BRB No. 02-0688 BLA

CLEARSY FRANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SOUTH MOUNTAIN COAL COMPANY, INCORPORATED	)	
	)	
	)	
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 -- Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Clearsy France, Clintwood, Virginia, *pro se*.

James M. Poerio (Tucker Arensberg, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of legal counsel,[2] appeals the Decision and

[1]Claimant is Clearsy France, the miner, who initially filed a claim for black lung benefits on August 24, 1998, which was denied by the district director on November 12, 1998. Director's Exhibits 54-1, 54-12. Claimant filed the instant claim for benefits on January 11, 2000. Director's Exhibit 1.

[2] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the

Order (2001-BLA-11) of Administrative Law Judge Edward Terhune Miller denying benefits on a duplicate 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).[3] The administrative law judge credited claimant with 18.14 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence submitted since the prior denial was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and was also insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits.[4] The Director, Office

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administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[3] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4] The district director designated three potentially liable responsible operators in this case: South Mountain Coal Company, Incorporated (South Mountain), Nicky Coal Company, Incorporated (Nicky), and Big Star Coal Company (Big Star). Big Star filed a responsive brief to the Board in support of the denial along with a request

of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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 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, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

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to be dismissed as a party. Nicky filed a Motion to Dismiss and to Reform Caption to the Board. By Order dated October 3, 2002, the Board granted these employers' requests and dismissed Big Star and Nicky as parties in the case and reformed the caption. Subsequently, by letter dated October 31, 2002, employer South Mountain filed a letter advising the Board that it was adopting as its brief the briefs filed by Big Star and Nicky and that it would rely upon the arguments raised therein.

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 of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant's 1998 claim was denied because claimant failed to establish that he suffered from a total respiratory disability. Decision and Order at 2; Director's Exhibit 54-12. Consequently, in order to establish a material change in conditions pursuant to Section 725.309(d) (2000),[5] the newly submitted evidence must support a finding of total respiratory disability.[6] *See Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090 (1997).

[5] The revisions to the regulation at 20 C.F.R. '725.309 do not apply to claims, such as this, which were pending on January 19, 2001. 20 C.F.R. '725.2.

[6] The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 78.

The administrative law judge concluded that total respiratory disability and disability causation were not established. The administrative law judge found that the newly submitted pulmonary function study evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i).[7] The administrative law judge initially noted that the qualifying June 28, 2000 pulmonary function study, administered and invalidated by Dr. Fino due to suboptimal effort, was entitled to no weight. Decision and Order at 8, 15; Director's Exhibit 46. The administrative law judge also addressed the four remaining newly submitted pulmonary function studies administered between February 7, 2000 and July 18, 2001. While the pulmonary function studies administered on July 5, 2000 and July 18, 2001, resulted in qualifying pre-bronchodilator values, the administrative law judge permissibly found that the February 7, 2000, July 5, 2000 and September 6, 2000, non-qualifying post-bronchodilator pulmonary function studies supported a determination that the preponderance of the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i). *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Bolyard v. Peabody Coal Co.,* 6 BLR 1-767 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 15; Director's Exhibit 53; Employer's Exhibit N 1. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).

In considering whether total disability was established under Section 718.204(b)(2)(ii), the administrative law judge noted that the preponderance of the newly submitted blood gas study was non-qualifying and permissibly found that total disability was not established thereunder. The administrative law judge noted that all four blood gas studies yielded non-qualifying pre-exercise values and outweighed the sole post-exercise blood gas study which yielded qualifying values. *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); Decision and Order at 15; Director's Exhibits 12, 46; Employer's Exhibits N 1, SM 3.

In addition, the administrative law judge correctly found that as the record

[7] A Aqualifying@ pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. '718.204(c)(1), (c)(2).

contained no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(b)(2)(iii), establishing total disability by this method was precluded. Decision and Order at 16.

In considering whether total disability was established under Section 718.204(b)(2)(iv), the administrative law judge permissibly credited the opinions of Drs. Castle and McSharry, who stated that claimant was not totally disabled from a respiratory standpoint, because they were better supported by the credible objective medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 16; Employer's Exhibits N 1, N 3, SM 3. In addition, with respect to the opinions of the two physicians who concluded that claimant was totally disabled, the administrative law judge reasonably allocated significant weight to Dr. Fino's reasoned opinion based on his credentials, but rationally determined that the medical opinion of Dr. Forehand was entitled to little weight regarding total disability as it was not well-reasoned because the doctor did not provide an explanation for his conclusion. *See Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see also Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 16; Director's Exhibits 12, 46. Upon weighing the conflicting opinions, the administrative law judge rationally found, within his discretion as fact-finder, that the medical opinion evidence was in equipoise and failed to establish total disability by a preponderance of the evidence.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *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). Moreover, since the administrative law judge rationally found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i)-(iv), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields*, *supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to demonstrate a material change in conditions pursuant to Section

725.309(d) (2000) as it is supported by substantial evidence and is in accordance with law. Consequently, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge