

BRB No. 94-0172 BLA

CLAUDE A. TAYLOR)
)
 Claimant-Petitioner)
)
 v.)
)
 W.A. BENNETT COAL COMPANY)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
 Employer/Carrier-)
 Respondents)
))
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk,
Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.
Jerome A. Hochberg (Arter & Haden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (87-BLA-0843) of

¹Claimant is Claude A. Taylor, who filed a claim for benefits on April 2, 1980.
Director's Exhibit 1.

Administrative Law Judge Clement J. Kichuk 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). This case is before the Board for the second time. The administrative law judge initially credited claimant with "at least" forty years of qualifying coal mine

employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Decision and Order at 3-5. The administrative law judge further found a totally disabling respiratory impairment established pursuant to 20 C.F.R. §718.204(c)(4), invoked the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305, and concluded that the evidence was insufficient to rebut the presumption. Decision and Order at 5-13. Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(1) and 718.204(c)(4) and his weighing of the medical opinion evidence at Section 718.305 and remanded the case to the administrative law judge for reconsideration. *Taylor v. W.A. Bennett Coal Co.*, BRB No. 90-1328 BLA (Sep. 25, 1992)(unpub.). On remand, the administrative law judge found that claimant failed to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) or a disabling lung impairment pursuant to Section 718.204. Decision and Order on Remand at 9. Thus, the administrative law judge concluded that claimant was not entitled to the Section 718.305 presumption. The administrative law judge further found that, even if invoked, the Section 718.305 presumption would be rebutted. Decision and Order on Remand at 9. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish invocation of the presumption pursuant to Section 718.305 and that employer rebutted the presumption. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to participate in 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that "[t]here is no basis for the administrative law judge's complete and utter reversal of" his findings regarding claimant's entitlement to the Section 718.305 presumption. Claimant's Brief at 3. Pursuant to Section 718.305(c) the administrative law judge considered the evidence of record relevant to total respiratory disability at Section 718.204(c). Pursuant to Section 718.204(c)(1), the administrative law judge found that two of the seven pulmonary function studies of

record², dated July 7, 1986 and June 10, 1982, produced qualifying results, but were invalidated upon review by Drs. Gaziano and Hippensteel. Decision and Order on Remand at 8; Director's Exhibits 30, 34, 45; Employer's Exhibit 4. The administrative law judge also found that a March 14, 1989 study resulted in qualifying results before bronchodilators were administered but produced non-qualifying values afterwards. *Id*; Claimant's Exhibit 1. The administrative law judge then concluded that claimant failed to establish total disability pursuant to Section 718.204(c)(1).

The Board has held that an administrative law judge may assign a qualifying pulmonary function study no weight because of insufficient reliability, *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984), and may accord greater weight to the opinions of consulting physicians regarding the validity of the studies, *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). While the administrative law judge failed to specify why he found the non-qualifying, post-bronchodilator results of the March 14, 1989 test more probative of claimant's condition, see *Keen v. Jewell Ridge Coal Co.*, 6 BLR 1-454 (1983), we infer this conclusion which is supported by a preponderance of the non-qualifying pulmonary function studies, see *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); see also *Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983); cf. *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(2), the administrative law judge properly found that none of the arterial blood gas studies yielded qualifying results. Decision and Order on Remand at 8; Director's Exhibits 32, 42; Employer's Exhibit 15; Claimant's Exhibit 1. Also, pursuant to Section 718.204(c)(3), the administrative law judge properly found that the record contains no evidence of cor pulmonale with right-sided

²Contrary to the administrative law judge's finding, the record contains nine pulmonary function studies; however, his error is harmless inasmuch as the two studies not counted resulted in non-qualifying values, thus supporting the administrative law judge's conclusion. Decision and Order on Remand at 8; Director's Exhibits 22, 37; see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

congestive heart failure. Decision and Order at 6. Thus, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(2) and (3).

Pursuant to Section 718.204(c)(4), the administrative law judge reconsidered the medical opinion evidence, including the opinions of Drs. Garzon, Hippensteel, and Endres-Bercher, who addressed whether claimant has a totally disabling respiratory condition.³ Decision and Order on Remand at 9; Director's Exhibit 45; Employer's Exhibits 4, 5, 11, 12, 15. The administrative law judge permissibly assigned less weight to the opinion of Dr. Garzon, who diagnosed a totally disabling respiratory impairment, because he found that Dr. Garzon relied on a pulmonary function study which was invalidated by Dr. Hippensteel. Decision and Order on Remand at 9; see *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge then permissibly assigned the most weight to the opinions of Drs. Hippensteel and Endres-Bercher that claimant is not totally disabled, because he found them to be well reasoned and supported by the clinical data. Decision and Order on Remand at 9; Employer's Exhibits 4, 12, 15; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985).

Inasmuch as the administrative law judge acted within his discretion as fact-finder in according determinative weight to the medical opinions finding no respiratory impairment, see *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988)(*en banc*); see also *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985), and, contrary to claimant's contention, the administrative law judge may accord dispositive weight to the opinion of a non-examining physician, see *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); see also *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993), we affirm the administrative law judge's findings pursuant to Section 718.204(c)(4). Further, as claimant has failed to establish the existence of total respiratory or pulmonary impairment, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent*

³Dr. Cardona, opined that he "cannot unequivocally state that this [claimant] is disabled from any type of work which was, for him, normal in the mining industry" and that "it is probable that, because of his breathing problem, he would be unable to perform that sort of work." Claimant's Exhibit 1. Neither Dr. Berry nor Dr. Scott opined that claimant has a totally disabling respiratory impairment. Director's Exhibits 17, 22, 31. Further, Dr. Berry's opinion that claimant has severe chronic obstructive pulmonary disease is based on a qualifying pulmonary function study which was invalidated by Dr. Gaziano. Director's Exhibit 30, 31.

v. Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge