BRB No. 99-1085 BLA

MICHAEL CHICKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANTERBURY COAL COMPANY	)	DATE ISSUED:
	)	
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 on Remand-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ross S. Bash (Ross S. Bash Law Offices), Delmont, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling & Associates, P.C.), Carnegie, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (95-BLA-0326) 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). This case is before the Board for a third time. Initially, the Board affirmed Administrative Law Judge Thomas Burke's determination that there was good cause for excusing the late filing of employer's controversion. Accordingly, the Board remanded the claim for a hearing on the merits. *Chicka v. Canterbury Coal Co.*, BRB No. 96-0126 BLA (Jun. 28, 1996).

On remand, Judge Leland found that claimant established a coal mine employment history of at least fifteen years, but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c).

Subsequent to an appeal by claimant, the Board vacated the administrative law judge's denial of benefits and remanded the claim to the administrative law judge for further consideration. *Chicka v. Canterbury Coal Co.*, BRB No. 98-0597 BLA (Mar. 26, 1999). The Board vacated the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and remanded the claim for further consideration of that issue. *Id.*. The Board further vacated the administrative law judge's finding that total disability was not demonstrated at 20 C.F.R. §718.204(c)(2) inasmuch as the administrative law judge failed to make specific findings regarding all of the blood gas study evidence. *Id.*

On remand, the administrative law judge found that, pursuant to the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the weight of the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a), and that the disease arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order on Remand at 2-3. The administrative law judge further concluded, however, that the blood gas study evidence failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2), and that a weighing of all of the relevant evidence failed to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Decision and Order on Remand at 3-4. Accordingly, benefits were denied.

On appeal, claimant contends that the blood gas study evidence establishes the existence of a totally disabling respiratory impairment, and that the administrative law judge therefore erred in failing to award benefits. Employer, in response, urges affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[1]

[1]The administrative law judge's finding that claimant has established the existence of

pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 this 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).

Claimant contends specifically that the administrative law judge should have found total disability established at Section 718.204(c)(2) as employer "failed to present contrary probative evidence to contest the results of Claimant's qualifying arterial blood gas studies, thereby allowing Claimant to invoke the interim presumption of total disability."[2] Claimant's Brief at 8. Claimant further asserts that employer has failed to rebut this presumption by showing that claimant was able to engage in his usual coal mine employment. Accordingly, claimant asserts that claimant has established a totally disabling respiratory impairment and entitlement to benefits.

Inasmuch as the instant claim was filed subsequent to March 31, 1980, the claim is governed by the regulations found at 20 C.F.R. Part 718. *See* 20 C.F.R. §718.2; *Mazgaj v. Valley Camp Coal Co.,* 9 BLR 1-201 (1986); *Muncy v. Wolfe Creek Collieries*, 3 BLR 1-627 (1981). Contrary to claimant's assertion that the qualifying blood gas study evidence gives rise to a presumption of total disability, in claims governed by the regulations at Part 718, a claimant must affirmatively establish the existence of a totally disabling respiratory impairment through the weight of all of the relevant evidence pursuant to Section 718.204(c). *See Gee v. W.G. Moore and Sons,* 9 BLR 1-4 (1986)(*en banc*); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Contrary to claimant's assertion, the burden does not rest with employer to demonstrate that claimant is not disabled in Part 718 claims. Rather, the burden rests with claimant to affirmatively establish the presence of a totally disabling respiratory or pulmonary impairment, after consideration of all probative evidence, like and unlike. 20 C.F.R.

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

§718.204(c); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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); *see also Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

Pursuant to the Board's remand instructions, the administrative law judge addressed the blood gas studies of record and found that the resting blood gas studies performed on March 25, 1992, and May 6, 1992, Director's Exhibits 12, 25, produced qualifying values, but that the resting study performed on March 19, 1992, Director's Exhibit 11 produced non-qualifying values.[3] The administrative law judge further found that the exercise study of March 25, 1992, Director's Exhibit 12, produced non-qualifying values, and that the study was entitled to the greatest weight at Section 718.204(c)(2), because it was the best indicator "of how the miner's pulmonary system responds to exertion." Decision and Order on Remand at 4. The weight to be accorded medical evidence is within the purview of the administrative law judge. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984). We conclude, therefore, that the administrative law judge has complied with our remand instructions and, contrary to claimant's assertions, has permissibly concluded that claimant has failed to affirmatively demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2). *See Ondecko*, *supra*.

[3] When this case was most recently before the Board, the Board held that the blood gas study of March 19, 1992, produced qualifying values and that, on remand, the administrative law judge was to address this study in conjunction with the other studies. *Chicka*, BRB No. 98-0597 BLA, slip op. at 5-6. Further review of the study in question, however, demonstrates that the administrative law judge properly found that the study was non-qualifying. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Moreover, the administrative law judged weighed all of the relevant evidence of disability, both like and unlike, together and, in a permissible exercise of his discretion as trier-of-fact, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), *see also Anderson*, *supra*, concluded that such evidence failed to affirmatively support a finding of total disability pursuant to Section 718.204(c).[4] Accordingly, we affirm the administrative law judge's determination that claimant has failed to affirmatively establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). *See Ondecko*, *supra*. Inasmuch as the administrative law judge has properly determined that the evidence of record fails to support a finding of total disability, a requisite element of entitlement, pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc)*, the administrative law judge's denial of benefits must be affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

[4]Along with the blood gas study evidence discussed, *supra*, the evidence relevant to total disability consists of two non-qualifying pulmonary function studies, Director's Exhibits 10, 25, and the medical opinions of Drs. Kettering and Fino, Director's Exhibits 15, 25, 40, which stated that claimant could return to his previous coal mine employment.

Administrative Appeals Judge