BRB No. 05-0688 BLA

JOSEPH R. KUFROVICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES INCORPORATED	)	
	)	
and	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED: 03/27/2006
	)	
Employer/Carrier-Respondent	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6739) of Administrative Law Judge Janice K. Bullard rendered 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 nineteen and one-quarter years of coal mine employment[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish either the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting the treatment records of Dr. Krause into the record. Claimant also contends that the administrative law judge erred in her analysis of the medical evidence pursuant to Sections 718.202(a)(1), (a)(4) and 718.204(b)(2)(i), (iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 rational, supported by substantial evidence, and 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 the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2), the administrative law judge found that the evidence did not establish a totally disabling respiratory impairment. Specifically, the administrative law judge initially found that the weight of the pulmonary function study evidence supported a finding of total disability pursuant to Section 718.204(b)(2)(i).[2]

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Although claimant alleges that the administrative law judge erred in her analysis of the pulmonary function study evidence, claimant concedes that any error is harmless since the administrative law judge ultimately concluded that the pulmonary function study evidence supported a finding of total disability; he raises the issue solely to preserve appellate issues in this case. Claimant's Brief at 15-19.

Decision and Order at 13-15. The administrative law judge further found, however, that the medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv), based on her crediting of the opinions of Drs. Hertz and Dittman over the opinions of Drs. Kruk, Kraynak and Santarelli, which she found less persuasive. Decision and Order at 16-18. The administrative law judge then weighed all of the relevant evidence together and found that claimant failed to establish total respiratory disability, noting that the probative value of the pulmonary function study evidence was compromised by the multiple instances of claimant expending inadequate effort. Decision and Order at 18.

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding that the opinions of Drs. Kruk, Kraynak, and Santarelli were not well documented and were entitled to less weight than the opinions of Drs. Hertz and Dittman. Specifically, claimant contends that the administrative law judge did not provide valid bases for discrediting the opinions of Drs. Kruk, Kraynak, and Santarelli and crediting the opinions of Drs Hertz and Dittman. We disagree.

The administrative law judge found that Dr. Kruk's opinion was not credible because the diagnosis was not supported by the documentation of record. Specifically, the administrative law judge permissibly found that in diagnosing a total respiratory disability, Dr. Kruk relied on an incomplete stress test and did not discuss the significance of claimant's cardiac condition. Decision and Order at 16; *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge also permissibly questioned Dr. Kruk's reasoning because Dr. Kruk relied on claimant's symptoms of exertional dyspnea, but did not address the other physicians' opinions that the dyspnea is a symptom of claimant's obesity. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Claimant argues that the administrative law judge acted inconsistently "with the principle that [p]neumoconiosis is a progressive . . . disease" when she also discounted Dr. Kruk's opinion because he did not explain the onset of claimant's respiratory symptoms years after his last exposure to coal mine dust. Claimant's Brief at 22. In this particular case, the administrative law judge did not run afoul of the principle that pneumoconiosis may be a progressive disease. Rather, she weighed Dr. Kruk's opinion in the context of other medical opinions in the record that pointed to intervening medical conditions as the source of claimant's respiratory symptoms. Contrary to claimant's contention, the administrative law judge reasonably exercised her discretion in finding that Dr. Kruk did not adequately explain his opinion in the context of this record, and substantial evidence supports this finding. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Claimant contends that the administrative law judge erred in according less weight to Dr. Kraynak's opinion because Dr. Kraynak relied on two pulmonary function studies

that were not admitted into evidence. Claimant's Brief at 23. Review of the administrative law judge's Decision and Order, however, reflects that she did not discount Dr. Kraynak's opinion for this reason. Rather, the administrative law judge expressed her concern that, through no fault of his own, Dr. Kraynak had reviewed evidence in excess of the limitations of Section 725.414, which would compromise his opinion "to the degree it [was] colored by that evidence." Decision and Order at 17. But the administrative law judge did not find that Dr. Kraynak's opinion was "colored" to any degree by excess evidence; she instead found that "[n]otwithstanding his opinion regarding inadmissible tests," Dr. Kraynak's opinion was flawed for other reasons. *Id*. In that regard, the administrative law judge was within her discretion to find that although Dr. Kraynak relied on qualifying pulmonary function studies, he did not adequately address how he considered the multiple pulmonary function studies reflecting insufficient effort by claimant. Decision and Order at 16-17; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 639-40, 13 BLR 2-259, 2-267 (3d Cir. 1990) (holding that a report based on unreliable medical evidence is not a reasoned medical judgment). In addition, the administrative law judge found that Dr. Kraynak relied on claimant's subjective symptoms without adequately addressing the other opinions of record attributing those symptoms to a condition other than pneumoconiosis, *i.e.*, obesity and possible cardiac disease. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). In this context, we also reject claimant's contention that the administrative law judge erred when she also discounted Dr. Kraynak's opinion because he did not provide a well-reasoned account for why claimant's subjective symptoms would have arisen long after his coal dust exposure ended. Claimant's Brief at 24. As just discussed, the administrative law judge weighed Dr. Kraynak's opinion in the context of other opinions attributing claimant's symptoms to conditions that have developed or worsened in the interim. Contrary to claimant's contention, the administrative law judge reasonably exercised her discretion in finding that Dr. Kraynak did not adequately explain his opinion, and substantial evidence supports this finding. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Consequently, we reject claimant's contention that the administrative law judge erred in according Dr. Kraynak's opinion less weight.

Claimant argues further that Dr. Santarelli's opinion should not have been discounted. This contention is without merit. The administrative law judge rationally gave Dr. Santarelli's diagnosis of a severe restrictive impairment "little weight" because Dr. Santarelli "heavily relied upon a pulmonary function test which I find to be invalid, and which the doctor himself noted reflected poor effort." Decision and Order at 18; *see* 20 C.F.R. §718.101(b); *see also Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267.

Contrary to claimant's additional contention, the administrative law judge reasonably exercised her discretion in crediting the opinions of Drs. Hertz and Dittman, based upon her determination that their opinions were reasoned and were supported by

the underlying documentation of record. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155. The administrative law judge is empowered to weigh the evidence and to draw her own conclusions, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. As the administrative law judge considered all aspects of the medical opinion evidence and claimant's contentions are tantamount to a request to reweigh the evidence, we affirm the administrative law judge's finding that the better reasoned medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

In challenging the administrative law judge's finding that all the relevant evidence weighed together did not establish total disability, claimant argues that the administrative law judge failed to provide a rationale for her weighing of the evidence under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Contrary to claimant's contention, however, the administrative law judge adequately explained her findings and conclusions. The administrative law judge found that although the pulmonary function studies supported a finding of total disability, neither the blood gas studies nor the medical opinions supported a finding of total disability. *See Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*). Moreover, in weighing the pulmonary function study evidence with the contrary evidence, the administrative law judge explained that she found "the merit of the pulmonary function study evidence . . . compromised because the Claimant was shown to have expended inadequate effort in performing the test on more than one occasion." Decision and Order at 18. Because the administrative law judge gave valid reasons for her finding, we reject claimant's contention and affirm the administrative law judge's determination that the credible evidence of record did not establish total disability pursuant to Section 718.204(b)(2).

Because claimant did not establish that he is totally disabled, a requisite element of entitlement under Part 718, entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's other arguments that the administrative law judge erred in admitting Dr. Krause's treatment records into evidence, and erred in her weighing of the evidence regarding the existence of pneumoconiosis.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge