BRB No. 96-0367 BLA

GOFFREDO CICLAMINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Robert A. Mazzoni, Scranton, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-0232) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge accepted the parties' stipulation to eight years of coal mine employment, found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20

[1] Claimant is Goffredo Ciclamino, the miner, whose initial application for benefits filed on March 23, 1971 was denied in a Decision and Order issued on April 15, 1985 and affirmed by the Board on September 25, 1987. Director's Exhibit 22; *Ciclamino v. Director, OWCP*, BRB No. 85-1157 BLA (Sep. 25, 1987)(unpub.). Claimant filed a second application on September 27, 1988 which was finally denied on December 15, 1988. Director's Exhibit 23. Claimant filed the present claim on March 7, 1994. Director's Exhibit 1.

C.F.R. §§718.202(a)(4) and 718.203(c), but concluded that the evidence failed to establish total respiratory disability pursuant to Section 718.204(c). Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence pursuant to Section 718.204(c)(4). The

Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.[2]

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).

Claimant contends that the administrative law judge erred by rejecting Dr. Levinson's opinion based on the physician's alleged partiality to claimant. Claimant's Brief at 12. The Board has held that, without specific evidence indicating that a report prepared for one party is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). Moreover, unless the opinions of the physicians retained by the parties are properly held to be biased, based on specific evidence in the record, the opinions of Department of Labor (DOL) physicians should not be accorded greater weight due to their impartiality. *Id*.

The administrative law judge stated that Dr. Levinson's opinion was "entitled to no weight" because the administrative law judge was convinced that "Dr. Levinson tailored his opinion to suit the needs of the party who engaged him -- first, the DOL and next, claimant." Decision and Order at 11. The administrative law judge declared the evidence of bias to be the inconsistency he perceived between the physician's two opinions: In 1988, when examining claimant on behalf of the Department of Labor, Dr. Levinson diagnosed a mild ventilatory impairment but did not state that it was disabling, whereas in 1994, when retained by claimant, he opined that claimant's mild obstructive defect was totally disabling. Decision and Order at 11; Director's Exhibits 18, 23.

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, and pursuant to 20 C.F.R. §§718.202(a), 718.203(c), and 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Although Dr. Levinson testified at the hearing that the two opinions differed because he simply had not addressed whether claimant could perform his usual coal mine employment in his 1988 report, Hearing Transcript at 37-38, the administrative law judge discounted his explanation as "inadequate" and rejected his opinion as biased. Decision and Order at 11. While an administrative law judge has broad discretion in assessing witness credibility and weighing documentary evidence, *see Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we agree with claimant that the disparity, if any, between Dr. Levinson's two reports does not constitute the specific evidence of bias required by *Melnick*.[3] Therefore, the administrative law judge's first reason for discrediting Dr. Levinson's opinion is invalid.

However, the administrative law judge provided a second, valid reason for the weight he accorded to Dr. Levinson's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-378 (1983)(Miller, J., dissenting). The administrative law judge permissibly found that even if Dr. Levinson's opinion were credible, Dr. Sahillioglu's opinion that claimant was not totally disabled was entitled to greater weight because it was better supported by the most recent non-qualifying[4] objective studies and the normal physical examination findings noted by both Drs. Sahillioglu and Levinson. Decision and Order at 11; Director's Exhibit 25; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youhiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). Substantial evidence supports this determination. Of the eight pulmonary function studies of record, only one, dating from 1974, yielded qualifying values, and all of the blood gas studies were non-qualifying. Director's Exhibits 8, 10, 18, 22, 23, 25. Both Drs. Levinson and Sahillioglu recorded normal physical findings. Director's Exhibits 18, 25. Because the administrative law judge provided a valid rationale for his weighing of Dr. Levinson's opinion, his error in finding Dr. Levinson to be biased is harmless. *See Kozele*, *supra*; *Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984). Therefore, we reject claimant's contention that remand is required for the administrative law judge to reweigh Dr. Levinson's opinion.

---

[3] An administrative law judge may accord diminished weight to a medical opinion found to be internally inconsistent or inadequately explained. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). However, the administrative law judge did not purport to do so here.

[4] 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).

Claimant further contends that the administrative law judge mischaracterized Dr. Desai's opinion. Claimant's Brief at 14. Dr. Desai diagnosed a mild obstructive ventilatory defect and stated that claimant "may become more [short of breath] with working in coal mine." Director's Exhibit 9 at 4. In Section D of DOL Form CM-988, which requests complaints "as described by patient," Dr. Desai recorded complaints of difficulty in climbing steps and walking more than one block. Director's Exhibit 9 at 2. No such limitations were listed in the section of the form requesting the physician's own medical assessment of claimant's impairment.

The administrative law judge concluded that Dr. Desai did not "provide sufficient information from which to infer whether she was of the opinion that claimant was totally disabled or to form my own judgment regarding this question." Decision and Order at 10. Inasmuch as Dr. Desai did not state that claimant was currently totally disabled but indicated only that he may become more short of breath if further exposed to coal mine dust, *see Taylor v. Evans and Gambrel Co*., 12 BLR 1-83 (1988), and did not indicate her assessment of claimant's physical limitations, *see Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990), we cannot say that the administrative law judge's conclusion regarding her opinion was unreasonable. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Because claimant has failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), a necessary element of entitlement under Part 718, the denial of benefits is affirmed.[5] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[5] In light of our affirmance of the denial of benefits, we do not address the duplicate claim issues in this case. *See* 20 C.F.R. §725.309(d); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

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

NANCY S. DOLDER
Administrative Appeals Judge