BRB No. 98-1642 BLA

ARDEN K. RIGGLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENTLEY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, L.C.), Charleston, West Virginia, for claimant.

Stephen E. Crist (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (96-BLA-631) of Administrative Law Judge Daniel L. Leland 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 "approximately"

forty-five years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found a totally disabling pulmonary impairment established pursuant to 20 C.F.R. §718.204(c) and, in light of the decision of the United States Court of Appeals for the Fourth Circuit in *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), the administrative law judge found that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge further found that the evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. On appeal, employer challenges the administrative law judge's evaluation of the medical opinion and blood gas study evidence of record to find that claimant established total disability and disability causation. *See* 20 C.F.R. §718.204(b), (c)(2), (4). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate 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 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 to 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).

Employer contends that the administrative law judge erred in relying, in part, on the February 16, 1998, blood gas study to find total disability established pursuant to Section 718.204(c)(2) when the results do not include a reported altitude. The administrative law judge reasonably found that the new blood gas study evidence, consisting of the May 1995 and the February 1998 studies which yielded qualifying values, was sufficient to establish total disability pursuant to Section 718.204(c)(2).[1] Decision and Order at 3, 5; Director's Exhibit 12; Claimant's Exhibit 1; *see Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). We reject employer's arguments

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

concerning the validity of the February 1998 study that did not record the altitude since the standards set forth in Section 718.105 for blood gas studies are not mandatory and should be considered and used as guidelines. An otherwise reliable and probative study must not be rejected simply for failing to satisfy a non-critical quality standard. *Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring). Furthermore, objective studies which do not meet the quality standards under the Part 718 regulations must be challenged below, which employer did not do in this case, and such challenges will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Orek*, *supra*. Consequently, we affirm the administrative law judge's finding that total disability was established pursuant to Section 718.204(c)(2).

Employer also contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(4) since, while according greater weight to Dr. Gaziano's opinion, in part, on the basis that he is board-certified in pulmonary diseases, he failed to consider that Dr. Crisalli is also board-certified in pulmonary diseases as denoted on the letterhead of the first page of his report. Employer also contends that even though Dr. Crisalli never performed a physical examination of claimant, his review of claimant's medical records provided him with a superior knowledge of claimant's condition. The administrative law judge permissibly gave less weight to Dr. Crisalli's opinion because he did not examine claimant and did not mention the May 5, 1995, qualifying blood gas study in his report since an administrative law judge may reasonably accord diminished weight to medical opinions of non-examining physicians who were not fully apprised of qualifying blood gas studies. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 4; Employer's Exhibit 1. The administrative law judge gave more weight to Dr. Gaziano's opinion because he is board-certified in pulmonary diseases and his opinion was supported by two qualifying blood gas studies. Contrary to employer's contention, the administrative law judge reviewed all of the factors considered by Drs. Gaziano and Crisalli in rendering their opinions and reasonably exercised his discretion in finding that Dr. Gaziano's opinion, that claimant was unable to perform his usual coal mine employment due to his pulmonary disease, is more consistent with the objective evidence. Decision and Order at 5; Claimant's Exhibit 1; Employer's Exhibit 1; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Therefore, since the administrative law judge is charged with the evaluation and weighing of the medical evidence, may draw appropriate inferences therefrom, and is not required to credit the conclusions of any particular medical expert, we affirm the administrative law judge's decision to defer to the medical opinion of Dr. Gaziano, which he found was best supported by the objective clinical evidence of record, over the contrary opinion of Dr. Crisalli. *See Lafferty, supra*; *see also Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as the administrative law judge permissibly credited Dr. Gaziano's opinion over

Dr. Crisalli's opinion on the ground that it was supported by the qualifying blood gas studies, any error in the administrative law judge's other reasons for giving less weight to Dr. Crisalli's opinion would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).[2] We therefore affirm the administrative law judge's finding that total disability was established pursuant to Section 718.204(c)(4). *Clark*, *supra*. Furthermore, the administrative law judge correctly considered the entirety of the relevant medical evidence and acted within his discretion in concluding that claimant established that he suffered from a totally disabling respiratory impairment pursuant to Section 718.204(c). *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 5. Consequently, we affirm the administrative law judge's finding that the evidence of record was sufficient to establish total disability pursuant to Section 718.204(c). *Shedlock*, *supra*. We, therefore, also affirm the administrative law judge's finding that the newly submitted medical evidence is sufficient to establish a material change in conditions pursuant to Section 725.309(d), inasmuch as the administrative law judge reasonably exercised his discretion, as trier-of-fact, in finding that this evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment. *Rutter*, *supra*; Decision and Order at 4-5.

Employer also contends that the administrative law judge erred in his weighing of the medical opinion of Dr. Gaziano in determining whether total disability due to pneumoconiosis was established pursuant to Section 718.204(b). In challenging the administrative law judge's finding that claimant's total disability was due, at least in part, to his pneumoconiosis, employer asserts that the administrative law judge impermissibly substituted his own opinion for that of Dr. Gaziano, as Dr. Gaziano did not specifically state that claimant's total disability was due to pneumoconiosis. We disagree. Contrary to employer's contention, the administrative law judge fully discussed all of the relevant medical opinion evidence of record which included the medical reports of both Drs. Gaziano and Crisalli. Decision and Order at 5-6; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge noted that Dr. Gaziano diagnosed coal workers' pneumoconiosis and a totally disabling pulmonary impairment, but that he did not specifically state the cause of the total disability. Decision and Order at 6. The administrative law judge found that "as the only pulmonary conditions he diagnosed were silicosis and coal worker's pneumoconiosis, it is fair to conclude that Dr. Gaziano believed that pneumoconiosis was at

[2] The administrative law judge did note that Dr. Crisalli was board-certified in internal medicine, the only board-certification listed on his *curriculum vitae* dated February 3, 1988, and attached to his report. Decision and Order at 4; Employer's Exhibit 1.

least a contributing cause of claimant's total disability." *Id*. The administrative law judge also noted that Dr. Crisalli diagnosed pneumoconiosis and found a mild impairment due to smoking and coal dust exposure. *Id*. 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). Inasmuch as the administrative law judge's inference is not patently unreasonable, we affirm his finding that the weight of the medical opinion evidence is sufficient to meet claimant's burden pursuant to Section 718.204(b). 20 C.F.R. §718.204(b); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Consequently, we affirm the administrative law judge's finding that the evidence was sufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. *See Trent, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Acting
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge