BRB No. 99-0222 BLA

FRANK POPOVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GATEWAY COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Susan Foster Blank, Eighty-Four, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling, Schmitt, Coletta & Deitrick, P.C.), Carnegie, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1890) of Administrative Law Judge Daniel L. Leland 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). The parties stipulated that claimant[1] established thirty-five years and ten

[1]Claimant is the miner, Frank Popovich, who filed his initial application for benefits on January 13, 1988, which he later withdrew and which was denied by reason of abandonment. Director's Exhibit 44. Claimant filed the present claim on November 27, 1996. Director's Exhibit 1.

months of coal mine employment, and the administrative law judge considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c)(1),(4). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in his consideration of the pulmonary function studies and the medical reports relevant to the issue of total disability. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987);[2] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 9.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order awarding benefits is supported by substantial evidence and contains no reversible error therein. The administrative law judge considered the three pulmonary function studies of record at Section 718.304(a)(1), and found that the December 1996 study produced qualifying values and was the only study of record which was found to be valid by the administering physician, and the reviewing physician.[3] Director's Exhibit 18. The remaining two studies, one performed on February 2, 1995 which produced qualifying values, and one performed on May 20, 1997 which produced non-qualifying values, were invalidated by the administering physicians. Director's Exhibits 17, 39. Contrary to employer's contention, the administrative law judge was not required to credit the most recent study of record, particularly since this study was considered invalid by the physician who administered it, and was therefore found to be an unreliable indicator of claimant's pulmonary ability. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309 (1984); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). Moreover, it was within the administrative law judge's discretion to credit the qualifying 1996 study despite the administering technician's statement that claimant's tracings were not reproducible, since this study was validated by both the administering physician and the reviewing pulmonary expert, and the administrative law judge may not independently evaluate the medical evidence. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

The administrative law judge then considered the relevant medical reports of record pursuant to Section 718.204(c)(4), and rationally credited the reports of Drs. Fiehler and Cho diagnosing totally disabling pneumoconiosis, as well reasoned opinions since they were based on pulmonary function studies, and claimant's pulmonary symptoms which are supported by the credited evidence of record. Claimant's Exhibits 1, 3; Director's Exhibits 20, 29. The administrative law judge permissibly gave little weight to the reports of Drs. Fino and Renn, both of whom found no evidence of pneumoconiosis, or a totally disabling respiratory impairment, since they were unaware of claimant's qualifying 1996 pulmonary function study.

[3]A "qualifying" pulmonary function study or blood gas 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, Appendices B, C, respectively. A 'non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Director's Exhibits 21, 33, 39; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Dr. Lebovitz's diagnosis of totally disabling coal workers' pneumoconiosis was also rationally accorded little weight since the administrative law judge correctly found that the record contains only his deposition, and not his original report, the date of his examination is not contained in the record, and he provided little support for his diagnosis. Director's Exhibit 36; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). We find no merit in employer's argument that Dr. Fiehler relied on an inaccurate description of the weight limits that claimant was required to lift in his former job as a mechanic in the mines, since although the weight limits described by Dr. Fiehler and claimant are not identical, they both indicate that claimant's job involved very heavy labor. Accordingly, it was within the administrative law judge's discretion to credit Dr. Fiehler's opinion that claimant's mild impairment would prevent him from performing the strenuous duties required of his former coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986); *Conley, supra; Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Moreover, the fact that Dr. Fiehler did not submit the values and tracings of his pulmonary function studies does not render his report undocumented or unreasoned since a physician is not required to perform objective tests in order to render a credible diagnosis. *Budash, supra; Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*. As we find no error in the administrative law judge's findings at Section 718.204(c), they are affirmed as supported by substantial evidence.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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 is entitled to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge