BRB No. 97-0867 BLA

ELMER G. CASEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (United Miner Workers of America), Castlewood, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1076) of Administrative Law Judge Robert G. Mahony 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). Claimant's application for benefits filed on December 10, 1993 was denied in a Decision and Order issued by Administrative Law Judge Julius A. Johnson on September 22, 1994. Director's Exhibits 1, 48. Judge Johnson accepted the parties' stipulation that the biopsy evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but concluded that the weight of the medical evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits. Claimant timely requested modification pursuant to 20 C.F.R. §725.310

and submitted additional medical evidence. Director's Exhibit 55.

Due to Judge Johnson's retirement, on modification the case was reassigned to Judge Mahony (the administrative law judge), who found that, "having looked at all the evidence of record, including . . . the evidence considered by Judge Johnson," no mistake in a determination of fact or change in conditions was demonstrated pursuant to Section 725.310. Decision and Order at 7-9. In so finding, the administrative law judge accorded "significant weight" to the "thorough discussion and analysis" by pulmonary experts who concluded that claimant was not disabled and found that the "contrary probative evidence clearly outweigh[ed] the evidence supportive of a finding of total disability." Decision and Order at 9. Accordingly, he denied benefits.

On appeal, claimant contends that the medical opinions submitted by employer should not have been credited because they are hostile to the Act. Claimant further asserts that the administrative law judge did not properly weigh the contrary probative evidence pursuant to Section 718.204(c). Finally, claimant alleges that the administrative law judge failed to accord proper weight to the medical opinions of examining physicians. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 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).

[1] We affirm as unchallenged on appeal Judge Johnson's findings regarding length of coal mine employment, responsible operator status, dependency, and pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Claimant contends that the medical opinions relied upon by the administrative law judge are hostile to the Act because the physicians opined that claimant was not disabled despite the qualifying[2] blood gas studies obtained on modification.[3] Claimant's Brief at 3-4. Doctor Forehand concluded that claimant's blood gas study results indicated the presence of a totally disabling respiratory impairment. Director's Exhibit 55. In contrast, Drs. Castle, Sargent, Dahhan, Fino, Morgan, and Repsher opined that the results of claimant's blood gas studies revealed minimal hypoxemia that did not worsen with exercise and which would not prevent him from performing his coal mine employment as he described it, in light of his normal pulmonary function studies and physical examination results. Director's Exhibits 58, 59, 61; Employer's Exhibits 1-4. Review of the record indicates that none of these physicians opined that simple pneumoconiosis is never disabling or otherwise relied on medical assumptions contrary to the Act. *See Searls v. Southern Ohio Coal Co*., 11 BLR 1-161 (1988). Instead, each based his opinion on all of the clinical and laboratory evidence before him, as is required for a reasoned medical judgment regarding disability. *See* 20 C.F.R. §718.204(c)(4). Therefore, we reject claimant's contention.

Claimant next asserts that, by accepting the reasoning of employer's physicians, the administrative law judge erroneously relied on normal pulmonary function studies to conclude that claimant's blood gas studies did not indicate total respiratory disability. Claimant's Brief at 5. Section 718.204(c) does not provide for a finding of total respiratory disability "upon a mere showing of evidence satisfying any one (or more) of the five alternatative methods" of proving disability. *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-197 (1986). Rather, it provides that such evidence establishes total respiratory

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] On modification, claimant submitted a non-qualifying pulmonary function study and two blood gas studies, one of which was qualifying. Director's Exhibit 55. He also submitted Dr. Forehand's opinion that claimant was totally disabled from a respiratory standpoint. *Id*. Employer submitted a non-qualifying pulmonary function study, a qualifying blood gas study, and the medical opinions of Drs. Castle, Sargent, Fino, Dahhan, Morgan, and Repsher. Director's Exhibits 58, 59, 61; Employer's Exhibits 1-4.

disability only in the absence of contrary probative evidence. *Shedlock*, 9 BLR at 1-198. Contrary to claimant's contention, "[t]he term 'contrary probative evidence' is not limited to a consideration of medical evidence of the same category or type," but instead "refers to all evidence (medical and otherwise) which is contrary and probative." *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987). The administrative law judge must weigh all of the contrary probative evidence, indicate the relative weight assigned thereto, and determine whether the evidence establishes a totally disabling respiratory impairment. *Id*. Here, the administrative law judge complied with the requirement to weigh the contrary probative evidence and provided valid reasons for the relative weight that he assigned to the evidence. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we reject claimant's contention.

Claimant contends that the administrative law judge failed to accord proper weight to the opinions of examining physicians. Claimant's Brief at 5. Claimant argues that, since none of the physicians who examined claimant in connection with the modification request obtained a non-qualifying blood gas study, "the opinions of the non-examining physicians that claimant was not disabled [are] unsupported." *Id*. We reject claimant's repeated assertion that the administrative law judge was compelled to find total respiratory disability established because the record contained qualifying blood gas studies.[4] Objective tests are almost always administered by examining physicians. Yet this does not mean that the test results obtained must establish total respiratory disability despite any contrary probative evidence in the record. *See Fields, supra*; *Shedlock, supra*. Here, the only examining physician to diagnose respiratory disability was Dr. Forehand. Director's Exhibits 10, 55. Two other examining physicians[5] and four reviewing physicians concluded that claimant was not totally disabled, for the reasons stated above. Director's Exhibits 58, 59, 61; Employer's Exhibits 1-4. The administrative law judge permissibly found Dr. Forehand's opinion and the two qualifying blood gas studies outweighed by this contrary probative evidence. *See Fields, supra*; *Clark, supra*; *Wetzel, supra*. Therefore, we reject claimant's contention and we affirm the administrative law judge's finding pursuant to Section 718.204(c) and his otherwise unchallenged conclusion that no basis for modification was established pursuant to Section 725.310.

[4] Contrary to claimant's assertion, the November 4, 1994 blood gas study obtained by examining physician Dr. Forehand was non-qualifying. Director's Exhibit 55.

[5] Dr. Castle examined claimant on modification and reviewed the medical evidence of record. Director's Exhibit 59. Dr. Sargent examined claimant in 1993 and reviewed additional medical records on modification. Director's Exhibits 23, 58.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge