U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Aug2001

CASE No.: 2000-BLA-00180

In the Matter of:

JAMES W. SCHAEFFER
Claimant

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-In –Interest

Appearances:

Helen M. Koschoff, Esquire
For the Claimant

Timothy S. Williams, Esquire
For the Director

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq (the Act). The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons who had pneumoconiosis and were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

On December 8, 1999, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing. A hearing was held before me in Reading, Pennsylvania on June 26, 2000, at which time all parties were

given a full opportunity to present evidence [1]and argument as provided in the Act and the Regulations issued thereunder, found at Title 20, Code of Federal Regulations.[2] Claimant was allowed additional time to proffer rebuttal evidence.[3] TR 7-8. On February 27, 2001, Director filed a post-hearing brief.

ISSUES

At the hearing, Director contested the existence of pneumoconiosis. Subsequently, in his closing brief, Director conceded and stipulated to the existence of pneumoconiosis.

The contested issues are:

(1) The length of Claimant's coal mine employment;
(2) Whether Claimant's pneumoconiosis arose out of coal mine employment;
(3) Whether Claimant suffers from a totally disabling pulmonary or respiratory impairment;
(4) Whether Claimant's total disability is due to pneumoconiosis; and
(5) Whether Claimant has established a material change in condition.

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[1] The following references will be used herein: TR for transcript, CX for Claimant's exhibit, DX for Director's exhibit.

[2] At the hearing Director's exhibits 1 through 15 and Claimant's exhibits 1 through 26 were admitted into evidence without objection. TR 5, 8. In addition, Director's exhibits 16 through 22 were identified and are now admitted into evidence. (TR 5, 9). Post-hearing, Claimant submitted CX-27, a medical note from Dr. Kraynak dated 8-16-00. Claimant's exhibit 27 is admitted into evidence.

[3] Subsequent to the hearing, there was a conflict between the parties as to the scheduling of the depositions of Drs. Sherman and Cander. Claimant requested said depositions for purposes of cross-examination. Because Dr. Cander was unable to testify at a deposition, on December 7, 2000, I issued an Order directing Dr. Cander to answer questions by way of Interrogatories and that the deposition of Dr. Sherman should be scheduled as soon as possible. The record was left open for an additional 60 days followed by a 20-day period to submit closing briefs. Following said Order, I have not received any additional submissions from Claimant. According to Director, in his closing brief, to his knowledge no Interrogatories were submitted by Claimant to Dr. Cander and that no effort was made by Claimant to schedule the deposition of Dr. Sherman. Claimant did not file a closing brief. The record is now closed. Based on the foregoing, I am denying Claimant's earlier request to strike the medical reports of Drs. Cander and Sherman. Claimant has had ample opportunity to submit additional evidence but has failed to do so without explanation. Moreover, Claimant will not be prejudiced since Claimant has filed opposing evidence to the Director's exhibits (see CX-27).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background and Procedural History

James W. Schaeffer, Claimant, was born on September 3, 1934. TR 11. He is married to his wife, Catherine. TR 12. He has no other dependents for purposes of augmentation of benefits under the Act. TR12.

While this case was pending a decision, new Federal Regulations were promulgated. Subsequently, there was litigation contesting their liability. On February 23, 2001, I issued an Order requiring the parties to submit a brief regarding the issue of whether specific regulations, i.e. 20 C.F.R. §§718.104(d), 718.201(a)(2). 718.201(c), 718.204(a), 718.205(c)(5) and 718.205(d), would affect the outcome of the current litigation. On March 2, 2001, Director submitted a response indicating that the new regulations would not affect the outcome of this case. Claimant did not file a response. Said failure will be construed as a position that the amended regulatory provisions will not affect the outcome of the claim. As all parties are in agreement, I concur and find that the amended regulations will not affect the outcome of the current litigation.

Claimant filed his first claim for benefits on March 9, 1979. Although the existence of pneumoconiosis was established, said claim was denied by a claims examiner on December 1, 1980 because there was insufficient evidence to show that Claimant's pneumoconiosis was caused by coal mine employment or that he was totally disabled. At that time Claimant was credited with zero (0) years of coal mine employment. DX-14. Claimant did not pursue the claim.

Claimant filed his second claim for benefits on March 8, 1999.[4] DX-1. The claim was denied by a claims examiner on October 25, 1999 because evidence did not support a finding of a material change in conditions. DX-11. Claimant requested a formal hearing and the case was subsequently transferred to the Office of Administrative Law Judges. Said hearing was held in reading, Pennsylvania on June 26, 2000.

Claimant testified regarding his coal mine employment history. He stated he started working in coal mines when he was thirteen (13) years old. TR 12. He worked in an independent, underground mine putting in props, drill, fire, and scooped coal and buggied

[4] Given the filing date of this claim, subsequent to the effective date of the permanent criteria of Part 718, (i.e. March 31, 1980), the regulations set forth at 20 C.F.R. Part 718 will govern its adjudication. Because Claimant's last exposure to coal mine dust occurred in the Commonwealth of Pennsylvania this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Third Circuit. *See Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998).

coal. He worked in this mine until he was twenty-one (21). TR 12. From the age of thirteen (13) to sixteen (16), Claimant worked five (5) hours per day, five (5) to six (6) days per week. TR 13. From age sixteen (16) to twenty-one (21), Claimant worked eight (8) hours per day, five (5) to six (6) days per week. TR 13-14. His job included climbing, crawling, lifting and carrying up to 150 pounds. TR 14.

Subsequently, Claimant worked for a period of six (6) months at Mount Eagle Coal. He then worked for American Briquette Company. He worked on a coal hopper. He would have to clean out the hopper. Said job involved crawling and climbing. TR 16-17. He worked for American Briquette for six and a half (6 ½) years. TR 17. This was his last coal mine employment relevant to this claim. TR 17-18.

Claimant testified he had breathing problems for twenty (20) years and it has gotten worse. TR 19. He could only walk on the level for a half (½) block or climb eight (8) stairs before becoming short of breath. TR 19-20. Claimant maintained he had never smoked. TR 20. He added he would not be able to perform the duties of his last coal mine employment because of his breathing. TR 20. Claimant stated he treats with Dr. Kraynak every three (3) months for his breathing problem. TR 20-21. He noted he had a valve replacement in October of 1999 and has no continuing problems. TR 21. He stated he is a diabetic, has high blood pressure and gout. TR 22. Claimant testified he has a cough with sputum production and on hot humid days he becomes short of breath. TR 22.

On cross-examination, Claimant agreed he had no reason to disagree with the October 1999 notes of Dr. Lynch, his cardiologist, that state Claimant had been experiencing shortness of breath just in the last six (6) to eight (8) months. TR 25. Then Claimant testified he did not recall stating that to Dr. Lynch. TR 25.

<u>Length of Coal Mine Employment</u>

Neither the Act nor the Regulations contain guidelines for computing the length of coal mine employment. The Benefits Review Board has held that such computations should be based on some reasonable method with the result supported by substantial evidence in the record considered as a whole. *Wilkerson v. Georgia Pacific Corp.*, 1 BLR 1-830 (1978). The Board has also held that the finding must be made with exactness. *Lauderback v. Director, OWCP*, 1 BLR 1-1033 (1978); *Gibson v. Director, OWCP*, 1 BLR 1-1016 (1978). The burden of proof is upon the claimant. *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859 (1978).

Claimant testified at the hearing that he had approximately fifteen (15) years of coal mine employment. Moreover, Claimant submitted the affidavits of James Bender, a neighbor who had known Claimant since childhood (CX-17), and Claude Schaeffer, the brother of the Claimant (CX-18). Both witnesses recounted the Claimant's relevant employment history and concluded that Claimant had worked approximately eleven (11) years in the

coal mines. I find the Social Security records support Claimant's testimony regarding his employment with Mount Eagle Coal and American Briquette for a total of seven years of coal mine employment for the years of 1952 through 1958. I find credible Claimant's testimony regarding his employment with his father in an independent underground mine. However, it appears that some of the time overlapped with his employment with American Briquette. Accordingly, I find that the credible evidence of record supports Claimant's contention that he worked in an independent mine from 1947 to 1951. Based on the foregoing, I find Claimant has established eleven (11) years of coal mine employment.

Duplicate Claim

Section 725.309 provides for the filing of multiple claims by a claimant but directs that such claims must be denied on the same grounds as the previously denied claim unless the claimant can demonstrate a "material change in conditions."
The Third Circuit has adopted the Sixth Circuit's standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) for assessing whether the claimant has demonstrated a "material change in conditions." See *LaBelle Processing Co. v. Sparrow*, 72 F.3d 308 (3d Cir. 1995). In *Sharondale*, the court held:

"[T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits."

Moreover, the court determined that the judge must examine evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted.

In the instant matter, Claimant established, previously, the existence of pneumoconiosis. He was unable to establish whether pneumoconiosis was caused by coal mine employment, whether he was totally disabled, and whether his total disability was due to pneumoconiosis. DX-14. In considering the newly submitted evidence, if he is able to establish any of these remaining elements of his claim, Claimant will establish a material change in conditions.

As discussed supra, Claimant has submitted additional evidence regarding his coal mine employment history. He was previously credited with zero (0) years of coal mine employment. DX-14. I find that the credible evidence of record shows that Claimant has over ten (10) years of coal mine employment and therefore is eligible for the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b). Director, in his brief, agreed that if it were found that Claimant had over ten (10) years of coal mine employment, the presumption would be applicable. Director

offered no argument to rebut said presumption. Accordingly, I find that since Claimant was able to prove an additional element of entitlement with newly submitted evidence, he has established a material change of conditions. Thus a complete analysis and discussion of all of the relevant evidence in the record will be conducted to determine whether Claimant is entitled to benefits.

Entitlement to Benefits: In General

Entitlement to benefits depends upon proof of three elements: in general, a miner must prove that: 1) he has pneumoconiosis which 2) arose out of his coal mine employment and 3) is totally disabling. Failure to prove any of these requisite elements precludes a finding of entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). Because Claimant has previously established the existence of pneumoconiosis, I must review the record as a whole to determine whether his pneumoconiosis was due to coal mine employment, whether he has proven that he is totally disabled, 20 C.F.R. §718.204(c); *see Carson v. Westmoreland Coal Company*, 19 BLR 1-16 (1994), *modified on recon.* 20 BLR 1-64 (1996); *see also Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), and whether pneumoconiosis is a substantial contributor to any total pulmonary or respiratory disability. 20 C.F.R. §718.204(b); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Cause of Pneumoconiosis Pursuant to 718.203

Once it is determined that the miner suffers from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. 718.203(a).

If a miner who is suffering from pneumoconiosis was employed in the coal mines for at least ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. §718.203(b). I find that Claimant was employed in the coal mines for at least ten years, thus he is entitled to the benefit of the rebuttable presumption that pneumoconiosis arose out of coal mine employment. All of the physicians of record attribute Claimant's pneumoconiosis to coal mine exposure.

Director, in his brief, agreed that if it were found that Claimant had over ten (10) years of coal mine employment, the presumption would be applicable. Director offered no argument to rebut said presumption.

Total Respiratory Disability

The finding of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. In making this determination, I must evaluate all relevant evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

A claimant shall be considered totally disabled if he is prevented from performing his usual coal mine work or comparable and gainful work. In the absence of contrary probative evidence, evidence which meets one of the Section 718.204(c) standards shall establish claimant's total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

According to §718.204(c), the criteria to be applied in determining total disability include: 1) pulmonary function studies, 2) arterial blood gas test, 3) a diagnosis of cor pulmonale with right-sided congestive heart failure, and 4) a reasoned medical opinion concluding total pulmonary or respiratory disability. I must also consider claimant's testimony in all of the hearings to compare the medical opinion disability assessments against that testimony regarding the physical requirements of his usual coal mine work. *See generally Onderko v. Director, OWCP*, 14 BLR 1-2 (1988).

Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, accounting for sex, age, and height, produce a qualifying value for the FEV 1 test, plus either a qualifying value for the FVC test, or the MVV test, or a value of the FEV 1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV 1, FVC and the MVV test are measured results less than or equal to the values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n.5, 13 BLR 2-259 (3d Cir. 1990).

Assessment of the pulmonary function study results is dependent on Claimant's height, which has been recorded between 68 and 71 inches. Considering this discrepancy, I find that Claimant's height is 69.3 inches for purposes of evaluating the pulmonary function studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

The Secretary's regulations allow for the review of pulmonary function testing by experts who can review the ventilatory tracings and determine the validity of a particular test. 20 C.F.R. §718.103 and Part 718, Appendix B; *Siwiec*, *supra*; *see generally Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283, 11 BLR 2-80 (7th Cir. 1988). Thus, in assessing the probative value of a clinical study, an administrative law judge must address "valid contentions" raised by consultants who review such tests. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42 (7th Cir. 1993); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1137-38 (7th Cir. 1988); *Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981); *also see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting); *accord Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

The Third Circuit has emphasized that the administrative law judge "must determine whether the tests meet the quality standards and whether the medical evidence is

reliable[.]" *Siwiec*, 894 F.2d at 638, 13 BLR 2-259.

The record includes the following pulmonary function study evidence:

Ex. No.	Date	Age	Ht.	FEV1	FVC	MVV	FEV1/FVC	Qualify
DX-14	10-17-80	46	71"	3.76	4.84	135	77%	No

Dr. Cubler interpreted this study as showing no indication of emphysema, no obstructive defect and no restrictive defect. Claimant's cooperation and comprehension were noted as "good."

Dr. Leon Cander, who is Board-Certified in Internal Medicine and is Board-Eligible in Pulmonary Disease, validated, without explanation, the pulmonary function study of 10-17-80 that documented the presence of normal lung function.

I find that this study is in substantial compliance with the regulations.

Ex. No.	Date	Age	Ht.	FEV1	FVC	MVV	FEV1/FVC	Qualify
DX-4	9-7-99		65	70"	2.94	3.78	133	78%	No

This study was conducted at the Good Samaritan Regional Medical Center. Dr. Ahluwalia interpreted this study as showing no evidence of an obstructive defect, normal study. Claimant's cooperation and comprehension were noted as "fair." It was also noted that there was audible wheezing and coughing on forced expiration and that the patient was unable to exhale completely on the FVCs prior to inspiration portion of the procedure.

At his deposition, Dr. Kraynak invalidated the vent study of 9-7-99 because of audible wheezing and coughing on forced expiration. Deposition TR 14-15.

Dr. Michael Sherman, who is Board-Certified in Internal Medicine, Pulmonary Medicine and Critical Care Medicine, validated the 9-7-99 pulmonary function study as being reproducible. He noted that coughing was not present during the vast majority of the expiratory maneuvers and that the study showed no pulmonary limitation to be present.

Dr. Cander validated, without explanation, the pulmonary function study of 9-7-99 that documented the presence of normal lung function.

I credit the validation opinion of Dr. Sherman over the opinion of Dr. Kraynak on the basis of his credentials. The highly qualified Dr. Sherman is Board-Certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine. See *Martinez v. Clayton Coal Co.*, 10

BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Dr. Kraynak is Board-Eligible in Family Medicine.

Although Dr. Cander is board-certified, I attribute less weight to his opinion since he provided no explanation as to why he validated the study. Without more explanation, I will not accord Dr. Cander's validation significant weight. In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-269 (4th Cir. 1998), the Fourth Circuit ruled that a validation of an arterial blood gas study which consisted of a checked box "lent little additional persuasive authority" to that claimant's case. 138 F.3d at 530, 21 BLR 2-269.

Accordingly, I find that this study substantially complies with the regulations.

Ex. No.	Date	Age	Ht.	FEV1	FVC	MVV	FEV1/FVC	Qualify
CX-16	2-2-00	65	68"	1.82	2.36	51	77%	Yes

Dr. Raymond Kraynak interpreted this study as showing a severe restrictive defect. Claimant's cooperation and comprehension were noted as "good."

Dr. Cander invalidated the vent study of 2-2-00 because of excessive variability of the FVC (10%) and FEV-1 (11%) and lack of effort demonstrated by failure to attain an expiratory plateau and a straight curve over the first 75% of the FVC indicated malingering.

Dr. Sherman invalidated the pulmonary function study of 2-2-00 because the expiratory effort was less than six (6) seconds without a two (2) second plateau and poor reproducibility.

Dr. Richard Kucera, who is Board-Certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine, reviewed the study and checked a box on a form "vents acceptable" without further explanation. DX-16.

Dr. David Prince, who is Board-Certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine (see CX-22), reviewed the vent study and checked a box on a form "vents acceptable" without further explanation. CX-21.

I will accept the invalidation opinions of Drs. Cander and Sherman based on their impressive credentials. *See Martinez; Dillon; Wetzel*. I am mindful that Drs. Kucera and Prince, whose credentials are impressive, reviewed this test and checked a form indicating the "vents are acceptable." Without more explanation, however, I will not accord their validations significant weight. *See Milburn*.

Upon reviewing the pulmonary function study evidence of record, I find that Claimant has

not demonstrated total respiratory disability at §718.204(c)(1) by a preponderance of the pulmonary function study evidence in the record as a whole.

I find that the pulmonary function study conducted on September 7, 1999 is entitled to considerable weight. Although the qualifying study conducted by Dr. Raymond Kraynak on February 2, 2000 is evidence of impairment, the results of this effort-dependent test have been persuasively invalidated by Drs. Cander and Sherman.

Arterial Blood Gas Studies

A claimant may demonstrate total disability with arterial blood gas tests which, accounting for altitude, demonstrate qualifying results as specified in Appendix C to 20 C.F.R. Part 718. 20 C.F.R. §718.204(c)(2).

The current record contains the following blood gas studies:

Ex. No.	Date	Physician	Alt.	PCO2	pO2	Qual.
DX-14	10-17-80	--	--	36	84	No
DX-7	9-7-99	--	--	37	79	No

None of the arterial blood gas test results demonstrate total respiratory disability at Section 718.204(c)(2). I therefore find that Claimant has failed to demonstrate total respiratory disability on the basis of the blood gas study evidence.

Cor pulmonale

A claimant may demonstrate total disability with medical evidence of cor pulmonale with right-sided congestive heart failure in addition to pneumoconiosis.
Because there is no evidence of cor pulmonale with right-sided congestive heart failure, I am unable to find that Claimant has demonstrated total disability at Section 718.204(c)(3). 20 C.F.R. §718.204(c)(3); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Medical Opinion Evidence

Claimant may demonstrate total respiratory disability by a reasoned medical opinion that assesses total respiratory disability, if the opinion is based on medically acceptable clinical and laboratory diagnostic techniques. Claimant must prove his respiratory or pulmonary condition prevents him from engaging in his "usual coal mine employment or comparable and gainful employment." 20 C.F.R. §718.204(c)(4). Any loss in lung function may qualify as a total respiratory disability under Section 718.204(c). *See Carson*, 19 BLR at 1-21, *modified on recon.* 20 BLR 1-64 (1996).

The medical report of Dr. Edward Cubler is dated October 17, 1980. DX-14. Dr. Cubler's credentials are not part of the record. He credited Claimant with nine years of coal mine employment. He noted a family history of heart disease, diabetes and emphysema. Claimant reported having attacks of wheezing, high blood pressure and a heart murmur. Claimant stated he stopped smoking in 1955. Claimant's complaints were cough for five (5) years, slight wheezing for four (4) to five (5) years, and minimal dyspnea. Claimant was on medication for his high blood pressure. Claimant's physical examination was unremarkable. It was noted that Claimant could walk several blocks, climb stairs with little difficulty and could lift fifty (50) pounds and carry with no problems. Dr. Cubler concluded Claimant had hypertension based on history, a normal chest x-ray and a breathing test and blood gas study was within normal limits.

The medical report of Dr. Harwinder Ahluwalia is dated September 7, 1999. DX-5. Director stipulated that Dr. Ahluwalia was Board-Eligible in Internal Medicine and Pulmonary Disease and had failed the written Internal Medicine Board examination on multiple occasions. (see also curriculum vitae at DX-6). Dr. Ahluwalia noted Claimant's occupational history and noted a family medical history of heart disease and pneumoconiosis. Claimant's reported having arthritis in the shoulders, gout ten years ago, heart murmur for five to six years, diabetes for four years, and high blood pressure for six to seven years. He reported a negative smoking history. Claimant complained of dyspnea walking one block, chest pain, and a cough aggravated by humid weather. Physical examination revealed moderate obesity but was otherwise unremarkable. Diagnostic testing conducted on 9-7-99 included a review of a chest x-ray read by Dr. Conrad, a vent study that revealed normal flows, arterial blood gases that were normal and an EKG that was abnormal and demonstrated the presence of a significant heart murmur suggestive of aortic stenosis. Dr. Ahluwalia concluded Claimant had hypertension, aortic stenosis, obesity, and uncomplicated coal worker's pneumoconiosis based on he x-ray report. He added that the coronary artery disease was secondary to high blood pressure and aortic stenosis. Claimant's shortness of breath was secondary to aortic stenosis, coronary artery disease and ischemia on EKG. He concluded that Claimant's coal worker's pneumoconiosis by x-ray only did not contribute to any impairment.

The medical report of Dr. James Lynch is dated October 6, 1999. DX-19. Dr. Lynch was Claimant's cardiologist who performed a cardiac evaluation for aortic stenosis. He noted that Claimant "lately has noticed unusual shortness of breath when he has to climb into a trailer…all of these symptoms have just been noticed over the past 6 to 8 months." He reviewed Claimant's medical history, medications, family history, and a negative smoking history. Dr. Lynch added Claimant reported that "generally he [Claimant] feels well and has always been quite healthy and vigorous." Physical examination revealed clear lung fields. An EKG and x-ray were also performed and reviewed. Dr. Lynch concluded Claimant had calcific aortic stenosis, symptomatic; hypertension; hyperlipidemia; and Type II Diabetes. Dr. Lynch also stated "just recently he [Claimant] has developed exertional symptoms that sound like typical symptoms of aortic stenosis."

The discharge report from Reading Hospital and Medical Center is also part of the record. DX-20. Claimant was admitted on October 6, 1999 for cardiac catherization and aortic valve replacement. He was ordered to walk three to four times per day and was prohibited from lifting more than five pounds. Claimant was discharged on October 13, 1999.

The medical report of Dr. Raymond Kraynak is dated February 23, 2000. CX-19. Dr. Kraynak is Board-Eligible in Family Medicine. (see curriculum vitae at CX-20). He noted that Claimant had been under his care since February 2, 2000. He noted eleven (11) years of coal mine employment. Claimant last worked in the coal mines in 1956. He last worked as a truck driver in September of 1999. Dr. Kraynak noted a medical history of gout, diabetes, bypass surgery and valve replacement. He noted a negative smoking history. He reviewed Claimant's current medications that included Glipizide, Zocur, Zyloprim, Lopressor, Aspirin, and Coumadin. Claimant's complaints included shortness of breath, productive cough and exertional dyspnea. He complained of difficulty walking one to two blocks or up one flight of steps. Physical examination revealed a patient that looked older than stated age, lips were slightly cyanotic, there was a mild increase in the AP diameter, and scattered wheezes were heard in all lung fields. Dr. Kraynak reviewed a x-ray from 10-17-80 that was read by Dr. Aycoth as Category 1, type "p", and a vent study performed on 2-2-00 that revealed FEV-1 of 62%, FVC of 56% and MVV of 44%. Dr. Kraynak concluded, based on Claimant's coal mine employment history of greater than ten (10) years of coal mine employment, his complaints, physical examination, and diagnostic studies, that Claimant was totally and permanently disabled due to coal worker's pneumoconiosis contracted during his employment in the anthracite coal industry. Claimant was unable to lift, carry, climb steps or walk for any period of time. Dr. Kraynak added that Claimant must be able to sit, stand, and lay down at his leisure.

Dr. Kraynak filed a supplemental medical note on April 12, 2000. CX-23. He noted that it was still his opinion that Claimant was totally disabled by pneumoconiosis even if he is credited with less than ten years of coal mine employment because his exposure would still have been sufficient to cause pneumoconiosis.

The deposition of Dr. Raymond Kraynak was taken on May 5, 2000. CX-24. Dr. Kraynak reiterated his findings in his report. He opined that Claimant, who is 68 inches tall and weighs 204 pounds, is not obese. TR 13. He added that Claimant's weight did not affect his pulmonary capacity. TR 13. Dr. Kraynak invalidated the vent study of 9-7-99 because of audible wheezing and coughing on forced expiration. TR 14-15. He stated that the arterial blood gases of 9-7-99 showed a borderline hypoxemic PO2 of 79 and opined that any hypoxemia experienced by Claimant was due to pneumoconiosis. TR 13-14. Dr. Kraynak stated that coughing could cause artificially inflated values. TR 15. He opined Claimant has had a worsening of his respiratory condition since 1980. TR 18. He added that the valve replacement corrected the aortic stenosis and the Claimant's cardiac standpoint was excellent. TR 18. On cross-examination, Dr. Kraynak admitted he did not know if Claimant was still seeing a cardiologist. TR 25. The medications Claimant was

taking were prescribed by someone else. TR 25. He was unaware whether Claimant was seeing another physician for his pulmonary condition prior to 2-2-00. TR 26. Dr. Kraynak admitted that obesity could cause shortness of breath. TR 26. Dr. Kraynak insisted when evaluating whether someone is obese, one has to look at the individual and body build and not at numbers in a table. TR 28.

The medical report of Dr. Matthew Kraynak is dated May 8, 2000. CX-25. Dr. Kraynak is Board-Certified in Family Medicine. (see curriculum vitae at CX-26). He noted he has seen Claimant on "several occasions." Claimant complaints included shortness of breath, productive cough and exertional dyspnea when walking one to two blocks or up one flight of stairs. He reviewed Claimant's medical history and current medications. Dr. Kraynak noted an occupational history of eleven (11) years of coal mine employment. He reviewed a vent study from 2-2-00 and a x-ray of 10-17-80. Physical examination revealed a patient who was 68 inches tall and weighed 200 pounds who looked older than his stated age. Dr. Kraynak also noted cyanotic lips and scattered wheezes. He concluded, based on his physical examination and medical records in the file, Claimant was totally and permanently disabled due to coal worker's pneumoconiosis contracted during his employment in the anthracite coal industry.

The medical report of Dr. Michael Sherman is dated May 28, 2000. DX-17. Dr. Sherman is Board-Certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine. (see curriculum vitae at DX-17). Dr. Sherman reviewed and discussed in detail the objective diagnostic testing, medical opinions, and records. He noted the ideal body weight for a man 68 inches tall is 154 pounds. He concluded Claimant had simple coal worker's pneumoconiosis based on the consensus of B-readers. He invalidated the pulmonary function study of 2-2-00 because the expiratory effort was less than six (6) seconds without a two (2) second plateau and poor reproducibility. He validated the 9-7-99 pulmonary function study as being reproducible. He noted that coughing was not present during the vast majority of the expiratory maneuvers and that the study showed no pulmonary limitation to be present. Dr. Sherman also noted that the exercise study of 9-7-99 demonstrated significant cardiac disease. He concluded there was no convincing evidence of any significant respiratory impairment present but that Claimant had a significant cardiac condition that appeared to be causing any dyspnea on exertion.

The medical report of Dr. Leon Cander is dated June 5, 2000. DX-18. Dr. Cander is Board-Certified in Internal Medicine and is Board-Eligible in Pulmonary Disease. (see curriculum vitae at DX-18). He noted an occupational history of six years of coal mine employment and a negative smoking history. Dr. Cander reviewed chest x-rays, pulmonary functions studies, arterial blood gases and medical records. He validated, without explanation, the pulmonary function studies of 10-17-80 and 9-7-99 that documented the presence of normal lung function. He invalidated the vent study of 2-2-00 because of excessive variability of the FVC (10%) and FEV-1 (11%) and lack of effort demonstrated by failure to attain an expiratory plateau and a straight curve over the first

75% of the FVC indicated malingering. He noted the portion of Dr. Lynch's report that indicated Claimant's exertional dyspnea had an onset six (6) to eight (8) months prior to October of 1999. He concluded Claimant may have pneumoconiosis but that there was no valid evidence of measurable pulmonary impairment causally related to coal mine employment. Claimant's breathlessness was explained by the severe limitation of cardiac output from aortic stenosis and angina caused by coronary artery disease.

The medical note of Dr. Raymond Kraynak is dated August 16, 2000. CX-27. He reviewed the medical information from Reading Hospital regarding Claimant's aortic valve replacement and hospital admission from 10-6-99 to 10-13-99 and correspondence from Dr. Lynch. Dr. Kraynak concluded Claimant did well after surgery and that there were no cardiac limitations. In his opinion Claimant was still totally and permanently disabled due to pneumoconiosis.

There are six physicians who have rendered opinions in this matter. Drs. Ahluwalia, Cander and Sherman opine Claimant does not suffer from any respiratory impairment and is not totally disabled. Drs. Matthew and Raymond Kraynak opine Claimant suffers from a totally disabling respiratory impairment. Dr. Cubler did not specifically address the issue of total disability in his report, therefore his opinion will be accorded less weight.

Upon review of the medical opinion evidence as a whole, I find that Claimant has not met his burden of proving total disability or respiratory disability at Section 718.204 (c)(4). I am mindful of Drs. Raymond and Matthew Kraynak's status as treating physicians. Nevertheless, I credit the medical opinions of Drs. Cander and Sherman, that Claimant is not totally disabled, on the basis of their superior credentials, the thoroughness of their reports, and the clinical testing that forms some of the documentation in support of their conclusions. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Moreover, their opinions are supported by the well-reasoned report of Dr. Ahluwalia. Although he is not Board-Certified, Dr. Ahluwalia's qualifications are impressive. Since 1983, he has practiced exclusively in the area of pulmonary medicine. In 1984 he was appointed Director of the Cardiopulmonary Laboratory, Respiratory Therapy Department and Arterial Blood Gas Laboratory at Good Samaritan Hospital. In 1986 he was made Medical Director of the Cardiopulmonary Laboratory and Pulmonary Rehabilitation Clinic at the American Rehabilitation Center.

Moreover, the medical note of Dr. Lynch, Claimant's cardiologist, is persuasive evidence that Claimant did not experience shortness of breath until six to eight months prior to his valve replacement in October of 1999.

On the other hand, Drs. Matthew and Raymond Kraynak are less qualified than Drs. Cander and Sherman. Their reports are not well-reasoned and are based, in part, on an

invalidated vent study. Their abnormal findings on physical examination (i.e. cyanosis, wheezing) are not supported by any other physician and are contrary to every credible objective finding of record.

Although Drs. Kraynak appear to be Claimant's treating physician since 2-2-00, there is no evidence as to what occurred during any of these visits, what examinations or treatment took place, what testing was or was not administered, or what information was obtained from these visits which would give these physicians superior knowledge to diagnose Claimant. Since the opinions of Drs. Kraynak are not well-reasoned or supported by objective medical evidence, they cannot be accorded additional weight. *Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997).

In conclusion, I find the medical reports of Drs. Cander, Sherman, and Ahluwalia sufficiently undermine Claimant's case so that the medical opinion evidence does not persuasively demonstrate total respiratory disability at Section 718.204(c)(4).

Total Respiratory Disability

After evaluating like-kind evidence under each provision of section 718.204(c), I must then evaluate all relevant evidence at Section 718.202(c), like and unlike, to find whether Claimant has established total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Upon my consideration of all relevant evidence, like and unlike, including Claimant's testimony, see generally *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1988); see also *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348 (7th Cir. 1990), I conclude that Claimant has not met his burden of establishing total disability.

I find that the non-qualifying arterial blood gas studies, the credible non-qualifying pulmonary function studies, the most recent reports from Drs. Cander and Sherman, which were detailed, comprehensive and corroborated by an earlier report from Dr. Ahlawalia constitute "contrary probative evidence" which precludes a finding of total disability pursuant to Section 718.204(c). Again, I have accounted for multiple opinions from Claimant's treating physicians. Nevertheless, I find, in the face of contrary probative evidence, that Claimant has failed to prove total respiratory disability by a preponderance of the evidence. Although Claimant need only establish total disability by a preponderance of the evidence, "the preponderance standard is not toothless." *See United States v. Roman*, 121 F.3d 136, 141 (3d Cir. 1997), *cert. denied* 522 U.S. 1061 (1998).

Disability Causation

The final issue is whether Claimant has established disability causation at Section 718.204(b). Claimant bears the burden of proving that pneumoconiosis is a substantial contributor to Claimant's total respiratory disability. *Bonessa v. U.S. Steel Corp.*, 884

F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In this case the record does not establish the existence of a totally disabling respiratory or pulmonary impairment. Assuming that Claimant had established total disability, I find that he has not convincingly established that pneumoconiosis is a substantial contributor to this total disability. Again, I credit the opinions of Drs. Cander and Sherman that Claimant suffers from no pulmonary or respiratory impairment, on the basis of their superior credentials.

Conclusion

Because Claimant has failed to prove any element of entitlement, I must conclude that he has failed to establish entitlement to benefits under the Act.

Order

The claim of James W. Schaeffer for benefits under the Act is hereby DENIED.

A
Ainsworth H. Brown
Administrative Law Judge

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee for services rendered to him in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a Notice of Appeals with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Room N-2117, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210.