BRB No. 05-1004 BLA

JOHN S. SHIKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/31/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand -- Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand -- Denying Benefits (03-BLA-5853) of Administrative Law Judge Ralph A. Romano on a subsequent claim[1] 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 on appeal before the

[1] Claimant, John S. Shiko, filed an application for benefits on December 30, 1983, which was denied by the Department of Labor on the basis of claimant having failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant subsequently filed a second claim on October 14, 1993. This second claim was withdrawn by claimant. Director's Exhibit 2. Claimant filed another claim on March 18, 2002, which is pending herein. Director's Exhibit 3.

Board for the second time. When this case was last before us, we affirmed the administrative law judge's analysis of the pulmonary function study evidence, and therefore, affirmed his finding that the pulmonary function study evidence failed to establish total respiratory disability, but we vacated the administrative law judge's finding that the evidence, as a whole, failed to establish total respiratory disability because the administrative law judge's finding in this regard was conclusory. 20 C.F.R. §718.204(b)(2)(i)-(iv). Further, pursuant to the Motion to Remand filed by the Director, Office of Workers' Compensation Programs (the Director), we instructed the administrative law judge to reconsider whether the opinions of Drs. Kraynak and Simelaro, claimant's treating physicians, were entitled to preferential weight based on their status as treating physicians in light of their reasoning and documentation pursuant to Section 718.104(d)(5), especially since the opinion of Dr. Talati was more in accord with the underlying medical evidence, *i.e.*, the non-qualifying pulmonary function study and blood gas study evidence than were the opinions of Drs. Kraynak and Simelaro.[2] Accordingly, we vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge with instructions to explain why he credited the non-qualifying objective evidence over the medical opinion evidence pursuant to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor. *Shiko v. Director, OWCP*, BRB No. 04-0476 BLA (Feb. 17, 2005) (unpub.).

On reconsidering the medical opinion evidence, the administrative law judge accorded greater weight to the opinion of Dr. Talati, who opined that claimant did not suffer from a totally disabling respiratory impairment, because he found it better reasoned than the opinions of Drs. Kraynak and Simelaro. Consequently, the administrative law judge concluded that total respiratory disability was not demonstrated by the medical opinion evidence. Weighing all of the medical evidence together, the administrative law judge concluded that the persuasive, non-qualifying pulmonary function studies,[3] the

[2] Even though the administrative law judge previously found that the evidence as a whole failed to establish total respiratory disability in light of the non-qualifying objective test evidence, the administrative law judge found that, on considering the medical opinion evidence alone, it supported a finding of total respiratory disability. He accorded greater weight to the opinions of Drs. Simelaro and Kraynak because of their treating physician status, 20 C.F.R. §718.104(d)(1)-(4). *Shiko v. Director, OWCP*, BRB No. 04-0476 BLA (Feb. 17, 2005) (unpub.).

[3] The administrative law judge had previously found that three of the five pulmonary function studies produced non-qualifying values, while two produced qualifying values. The administrative law judge further found that the two qualifying

non-qualifying arterial blood gas studies, the absence of evidence of cor pulmonale, and the persuasive medical opinion of Dr. Talati, that claimant did not have a totally disabling respiratory impairment, lending support to each other, failed to establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, as claimant failed to establish total respiratory disability, a requisite element of entitlement, the administrative law judge again denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence failed to establish total respiratory disability. Claimant also avers that the Board erred in permitting the administrative law judge to revisit his prior favorable determination that the medical opinion evidence was sufficient to establish total disability since the Director had waived his right to raise this issue by failing to file a cross-appeal. In response, the Director contends that the administrative law judge permissibly accorded determinative weight to the opinion of Dr. Talati over the contrary opinions of Drs. Simelaro and Kraynak, and as such, properly found that the medical opinion evidence failed to establish total respiratory disability. The Director also avers that it was not necessary that he file a cross-appeal in this case raising the issue of the sufficiency of the medical opinion evidence to establish total disability since the Board may, on its own motion, or at the request of the Secretary of Labor, remand a case for further appropriate action, and need not obtain the consent of the parties in interest as to what issues necessitate the remand.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

First, claimant recognizes that the Board previously rejected his arguments concerning the administrative law judge's analysis of the pulmonary function study evidence, but nonetheless raises the same arguments again in order to preserve the issue for further appellate review. In response, the Director requests that the Board decline to revisit claimant's arguments regarding the administrative law judge's analysis of the pulmonary function study evidence. We agree with the Director and decline to reconsider claimant's arguments which were previously considered and rejected. *See*

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studies were properly invalidated. [2004] Decision and Order at 9-10. This finding was affirmed by the Board. *Shiko v. Director, OWCP*, BRB No. 04-0476 BLA (Feb. 17, 2005) (unpub).

Coleman v. Ramey Coal Co., 18 BLR 1-9, 1-15 (1993); *Witherow v. Rushton Mining Companies*, 8 BLR 1-232 (1985).

Second, claimant argues that the administrative law judge erred in his consideration of the medical opinion evidence. Specifically, claimant contends that the administrative law judge erred in according greater weight to the opinion of Dr. Talati than the opinion of Dr. Simelaro, based on the doctor's qualifications, because Dr. Simelaro is equally or better qualified. Claimant's Brief at 14. This argument is misplaced, however, since the administrative law judge accurately noted the qualifications of both Drs. Talati and Simelaro and did not express his preference for Dr. Talati's opinion based upon qualifications. Decision and Order at 2-3; *see* Director's Letter Brief at 4. Instead, the administrative law judge accorded greater weight to the opinion of Dr. Talati because he found the opinion better reasoned. Decision and Order on Remand at 14. Accordingly, claimant's argument that the administrative law judge erred in according greater weight to Dr. Talati's opinion is without merit. *See generally Sarf v. Director, OWCP*, 10 BLR 1-119 (1987) (claimant must identify specific error in the administrative law judge's analysis).

Additionally, claimant contends that the administrative law judge erred in rejecting Dr. Simelaro's opinion because he relied on a non-qualifying pulmonary function study and a pulse ox test,[4] without explanation. Claimant contends that a doctor's partial reliance on a non-qualifying pulmonary function study is not a sufficient basis to reject his opinion and, even if it were, an administrative law judge may not engage in a selective analysis of the constituent parts of a medical opinion inasmuch as the doctor's opinion was based on many factors. The Director responds that even if the doctor adequately explained the pulse ox test, he could still accord less weight to the doctor's opinion because it was unsupported by underlying documentation, *i.e.*, non-qualifying pulmonary function studies.

On remand, the administrative law judge concluded that Dr. Simelaro found claimant to be disabled by his pulmonary condition based on the pulse ox tests he performed when examining claimant, as well as on the results of a pulmonary function test. The administrative law judge found, however that the pulmonary function study upon which Dr. Simelaro relied was non-qualifying and that he failed to explain why the results of the pulse ox testing were more persuasive than the non-qualifying pulmonary function study. The administrative law judge further observed that even though Dr. Simelaro had seen claimant on a regular basis every three months since December 5,

[4] Dr. Simelaro described a pulse ox test as an exercise test whereby a "pulse ox" is placed on claimant and his oxygen is then measured at rest and after claimant walks up and down a hallway. Claimant's Exhibit 4.

2000, the doctor did not have a copy of the discharge statement from claimant's hospitalization prior to his deposition. Considering all of these factors, the administrative law judge concluded that Dr. Simelaro's opinion was not sufficiently reasoned to establish total respiratory disability. This was rational.

While, as claimant contends, a doctor's report may not be rejected solely because it relies on a non-qualifying pulmonary function study, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and an administrative law judge may not selectively analyze a physician's opinion, *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), an administrative law judge may reject or accord less weight to an opinion which is not supported by underlying documentation, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985) (it is incumbent upon the administrative law judge to determine whether documentation underlying a physician's report logically leads to his conclusion regarding whether or not the miner was totally disabled by a respiratory or pulmonary impairment); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984) (physician's failure to provide adequate explanation for evidence in his report which appears to conflict with his conclusions is a factor which the administrative law judge may consider in determining the weight to be accorded that report); Decision and Order on Remand at 2-3. Considering Dr. Simelaro's treatment of claimant commencing on December 5, 2000, the regularity and frequency of claimant's visits, *i.e.*, every three months, and the doctor's reliance on objective tests, the administrative law judge, within a permissible exercise of his discretion, determined that Dr. Simelaro's disability opinion was entitled to diminished weight because it was not supported by its underlying documentation, *i.e.*, it was based, in part, on non-qualifying pulmonary function studies and it lacked an explanation for the doctor's reliance on claimant's pulse ox test as opposed to the non-qualifying pulmonary function study results. 20 C.F.R. §718.104(d)(5); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Further, claimant contends that the administrative law judge erred in rejecting Dr. Simelaro's opinion because the doctor "did not have a copy of the Discharge Statement from Claimant's hospitalization," Claimant's Brief at 17. Claimant contends that this hospitalization was for a back condition and had no relevance to the pulmonary problem for which Dr. Simelaro was treating claimant. The administrative law judge found, however, that because Dr. Simelaro, who had been treating claimant on a regular basis every three months since December 2000, did not have any records from claimant's most recent hospitalization at Good Samaritan Regional Medical Center, the doctor was unable to render an opinion with respect to claimant's complete medical condition. This was rational. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716, 1-

719 (1984); Decision and Order on Remand at 2-3; Claimant's Exhibits 1, 3, 4, 6. As the administrative law judge's analysis constitutes a proper evaluation of the evidence, we reject claimant's contention that the administrative law judge erred in discounting Dr. Simelaro's opinion. Moreover, we reject claimant's argument that Dr. Simelaro's opinion is entitled to added weight because he was a treating physician. The administrative law judge acknowledged that Dr. Simelaro was a treating physician and that this status lent support to his findings, 20 C.F.R. §718.104(d)(1)-(4), Decision and Order at 3, but nonetheless, found that the doctor's opinion was not dispositive because it was not "creditable in light of its reasoning and documentation." Decision and Order on Remand at 3. This was proper. 20 C.F.R. §718.104(d)(5); *Soubik*, 366 F.3d at 235, 23 BLR at 2-101; *Lango*, 104 F.3d at 573, 21 BLR at 2-12.

Next, claimant asserts that the administrative law judge's consideration of the opinion of Dr. Kraynak, a treating physician who opined that claimant was totally disabled due to coal workers' pneumoconiosis, was illogical and inconsistent because, on the one hand, the administrative law judge faulted Dr. Kraynak for failing to discuss the non-qualifying pulmonary function studies, but then faulted the doctor for concluding that the credible, non-qualifying pulmonary function studies were invalid. Claimant contends that Dr. Kraynak's opinion was detailed, comprehensive, and well-reasoned and that there was absolutely no basis for the administrative law judge to reject the opinion. Further, claimant contends that the administrative law judge failed to accord Dr. Kraynak's opinion proper weight based on his treating physician status. We disagree.

While noting that Dr. Kraynak treated claimant's pulmonary condition during monthly visits commencing in January 1994, the administrative law judge nonetheless permissibly found that Dr. Kraynak's opinion was not entitled to special deference because Dr. Kraynak failed to discuss the non-qualifying pulmonary function study results and found, contrary to the administrative law judge's own finding, that the credible non-qualifying pulmonary function studies were invalid. This was rational. *See* 20 C.F.R. §718.104(d)(5); *Soubik*, 366 F.3d at 235, 23 BLR at 2-101; *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984) (evidence that calls into question reliability of tests upon which a physician's opinion is based is relevant in determining whether that report is documented and reasoned); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order on Remand at 3; Director's Exhibits 25, 32, 53, 70; Claimant's Exhibits 4, 5, 8.

Additionally, claimant contends that the administrative law judge erred in accepting the opinion of Dr. Talati. Claimant contends that Dr. Talati's opinion is less detailed than the opinions of Drs. Kraynak and Simelaro inasmuch as Dr. Talati did not exhibit any knowledge of the length of claimant's coal mine employment, of the specific years claimant worked, nor of the physical requirements of claimant's usual coal mine

employment in terms of lifting and carrying requirements. The administrative law judge credited the opinion of Dr. Talati, that claimant had the respiratory capacity to perform his usual coal mine work. The administrative law judge found Dr. Talati's opinion entitled to dispositive weight because it was well-documented and well-reasoned opinion, supported by objective test results, and based upon a review of all of claimant's medical records, including those pertaining to claimant's recent hospitalization. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-149; *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46; Decision and Order on Remand at 3; Director's Exhibits 11, 30. Further, the record shows that Dr. Talati was aware of claimant's employment history and the exertional requirements of his most recent coal mine employment. Director's Exhibit 30. Thus, because the administrative law judge's crediting of Dr. Talati's opinion is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's findings that the medical opinion evidence failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order on Remand at 3; Director's Exhibits 11, 30, 34. Further, because claimant has not otherwise challenged the administrative law judge's weighing of all the evidence relevant to total disability at Section 718.204(b)(2)(i)-(iv), we affirm his determination that the evidence of record failed to affirmatively establish total respiratory disability by a preponderance of the evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order on Remand at 3.

Lastly, claimant contends that the Board erred in granting the Director's Motion to Remand for reconsideration of the medical opinion evidence on total disability inasmuch as the administrative law judge had found in his first decision found that the medical opinion evidence established total respiratory disability.[5] Claimant contends that the Director's failure to raise this issue in a cross-appeal, instead of a Motion to Remand, precluded the Board from addressing it in the prior appeal. Claimant avers that by addressing this issue which was raised in the Director's Motion to Remand, the Board erroneously permitted the Director to circumvent the requirement of filing an appropriate cross-appeal and essentially granted the Director an appeal *nunc pro trunc*. We disagree.

[5] The record reflects that the Director alleged that the administrative law judge had erred in his consideration of the medical opinions and the Director requested that the case be remanded for the administrative law judge to reconsider that evidence and to explain his weighing of all evidence relevant to total disability. 20 C.F.R. §718.204(b).

Statutory authority provides that the Board may, on its own motion, or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. 33 U.S.C. §921(b)(4), as incorporated into the Act by 30 U.S.C. §932(a). The Board has held that the consent of the parties in interest shall not be a prerequisite to a remand by the Board and, further, that the Director, as designee of the Secretary, has statutory authority to request that a case be remanded to the administrative law judge. 20 C.F.R. §726.6, *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-10 (1994) (*en banc*). Because a Motion to Remand is distinct and separate from a response brief, which is limited to only those arguments raised in the petitioner's brief, in cases, such as here, where the Director has filed a Motion to Remand, the Director is not limited to raising arguments which either respond to arguments raised in claimant's brief or support the decision below. 20 C.F.R. §§802.212, 802.219; *Kingery,* 19 BLR at 1-11. Accordingly, we reject claimant's contention that the Director was procedurally required to file a cross-appeal in order to advance the arguments set forth in his Motion to Remand.

Consequently, because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See* 20 C.F.R. §718.204(b)(2); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order on Remand – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge