

BRB No. 97-1281 BLA

REGINA P. SHUEY )  
(o/b/o the Estate of CLARENCE PURCELL) )  
 )  
Claimant-Petitioner )

v. )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent )

DATE ISSUED:

DECISION and ORDER

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

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Cathryn Celeste Helm (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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (96-BLA-00053) 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 found that claimant established ten years of qualifying coal mine employment and the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits

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<sup>1</sup>The miner, Clarence Purcell, filed a claim for benefits on July 29, 1994 and died on April 8, 1996. Director's Exhibit 1. The miner's claim is being pursued by claimant, Regina P. Shuey, the administratrix of the miner's estate. Claimant's Exhibits 30, 34.

were denied. On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence and lay testimony pursuant to 20 C.F.R. §718.204(c)(3), (4). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance.<sup>2</sup>

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).

In order to establish entitlement pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. See *Anderson, supra*; *Baumgartner, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Claimant initially contends that the administrative law judge erred in failing to find that Dr. Bindie's autopsy report did not indicate findings of cor pulmonale with right sided congestive heart failure. Claimant's Brief at 6. Dr. Bindie, in his autopsy report of April 9, 1996, makes no specific mention of cor pulmonale with right sided congestive heart failure. Claimant's Exhibit 30. In order to establish total respiratory disability pursuant to Section 718.204(c)(3), the evidence must show that the miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure. In light of the plain language of the regulation, the administrative law judge properly held that Dr. Bindie's autopsy report does not support a finding of total respiratory disability pursuant to

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<sup>2</sup>We affirm the administrative law judge's findings regarding the length of claimant's coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(1), (2) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 718.204(c)(3). Decision and Order at 10; Claimant's Exhibit 30; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Claimant next contends that the administrative law judge erred in finding that Dr. Simelaro's opinion, that the miner should not return to mine work, was not an opinion that the miner is totally disabled and in finding that this physician's opinion supports that of Dr. Ahluwalia. Claimant's Brief at 3-5. Dr. Simelaro, in an opinion dated January 11, 1996, noted that the miner admitted to chest pain and that his cardiac history is positive for a "silent MI 'some time back.'" Claimant's Exhibit 21. Dr. Simelaro diagnosed anthracosilicosis due to coal mining and minimal to moderate obstructive airways disease and opined that "Due to his heavy concentration of coal dust in his lungs, [the miner] should not return to any job in coal mining industry or his last job held in the coal mines." Claimant's Exhibit 21. Dr. Ahluwalia, in two reports, diagnosed coronary artery disease (CAD), diabetes melitis, and peripheral vascular disease. Dr. Ahluwalia opined that the miner is unable to perform his last coal mine job due to angina and CAD, that there is no evidence of coal workers' pneumoconiosis clinically, and that all impairment is probably on the basis of poor cardiac status or deconditioning. Director's Exhibits 10, 46.

Contrary to claimant's contention, Dr. Simelaro's statement that the miner should not return to coal mine employment is not an opinion that the miner is not able to return to coal mine employment. Claimant's Exhibit 21. Consequently, the administrative law judge rationally found that Dr. Simelaro's statement is not sufficient to support a finding of total respiratory disability pursuant to Section 718.204(c)(4). Decision and Order at 13; *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); see also *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Further, because Dr. Simelaro's opinion notes a history of chest pain and past cardiac problems, the administrative law judge rationally found that Dr. Simelaro's report supports Dr. Ahluwalia's opinion that the miner suffered from a totally disabling cardiac condition. Decision and Order at 14; Director's Exhibits 10, 46; Claimant's Exhibit 21; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Regarding Dr. Kraynak's opinion, claimant contends that the administrative law judge erred in failing to consider Dr. Kraynak's status as the miner's treating physician, in discrediting Dr. Kraynak's opinion because the results of his EKG were not part of the record, and in rejecting Dr. Kraynak's findings regarding the miner's cardiac condition. Claimant's Brief at 6-7. Dr. Kraynak opined, in a report dated March 23, 1995 and a deposition dated March 1, 1996, that the miner was totally and permanently disabled due to coal workers' pneumoconiosis, that the miner was not having cardiac complaints, that his cardiac condition was not significant, and that nothing supports Dr. Ahluwalia's diagnosis of coronary artery disease. Director's Exhibit 31; Claimant's Exhibit 26. The administrative law judge noted that Dr. Kraynak did not conduct an EKG, seemed unaware of or unconcerned with the miner's history of cardiac complaints, and found that Dr. Kraynak's report is not well-reasoned or well-documented. Decision and Order at 14. Because the physician's status as a treating physician is only one factor for the

administrative law judge to consider in weighing an opinion, *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), and as the administrative law judge properly considered all the factors affecting the credibility of the physician's opinion, *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we reject claimant's contentions concerning the administrative law judge's weighing of Dr. Kraynak's opinion.

Finally, claimant contends that the administrative law judge erred in weighing Dr. Ahluwalia's opinion because Dr. Ahluwalia did not state that the miner suffered from a severely disabling cardiac condition and because Dr. Ahluwalia did not diagnose pneumoconiosis. Claimant's Brief at 7-9. Contrary to claimant's contention, Dr. Ahluwalia opined that the miner was unable to perform his last coal mine employment due to angina and CAD. Director's Exhibit 46. Thus, the administrative law judge properly stated that Dr. Ahluwalia opined that the miner suffered from a totally disabling cardiac condition. Decision and Order at 14. Further, Dr. Ahluwalia's opinion regarding the existence of pneumoconiosis has no bearing on whether the miner had total respiratory disability. Thus, we reject claimant's contentions regarding the administrative law judge's weighing of Dr. Ahluwalia's opinion. The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra; Anderson, supra*. Consequently, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4) and the denial of benefits.<sup>3</sup>

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<sup>3</sup>As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); Claimant's Brief at 7.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge