exposure, to be insufficient to demonstrate total respiratory disability since such an opinion is not the equivalent of a finding of total disability. Decision and Order at 14; Employer's Exhibit 13; *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice, supra*; *see generally Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Inasmuch as the administrative law judge reasonably declined to credit the opinion of Dr. Forehand, the only evidence supportive of a finding of total respiratory disability, we need not address claimant's contentions regarding the administrative law judge's weighing of the contrary evidence of record, as error, if any, in the administrative law judge's crediting of these opinions is harmless because claimant failed to sustain his burden of producing evidence supportive of a finding of total respiratory disability pursuant to Section 718.204(c)(4) (2000). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Consequently, since the administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant failed to satisfy his burden of proof in establishing a totally disabling respiratory or pulmonary impairment. Decision and Order at 14; *see 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.*, 9 BLR 1-236 (1987)(*en banc*); *see also Street, supra.*

Claimant's failure to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000) or 65 Fed. Reg. 80,049, to be codified at 20 C.F.R. '718.204(b), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Street, supra; Trent, supra; Perry, supra*.

. In light of our affirmance of the administrative law judge's findings that the medical evidence of record is insufficient to establish total respiratory disability pursuant to 20 C.F.R. '718.204(c) (2000), a requisite element of entitlement, we need not address the administrative law judge's findings under 20 C.F.R. '718.202(a)(4) (2000). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also 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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge