BRB No. 99-1148 BLA

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

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0861) of Administrative Law Judge Paul H. Teitler 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.[1] The administrative law judge

[1] Claimant originally filed a claim on June 28, 1993, Director's Exhibit 1, and in a Decision and Order issued on September 25, 1996, Administrative Law Judge Frank D. Marden found that claimant established fourteen years and five and one-half months of coal mine employment and ultimately adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 64. Judge Marden 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), but further found that total disability was not established pursuant to 20 C.F.R.

found that the parties stipulated that claimant had 14.46 years of coal mine employment and found that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202 and 718.203(b). The administrative law judge further found, however, that total disability was not established by the newly submitted evidence pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, therefore, found that a change in conditions was not established pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in not determining whether a mistake in a determination of fact was established pursuant to Section 725.310 and in finding the newly submitted pulmonary function study and medical opinion evidence insufficient to demonstrate total disability pursuant to Section 718.204(c)(1) and (4). The Director, Office of Workers' Compensation Programs (the Director) responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.

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).

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§718.204(c)(1)-(4). Accordingly, benefits were denied.

Claimant appealed and the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a)(1) and 718.203(b), and that total disability was not established pursuant to Section 718.204(c)(1)-(4), Director's Exhibit 76. *Tamanini v. Director, OWCP*, BRB No. 97-0157 BLA (Sep. 25, 1997)(unpub.). Thus, the Board affirmed Judge Marden's Decision and Order denying benefits. Subsequently, claimant filed a request for modification based on a mistake in a determination of fact and a change in conditions on February 17, 1998, Director's Exhibit 79.

Initially, claimant contends that the administrative law judge erred in not determining whether a mistake in a determination of fact was established pursuant to Section 725.310. Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). Moreover, the Third Circuit Court held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both the newly submitted evidence and the evidence previously in the record and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact, *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63. Consequently, as claimant based his request for modification, in part, on a mistake in a determination of fact, *see* Director's Exhibit 79, we vacate the administrative law judge's Decision and Order denying benefits pursuant to Section 725.310 and remand the case for the administrative law judge to consider whether a mistake in a determination of fact was established pursuant to Section 725.310.

Next, we address the administrative law judge's findings and claimant's contentions regarding the administrative law judge's findings pursuant to Section 718.204(c). The administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to Section 718.204(c). In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).[2]

[2] Claimant also contends that the administrative law judge denied claimant's due process rights by failing to give claimant an opportunity to submit an x-ray re-reading of an x-ray submitted by the Director. However, inasmuch as the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202 and 718.203(b) are not challenged on appeal, they

are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-701 (1983). Moreover, x-rays are not diagnostic of the extent of respiratory disability, but only of the presence or absence of disease, *see Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129, n. 4 (1987), and a diagnosis of pneumoconiosis does not go to the issue of impairment or disability, *see Jarrel v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting). Thus, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge considered the newly submitted pulmonary function study evidence pursuant to Section 718.204(c)(1), which consisted of five pulmonary function studies administered in 1998, four of which were qualifying.[3] The record contains a qualifying pulmonary function study dated February, 1998, from Dr. Kraynak, Director's Exhibit 79, found invalid by Dr. Michos, Director's Exhibit 83, but valid by Dr. Kraynak, Claimant's Exhibits 1, 30, a qualifying pulmonary function study dated July, 1998, from Dr. Kraynak, Claimant's Exhibit 3, found invalid by Dr. Ranavaya, Director's Exhibit 96, but valid by Dr. Kraynak, Director's Exhibit 30, a qualifying pulmonary function study dated August 26, 1998, Claimant's Exhibit 4, and a qualifying pulmonary function study dated October, 1998, from Dr. Kraynak, Claimant's Exhibit 5, which was found invalid by Dr. Ranavaya. Finally, the record contains a contrary, non-qualifying pulmonary function study dated August 19, 1998, from Dr. Green, Director's Exhibit 91.

The administrative law judge noted that a Third Circuit unpublished decision held that pulmonary function studies yielding higher values are more reliable than those yielding lower values because a pulmonary function study is effort dependent and, therefore, spurious low values can result, but spurious high values are not possible. Decision and Order at 9-10. Thus, the administrative law judge found the non-qualifying pulmonary function study dated August 19, 1998, from Dr. Green more reliable than the qualifying pulmonary function studies and, therefore, credited as reasoned the invalidations of the qualifying February, 1998, and July, 1998, pulmonary function studies by Drs. Michos and Ranavaya. In addition, the administrative law judge found the non-qualifying pulmonary function study dated August 19, 1998, from Dr. Green more reliable than the two remaining qualifying pulmonary function studies dated August 26, 1998, and October, 1998.

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[3] A "qualifying" pulmonary function study sufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1) yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B and a "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1). Moreover, inasmuch as the administrative law judge's findings that total disability was not demonstrated pursuant to Section 718.204(c)(2)-(3) are not challenged on appeal, they are affirmed, *see Skrack*, *supra*.

Claimant contends that the administrative law judge did not adequately explain why he found the opinions of Drs. Michos and Ranavaya invalidating the qualifying February, 1998, and July, 1998, pulmonary function studies were reasoned and/or should be credited over the contrary opinion of Dr. Kraynak, who personally administered both pulmonary function studies. We agree. The administrative law judge did not adequately explain why the results of the single non-qualifying pulmonary function study from Dr. Green is necessarily more reliable than the contrary results of the other four remaining pulmonary function studies considered by the administrative law judge, which were qualifying, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Moreover, the administrative law judge found the February, 1998, and July, 1998, pulmonary function studies invalid without discussing or resolving Dr. Kraynak's subsequent, conflicting opinion validating the results of the pulmonary function studies he administered. The administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989).[4] Thus, inasmuch as the administrative law judge has not adequately explained his finding, *see Tenney*, *supra*, we vacate the administrative law judge's finding under Section 718.204(c)(1) and remand the case for reconsideration.

Finally, the administrative law judge considered the newly submitted opinions of record from Drs. Kraynak and Green pursuant to Section 718.204(c)(4). Dr. Kraynak, board-eligible in family medicine and claimant's treating physician, found that claimant's condition had worsened and that claimant was totally disabled due to coal workers' pneumoconiosis, Director's Exhibit 84; Claimant's Exhibit 30. Dr. Green, board-certified in internal medicine and pulmonary disease, found that claimant was totally disabled due to his arteriosclerotic heart disease and coronary artery bypass surgery, as well as degenerative arthritis, Director's Exhibit 89. Although the administrative law judge noted that Dr. Kraynak stated that he was claimant's treating physician, he did not give his opinion greater weight on that basis because Dr. Kraynak admitted that he had not seen claimant between December, 1995, and February, 1998, over a "three year gap of time" [*sic*], see Decision and Order at 7 n. 3, 11. In addition,

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[4] In addition, when weighing the newly submitted pulmonary function study evidence, the administrative law judge failed to consider an invalidation by Dr. Ranavaya of the most recent pulmonary function study dated October, 1998, from Dr. Kraynak, which the administrative law judge admitted into the record by an Order dated March 25, 1999, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

the administrative law judge found Dr. Kraynak's opinion was not reasoned because the administrative law judge found that "two of the three pulmonary function studies relied on by Dr. Kraynak"[*sic*] were invalid and gave greater weight to Dr. Green in light of his superior qualifications.

Inasmuch as the administrative law judge did not adequately explain why he credited the opinions of Drs. Michos and Ranavaya invalidating the qualifying February, 1998, and July, 1998, pulmonary function studies over the contrary opinion of Dr. Kraynak under subsection (c)(1), *see Tenney*, *supra*, we also vacate the administrative law judge's finding that Dr. Kraynak's opinion was not reasoned under subsection (c)(4) because Dr. Kraynak relied on invalid pulmonary function studies. Consequently, we also vacate the administrative law judge's finding under Section 718.204(c)(4) and remand the case for reconsideration.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge