BRB No. 97-1256 BLA

RUFUS C. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SANDY LANE, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Rufus C. Turner, Clinchco,Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (90-BLA-1034) of Administrative Law Thomas Schneider 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). This case is on appeal to the Board for the third time. In the original decision, Administrative Law Judge Robert S. Amery credited claimant with twenty-one and three-quarter years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and in *Turner v. Sandy Lane, Inc.*, BRB No. 91-1236 BLA (Nov. 30, 1993) (unpub.), the Board held that the administrative law judge's failure to make a specific finding pursuant to 20 C.F.R. §725.309 was harmless error, affirmed the administrative law judge's finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b), (c)(1) and remanded the case for further consideration.

On remand, the administrative law judge found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (4). Accordingly, benefits were awarded. Employer appealed and in *Turner v. Sandy Lane, Inc.*, BRB No. 94-2271 BLA (Sept. 26, 1995) (unpub.), the Board vacated the award of benefits and remanded the case to the administrative law judge to make a specific finding pursuant to 20 C.F.R. §725.309 based on intervening case law. *See Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In addition, the Board noted that the United States Supreme Court had recently issued *Director, OWCP v. Greenwich Collieries* [Ondecko],114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), which held that the "true doubt rule" violated Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Inasmuch as the administrative law judge had found total disability established pursuant to 20 C.F.R. §718.204(c)(4) because he applied the true doubt rule, the Board vacated his finding and remanded the case for further consideration thereunder. The Board also instructed the administrative law judge to compare the exertional requirements of claimant's usual coal mine work with the physicians' assessment of his respiratory impairment and to weigh the contrary probative evidence in determining whether total disability was established pursuant to 20 C.F.R. §718.204(c).

On remand, the case was reassigned to Administrative Law Judge Schneider who found that the recently submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, but that the evidence of record as a whole was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits and also contends that the administrative law judge erred in finding that claimant established a material change in condition pursuant to Section 725.309. The Director, Office of Workers' Compensation Programs (the Director), filed a response to employer's contentions with respect to the administrative law judge's finding pursuant to 20 C.F.R. §725.309, to which employer replied.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence and are in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of claimant 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments of the parties and the evidence of record, we conclude that substantial evidence supports the denial of benefits under 20 C.F.R. Part 718. With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence as well as the other evidence of record failed to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established under Section 718.204(c), the administrative law judge initially noted that Judge Amery had found

that the pulmonary function study evidence established total disability pursuant to Section 718.204(c)(1), even though only one study was qualifying, but that the blood gas study evidence of record was non-qualifying and total disability was not established pursuant to Section 718.204(c)(2).[1] *See* Decision and Order on Remand at 4-5, 7 Furthermore, the administrative law judge correctly determined that the record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total disability pursuant to Section 718.204(c)(3). *See* Decision and Order at 7; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. (en banc)* 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

[1]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 and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

In considering whether total disability was demonstrated pursuant to Section 718.204(c)(4), the administrative law judge permissibly accorded less weight to the medical opinion of Dr. Fino since he did not examine claimant and less weight to Dr. Pfoff's opinion since he did not state definitively whether claimant was totally disabled. Decision and Order on Remand at 8; *see Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Further, the administrative law judge concluded that the exertional requirements of claimant's usual coal mine employment of a scoop operator and shuttle car operator were minimal and required him to sit for 9-10 hours, which was considered by Dr. Endres-Bercher in forming his opinion, but was not addressed by Dr. Robinette in opining that claimant's ability to return to work was marginal. *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); Decision and Order on Remand at 8. In addition, the administrative law judge reasonably determined that the medical opinion of Dr. Endres-Bercher, that claimant did not have a totally disabling respiratory impairment in spite of a qualifying pulmonary function study, was entitled to the greatest weight since he possessed superior qualifications to Dr. Pfoff and his opinion was supported by the weight of the blood gas studies and the majority of the pulmonary function studies.[2] *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order on Remand at 8. Thus, the administrative law judge reconsidered the entirety of the medical opinion evidence in conjunction with the pulmonary function study evidence, the exertional requirements of claimant's usual coal mine employment and the contrary evidence and acted within his discretion in concluding that claimant failed to establish that he suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c). *Fields*, *supra*; Decision and Order on Remand at 8-9. As 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), 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 the evidence of record is insufficient to establish total disability pursuant to Section

[2]Although the administrative law judge, in summarizing the evidence, stated that other than the one qualifying pulmonary function study, all other objective tests, both pulmonary function studies and blood gas studies were non-qualifying, Decision and Order on Remand at 9, he earlier noted that one of the four blood gas studies was qualifying, but that the two most recent blood gas studies were non-qualifying and that total disability was not established. As the administrative law judge found that the weight of the blood gas study evidence was non-qualifying, any error with respect to his summary is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

718.204(c) as it is supported by substantial evidence and is in accordance with law.[3] *Fields*, s*upra*; *Shedlock*, *supra*.

[3]As we affirm the administrative law judge's denial of benefits on the merits, we need not address employer's contentions with respect to the administrative law judge's findings pursuant to 20 C.F.R. §725.309.

Accordingly, the Decision and Order on Remand of the administrative law judge

denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge