BRB No. 00-0491 BLA

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

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-00029) 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).[1] This case involves a duplicate claim.[2]

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations

The administrative law judge accepted the parties' stipulation of ten years of coal mine employment and the concession of the Director, Office of Worker's Compensation Programs (the Director), that a material change in conditions had been established as the evidence now established that the miner suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718 (2000) and found that the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000). Accordingly, benefits were denied. On appeal, claimant alleges that the administrative law judge committed several procedural errors and erred in his weighing of the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(1) and (4) (2000). The Director responds, contending that the administrative law judge's decision is supported by substantial evidence and should be affirmed.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not

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to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant, Thomas Parry, filed his first application for benefits on February 6, 1987, which was denied by Administrative Law Judge Paul H. Teitler on September 20, 1988. Director's Exhibit 11. Thereafter, claimant submitted a petition for modification which the administrative law judge denied on December 3, 1991. *Id*. Claimant filed his second claim for benefits on July 24, 1995, which the district director denied on January 18, 1996. Director's Exhibit 12. Claimant subsequently filed a new claim on April 8, 1998, which is the subject of the instant case. Director's Exhibit 1.

[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2)-(3) (2000) are unchallenged on appeal and therefore are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

affect the outcome of this case. Based on the briefs submitted by claimant and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated 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 under Part 718 in a living miner's claim, 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 (2000). Failure to prove 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*).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error therein.

Initially, claimant raises several procedural issues. First, claimant contends that since the administrative law judge admitted into evidence at the hearing the May 1999 medical report of Dr. Ahluwalia, which was submitted by the Director just prior to the twenty-day deadline enunciated in 20 C.F.R. §725.456(b) (1999),[4] due process requires that claimant be afforded the opportunity to respond to Dr. Aluwalia's medical report. Claimant asserts that he is entitled to respond "in kind" to the Director's evidence with a new examination and additional diagnostic testing, and that the administrative law judge erred in allowing only the post-hearing submission of a review of the report by Dr. Kraynak, claimant's physician. We disagree. While it is well-established that a party must be provided an opportunity to respond to medical reports submitted into the record by the opposing party or to cross-examine the physicians who prepared the reports, in the present case the

[4]The amendments to the regulations at 20 C.F.R. §§725.407, 725.456, and 725.457 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the versions of these regulations as published in the 1999 Code of Federal Regulations are applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

administrative law judge satisfied this requirement when he granted claimant the opportunity to respond to Dr. Aluwalia's report by having the report reviewed by a physician of claimant's own choosing. Hearing Transcript at 13-14. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *Fowler v. Freeman United Coal Co.*, 7 BLR 1-495 (1984), *aff'd sub nom. Freeman United Coal Mining Co. v. Director, OWCP*, No. 85-1013 (7th Cir. Jan. 24, 1986)(unpub.); *Lane v. Harman Mining Corp.*, 5 BLR 1-87 (1982); *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 BLR 1-249 (1979), *rev'd on other grounds sub nom. Director, OWCP v. Rochester and Pittsburgh Coal Co.*, 678 F.2d 17, 4 BLR 2-74 (3d Cir. 1982); *Strozier v. United States Pipe & Foundry Co.*, 2 BLR 1-87 (1979). As claimant obtained and submitted Dr. R. Kraynak's post-hearing review of Dr. Aluwalia's report, Claimant's Exhibit 31, as well as the post-hearing review of Dr. Aluwalia's pulmonary function study by Dr. M. Kraynak, Claimant's Exhibit 31, we reject claimant's argument that the administrative law judge violated claimant's right to due process.

Claimant also contends that the administrative law judge abused his discretion by questioning claimant during the hearing regarding Dr. Nurine's treatment of claimant for chest pain. We reject claimant's assertion that the administrative law judge exceeded his role as an impartial fact-finder by asking leading questions as an advocate for the Director. A review of the hearing transcript indicates that the administrative law judge questioned claimant in an attempt to clarify why claimant sought treatment from Dr. Nurine, a matter within the scope of his authority. *See Laughlin v. Director, OWCP*, 1 BLR 1-488 (1978); Hearing Transcript at 42-43. An administrative law judge is empowered to "question witnesses with respect to any matters relevant and material to any contested issue," 20 C.F.R. §725.457(a) (1999), in pursuit of his duty to "inquire fully into all matters at issue," 20 C.F.R. §725.455(b) (2000), in a effort to insure a full and fair hearing on all of the issues presented. *Id.* Moreover, claimant has waived consideration of this issue by the Board since he failed to object to the administrative law judge's inquiry at the hearing.

Claimant also alleges the administrative law judge abused his discretion by consulting
The Physicians' Desk Reference to determine the conditions for which three medications, listed in Dr. Kruk's report as taken by claimant, were prescribed. We disagree. In discussing Dr. Kruk's January 20, 1999 report, wherein the physician noted that claimant takes Mevacor, Atenolol, Hyzaar and Proventil, Claimant's Exhibit 1, the administrative law judge implicitly took judicial notice that, as listed in *The Physicians' Desk Reference* (PDR), 54th ed., 2000, pp. 569, 572, 1809-10,

1833, the first three medications are prescribed for, respectively, lowering cholesterol, long-term management of angina pectoris, and hypertension. Decision and Order at 3. The Board has held that an administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary. 29 C.F.R. §18.45; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd sub nom. Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1988); *Pruitt v. Amax Coal Co.*, 7 BLR 1-544 (1984); *Casias v. Director, OWCP*, 2 BLR 1-259 (1975); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528 (1978). As the administrative law judge identified the PDR by title and edition, claimant was apprised of the source of the noticed facts. Claimant however does not aver on appeal that the administrative law judge's noticed descriptions are inaccurate. We therefore reject claimant's argument that he was denied his due process right to a full and fair hearing.

Claimant also contends that the administrative law judge abused his discretion when, after ruling that each party would be limited to one validation report concerning the May 23, 1999 pulmonary function study, he considered two validation reports from the Director and rejected claimant's proffer of a second validation report. Claimant's arguments are without merit. A review of the record reveals that although the Director obtained validation reports from Drs. Ranavaya and Michos concerning the May 23, 1999 pulmonary function study, the Director only submitted Dr. Ranavaya's validation report for inclusion in the record. Claimant himself submitted Dr. Michos's validation report, Claimant's Exhibit 31, as well as two other reviews of the study which claimant obtained from Drs. Simelaro and Venditto, Claimant's Exhibit 27. By submitting Dr. Michos's validation report himself, claimant waived any objection to its admission into the record and the administrative law judge, within his discretion, could properly exclude Dr. Venditto's report from the record. *See* 20 C.F.R. §725.407(b) (1999); *see generally White v. Director, OWCP*, 6 BLR 1-368 (1983).

Turning to the merits, claimant contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) (2000) based on the pulmonary function study evidence. We disagree. Claimant initially asserts that since claimant's height was recorded as 61 inches and 63 inches an equal number of times since his initial claim, the administrative law judge should have found that claimant was 62 inches tall. As claimant's height was recorded as 61 inches most frequently in the most recent claim, the administrative law judge, as finder-of-fact,

reasonably found that claimant was 61 inches tall and used that height in evaluating the studies. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 5. Next, the administrative law judge noted that the May 23, 1999, pulmonary function study was qualifying while the July 8, 1998 and May 4, 1999 pulmonary function studies were non-qualifying.[5] Decision and Order at 5-6; Director's Exhibits 2, 14; Claimant's Exhibit 25. The administrative law judge found that the July 8, 1998 and May 4, 1999 non-qualifying pulmonary function studies were the most probative and credible pulmonary function studies and then concluded that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1) (2000). Decision and Order at 5. In making this determination, the administrative law judge permissibly rejected the invalidations of the May 4, 1999 study by Drs. R. Kraynak and M. Kraynak because Dr. Ahluwalia possessed greater expertise based on his credentials.[6] *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Moreover, contrary to claimant's assertion, in finding that Dr. Ahluwalia found the May 4, 1999, pulmonary function study valid, the administrative law judge made a reasonable inference based on the fact that the physician specifically listed the results on his medical report and referred to them in making his diagnosis and assessing the level of claimant's impairment. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 5-6; Director's Exhibit 14. In addition, the administrative law judge noted that pulmonary function studies are "effort-dependent," and rationally concluded that the May 23, 1999 pulmonary function study was not a valid indicator of claimant's pulmonary condition due to the disagreement among Dr. Ranavaya, who found the study invalid, and Drs. Simelero and Michos, who did not indicate that they were aware of the earlier studies with higher values. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6. Furthermore, contrary to claimant's assertion, the administrative law judge did not credit Dr. Ahluwalia's opinion over Dr. R. Kraynak's opinion on the basis that Dr. Aluwalia was Board-eligible in internal medicine, but instead reasoned that Dr. Aluwalia's position, as the medical director of a hospital's pulmonary laboratory,

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

[6] Dr. Ahluwalia is Board-eligible in Internal Medicine and Director of the Cardiopulmonary and Arterial Blood Gas Laboratories and the Respiratory Therapy Department at Good Samaritan Hospital. Dr. R. Kraynak is Board-eligible in Family Medicine and Dr. M. Kraynak is Board-certified in Family Medicine. Decision and Order at 5-6.

implied greater expertise in this area of medicine. Decision and Order at 3-4; see *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Bolyard v. Peabody Coal Co.,* 6 BLR 1-767 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Director's Exhibit 14. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1) (2000).

In considering whether total disability was established under Section 718.204(c)(4) (2000), the administrative law judge permissibly credited the opinion of Dr. Ahluwalia, which concluded that claimant had no pulmonary impairment and was totally disabled due to his coronary artery disease and angina, because his conclusion was better supported by the credible objective medical evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 6-7; Director's Exhibit 14. Furthermore, the administrative law judge found the opinions of Drs. R. Kraynak and Kruk, on the issue of total pulmonary disability, undocumented and unreasoned based on their apparent lack of knowledge that claimant was being treated for coronary artery disease, thus undermining their diagnosis. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 7. 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), and 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). Moreover, since the administrative law judge rationally found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c) (2000), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2) (2000); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields*, *supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish total respiratory disability pursuant to Section 718.204(c) (2000), an essential element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718 (2000). *Anderson*, *supra*; *Trent*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge