BRB No. 00-0948 BLA

RALPH A. GALLUCCI, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G.M. & W. COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
STATE WORKMEN'S INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William J. Walls (Marshall, Dennehey, Warner, Coleman & Goggin), Pittsburgh, Pennsylvania, for employer-carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-1188) of Administrative Law Judge Richard A. Morgan 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] Based on the filing date of the claim, the administrative law judge applied the regulations found at 20 C.F.R. Part 718 and found that claimant established at least 14.75 years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b). However, the administrative law judge also found that claimant failed to establish total disability due to pneumoconiosis. 20 C.F.R. §§718.204(b), (c), and, accordingly denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the evidence sufficient to establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(b)(2)(iv), (c).[2] Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

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

[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. 80,045-80,107 (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] We affirm the administrative law judge's finding on length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b)(2000) as unchallenged on appeal. 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). For the same reason, we affirm the administrative law judge's finding that the evidence of record fails to establish total disability at 20 C.F.R. §718.204(c)(1)-(3)(2000). 20 C.F.R. §718.204(b)(2)(i)-(iii).

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 all the parties 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 the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, rational and 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 to establish 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*).

Claimant contends that the administrative law judge erred in failing to credit the opinion of Dr. Pickerill while crediting the opinion of Dr. Fino. Specifically, claimant contends that the administrative law judge erred in according less weight to Dr. Pickerill's opinion based on a suspect pulmonary function study without considering other factors supportive of Dr. Pickerill's opinion and in relying on the opinion of Dr. Fino who found no x-ray evidence of pneumoconiosis when the administrative law judge had found that the x-ray evidence established the existence of pneumoconiosis.[3]

[3] Although claimant notes that the administrative law judge rejected the opinion of Dr. Schaaf that claimant was totally disabled due to pneumoconiosis, he does not argue that this

was error. Claimant's Brief at 3. Likewise, claimant does not point to any other errors made by the administrative law judge in his analysis of the medical opinion evidence. The administrative law judge's findings regarding these other medical opinions are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

The evidence of record contains the opinions of six physicians, in addition to various hospital records.[4] Dr. Pickerill found that claimant had a mild to moderate respiratory impairment due to chronic obstructive pulmonary disease and simple coal workers' pneumoconiosis and was unable to perform his last coal mine job because of heart disease and chronic lung disease. Decision and Order at 22; Claimant's Exhibits 7, 13. The administrative law judge, however, accorded little weight to Dr. Pickerill's opinion because he found it based on the October 20, 1990 pulmonary function study, a study which he found "suspect" due to claimant's fair cooperation and Dr. Ranavaya's conclusion that the study was unacceptable due to an insufficient number of tracings and less than optimal effort and cooperation on claimant's part. Decision and Order at 6; 22; Claimant's Exhibit 8; Director's Exhibits 30, 33. In addition, the administrative law judge found that four subsequently performed pulmonary function studies failed to produce qualifying results.[5] Therefore, the administrative law judge rationally concluded that Dr. Pickerill's opinion was insufficiently persuasive to establish a totally disabling respiratory impairment. Decision and Order at 22-23; *Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-106 (1994); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *see also Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Moreover, we affirm the administrative law judge's finding that Dr. Fino's opinion was most consistent with the objective evidence, as his finding that claimant is not disabled from a respiratory standpoint is supported by the non-qualifying objective tests and claimant's history of heart problems. Employer's Exhibits 3, 4; Director's Exhibit 31; Decision and Order at 23; *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994), *modif'd. on remand* 20 BLR 1-64 (1996). Further, contrary to claimant's argument, the

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[4] As none of the hospital records speak to the issue of disability, the administrative law judge properly did not consider them at 20 C.F.R. §718.204(b). *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon*. 9 BLR 1-104 (1986); Director's Exhibits 28, 30, 35, 36; Claimant's Exhibit 8; Employer's Exhibits 1, 2. In addition, Dr. Perper failed to render an opinion on disability, and therefore the administrative law judge properly accorded his opinion no great weight on this issue. Decision and Order at 22. Moreover, we affirm the administrative law judge's finding that the opinions of Drs. Schaaf, Hanzel, Perper, and Naeye are not entitled to great weight as unchallenged on appeal. *See Skrack, supra*.

[5] Of the six pulmonary function studies of record, only the earliest two yielded qualifying results, but the administrative law judge found that these two were entitled to less weight as a result of poor performance, a finding which is unchallenged by claimant. The remaining pulmonary function studies yielded non-qualifying results. *See* Decision and Order at 5-7, 21. We further note that none of the four blood gas studies of record yielded qualifying results.

administrative law judge did not act irrationally in relying on Dr. Fino's opinion even though he found that claimant did not have pneumoconiosis, a finding contrary to the administrative law judge's finding, inasmuch as Dr. Fino stated that "even assuming claimant had coal workers' pneumoconiosis, he is not disabled from a respiratory standpoint." Decision and Order at 23; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Finally, in weighing all the evidence, including the evidence of claimant's extensive heart problems, claimant's non-qualifying pulmonary function studies and blood gas studies, and the physicians' opinions of record, the administrative law judge rationally found the evidence insufficient to establish a totally disabling respiratory impairment. *Anderson, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see Kowalchick v. Director, OWCP*, 893 F.2d 615, 619, 13 BLR 2-226, 2-234 (3d Cir. 1990). We, therefore, affirm the administrative law judge's finding that claimant failed to meet his burden of establishing a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). Because claimant has not established a totally disabling respiratory impairment at Section 718.204(b)(2)(i)-(iv), we need not consider the administrative law judge's finding at Section 718.204(c). *Trent, supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge