

BRB No. 06-0170 BLA

FRANK A. OZARK)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 08/15/2006
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (03-BLA-5045) of Administrative Law Judge Janice K. Bullard denying benefits on a subsequent 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 has been before the Board previously.¹ In the prior Decision and Order, the administrative law judge noted that this

¹ The Board set forth this claim's procedural history in the Board's prior decision in *Ozark v. Director, OWCP*, BRB No. 04-0280 BLA (Nov. 30, 2004)(unpub.), which is incorporated herein by reference.

case is a subsequent claim and found, based on the parties' stipulation, eight years of coal mine employment² and the existence of pneumoconiosis arising out of coal mine employment, which established an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R. §725.309. Decision and Order dated November 25, 2003. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Decision and Order dated November 25, 2003. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's total disability findings and her denial of benefits and remanded the case for the administrative law judge to reconsider the pulmonary function study and medical opinion evidence and to address the remaining issues of entitlement, if reached. *Ozark v. Director, OWCP*, BRB No. 04-0280 BLA (Nov. 30, 2004)(unpub.). On remand, the administrative law judge concluded that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order on Remand at 7-13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to Section 718.204(b)(2)(i) and (iv). The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

² The record indicates that claimant's last coal mine employment occurred in Pennsylvania. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge acted within her discretion in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant initially asserts that the administrative law judge erred in finding the pulmonary function study evidence insufficient to establish total disability. Claimant's Brief at 4. Specifically, claimant contends that the administrative law judge erred in accepting the opinion of the reviewing physician, Dr. Michos, and for failing to find that a fair effort constitutes a valid study. Claimant's Brief at 5-6. We disagree. The administrative law judge noted that the record contained fifteen pulmonary function studies, of which four studies were qualifying and eleven studies were non-qualifying.³ Decision and Order on Remand at 8; Director's Exhibits 1, 2, 10, 31; Claimant's Exhibits 1-5. The administrative law judge further noted that of the four qualifying tests, claimant's effort was noted as fair by Dr. Levinson on three tests, and on the pulmonary function study submitted by Dr. Corazza, the administering technician noted that "patient did not appear to perform to the maximum ability." Decision and Order on Remand at 8. The administrative law judge concluded that the majority of the pulmonary function studies, including the most recent test, were non-qualifying and the qualifying studies were entitled to less weight and therefore, claimant failed to establish total disability on the basis of the pulmonary function study evidence. Decision and Order on Remand at 10.

Contrary to claimant's assertions, the administrative law judge rationally addressed the credibility of the pulmonary function study evidence of record and the weight to be accorded this evidence in determining if claimant met his burden of proof. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The administrative law judge found that Dr. Michos did not provide an explanation as to what he considered to be suboptimal flow volume loops and thus his opinion on that issue was entitled to little weight. Decision and Order on Remand at 9; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge further found, however, that the opinion of Dr. Michos

³ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the 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(b)(2)(i), (ii).

stating that the qualifying studies by Dr. Levinson were invalid, was well reasoned and documented because the physician correctly determined that the tests do not include the requisite three tracings and Dr. Levinson acknowledged that the ventilatory studies are heavily dependent on the patient's effort and a fair effort could affect the results. Decision and Order on Remand at 9-10; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic*, 8 BLR 1-46. The administrative law judge permissibly determined that the qualifying pulmonary function studies performed by Dr. Levinson do not reliably reflect a finding of total disability as they do not conform with the requirements set forth in 20 C.F.R. §718.103 or Third Circuit case law. See 20 C.F.R. §718.103(b), (c); Decision and Order on Remand at 9-10; Claimant's Exhibits 1, 3; *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).

Moreover, we find no error in the administrative law judge's consideration of claimant's "fair" effort in questioning the reliability of the pulmonary function study evidence. Although the notation of "fair" effort on a pulmonary function study may be conforming, it is the function of the administrative law judge, as fact-finder, to assess the credibility and reliability of the evidence. *Witmer*, 111 F.3d 352, 21 BLR 2-83; *Mabe*, 9 BLR 1-67. Based on the record in this case, substantial evidence supports the administrative law judge's conclusion that the qualifying test results obtained on Dr. Levinson's studies, based on a "fair" effort, are questionable in light of the physician's own testimony that pulmonary function studies are "heavily dependent on the patient's effort" and that fair is "not the best effort and it could affect the results of the test." Decision and Order on Remand at 9-10; Claimant's Exhibit 8 at p. 32. Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).⁴

Claimant further argues that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Levinson, the miner's treating physician, as his opinion is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 6-9. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1988). Additionally, we reject claimant's assertion that Dr. Levinson's opinion is sufficient to establish entitlement, because an administrative law judge is not required to accord determinative weight to an

⁴ The administrative law judge's credibility determination with respect to the pulmonary function study performed by Dr. Corazza is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 6-9; Decision and Order on Remand at 10-12; Director's Exhibits 1, 7, 27, 30; Claimant's Exhibits 6, 8; *Lafferty*, 12 BLR 1-190; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge properly accorded substantial weight to the opinion of Dr. Talati, that claimant has no significant impairment to preclude claimant from performing his last coal mine job, over the contrary opinion of Dr. Levinson because Dr. Talati's opinion is better reasoned and consistent with the most recent clinical studies of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Remand at 11-12.

Further, although Dr. Levinson is the miner's treating physician, the administrative law judge considered the factors set forth in 20 C.F.R. §718.104(d) and provided a rational reason for finding his opinion insufficient to meet claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Lango*, 104 F.3d 573; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 11-12. We, therefore, affirm the administrative law judge's credibility determinations and his finding that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as they are supported by substantial evidence and are in accordance with law.⁵ *See Trent*, 11 BLR at 1-27; *Mabe*, 9 BLR 1-67; *Perry*, 9 BLR 1-1.

⁵ The administrative law judge's credibility determinations with respect to the opinions of Drs. Lehman and Corazza are not challenged on appeal and therefore they are affirmed. *See Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge