BRB No. 01-0301 BLA

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

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

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

Helen H. Cox (Howard M. Radzely, 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1361) of Administrative Law Judge Ainsworth H. Brown 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 is before the Board for the second time. In the original

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

Decision and Order, the administrative law judge credited claimant with six and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Based upon the concession by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).[2] Accordingly, the

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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 for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R.

administrative law judge denied benefits.

In response to claimant's appeal, the Board noted that the Director conceded that claimant's pneumoconiosis arose out of coal mine employment and held that any error in the administrative law judge's calculation of six and one-half years of coal mine employment is harmless since the administrative law judge's length of coal mine employment finding did not bear on his credibility determinations with respect to the evidence at 20 C.F.R. §718.204(c) (2000). The Board affirmed the administrative law judge's findings at 20 C.F.R. §718.204(c)(2) and (c)(3) (2000). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.204(c)(1) and (c)(4) (2000), and remanded the case for further consideration of the evidence. *Confair v. Director, OWCP*, BRB No. 99-1111 BLA (July 24, 2000)(unpub.). On remand, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). The Director responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order.

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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) (2000). Specifically, claimant argues, and the Director agrees, that the administrative law judge erred in relying on Dr. Sahillioglu's consulting opinion to invalidate the March 9, 1999 pulmonary function study since, claimant asserts, Dr. Sahillioglu relied on criteria not required by the regulations. Of the two pulmonary function studies of record, the March 9, 1999 study administered by Dr. Kraynak yielded qualifying values, Claimant's Exhibit 14, and the June 9, 1998 study administered by Dr. Green yielded non-qualifying values,[3] Director's Exhibit 12. Based upon the Board's instructions to further consider the March 9, 1999 study, the administrative law judge considered the consulting opinions by various doctors with regard to the validity of this study.[4] The administrative law judge stated that "[t]he dispute concerning the validity of the March 1999 testing concerns whether the entire forced vital capacity value reflects the entire amount of air exhaled." Decision and Order on Remand at 2. The administrative law judge also stated that "[i]f there has been shallow inspiration the exhalation would be understated."[5] *Id*. With regard to Dr. Sahillioglu's opinion invalidating the 1999 study, the administrative law judge observed, "Dr. Sahillioglu wrote simply 'No demonstration of inspiratory effort.'"[6] *Id*. Hence, the administrative law judge stated, "I find that the

[3]Claimant asserts that the administrative law judge erred in finding the June 9, 1998 pulmonary function study to be valid. In its previous Decision and Order, the Board held that the administrative law judge properly determined that the June 9, 1998 pulmonary function study was valid. *Confair v. Director, OWCP*, BRB No. 99-1111 BLA, slip op. at 3 (July 24, 2000)(unpub.). The Board's prior disposition of this issue constitutes the law of the case, as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we are not persuaded that there is reason for us to revisit this issue.

[4]Whereas Drs. Kraynak, Simelaro, Strimlan and Venditto validated the March 9, 1999 pulmonary function study, Claimant's Exhibits 16, 18-20, Dr. Sahillioglu invalidated this study, Director's Exhibit 27.

[5]The administrative law judge observed that "[t]he quality standard reads '...The effort shall be judged unacceptable where the patient:

(A) Has not reached full inspiration preceding the forced expiration;....'"

Decision and Order on Remand at 2.

[6]Dr. Sahillioglu also indicated that "restrictive defect need be verified by TLC determination." Director's Exhibit 27.

[c]laimant did not satisfy his burden of establishing that the inspiration was full."[7] *Id*. at 3.

[7]The administrative law judge stated, "Dr. Sahillioglu did not report that there was hesitancy, or, that the lines were not comparable or reproducible - he found that there was a lack of evidence to show that an actual deep breath was taken in. This could easily explain the disparity in the two test procedures in this record." Decision and Order on Remand at 3.

The pertinent regulations provide that "[t]he patient shall be instructed to make a full inspiration, either from the spirometer or the open atmosphere, using a normal breathing pattern and then blow into the apparatus, without interruption, as hard, fast, and completely as possible."[8] 20 C.F.R. Part 718, Appendix B, 2(ii). As claimant and the Director argue, the pertinent regulations permit the initial inspiration to be taken from room air. *Id*. Thus, since Dr. Sahillioglu's opinion is not based upon valid criteria for considering the quality of pulmonary function study evidence in this case, we hold that the administrative law judge erred in discrediting the March 9, 1999 pulmonary function study.[9] Nonetheless, we hold that the administrative law judge's error is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), since the administrative law judge provided a valid alternate basis for weighing the conflicting pulmonary function study evidence, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge additionally stated, "[a]ssuming that he did [establish that the March 9, 1999 pulmonary function study was valid,] there would remain the weighing of 'pro and con' evidence to complete a finding of total disability" and "[w]hile I recognize my duty to insure an adequate record that does not take away what the Supreme Court says is the [c]laimant's burden." *Id*. In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that "when the evidence is evenly balanced, the benefits claimant must lose." Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i).

Further, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000). Whereas Drs. Bower and Kraynak opined that claimant suffers from a disabling respiratory impairment, Claimant's Exhibits 7, 12, 15, Dr. Green opined that claimant does not suffer from a disabling respiratory impairment, Director's Exhibit 13. The administrative law judge properly accorded greater weight to the opinion of Dr. Green than to the contrary opinion of

[8]The revised regulations at 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B do not permit the initial inspiration to be taken from an open atmosphere. However, the revised regulations at 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B are only applicable to evidence developed after January 19, 2001.

[9]Both parties, claimant and the Director, agree that Dr. Sahillioglu's statement that there was "[n]o demonstration of inspiratory effort" implied that claimant's March 9, 1999 pulmonary function study is invalid since claimant should have made his inspiration from a spirometer, and not from room air.

Dr. Kraynak because of Dr. Green's superior qualifications.[10] *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). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Kraynak's opinion.

[10]The administrative law judge stated that "Dr. Green possesses superior credentials." Decision and Order on Remand at 3. Whereas Dr. Kraynak is Board eligible in family medicine, Claimant's Exhibit 13, Dr. Green is Board-certified in internal medicine and pulmonary disease, Director's Exhibit 13.

In addition, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to the opinions of Drs. Bower and Hodge due to their status as claimant's treating physicians.[11] While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The administrative law judge permissibly discredited Dr. Bower's opinion because he found Dr. Bower's opinion not to be well documented or well reasoned.[12] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v.*

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[11]The Board correctly stated, in its previous Decision and Order, that "Dr. Hodge discussed exclusively claimant's cardiac condition and did not indicate that claimant is totally disabled or has any physical limitations." *Confair v. Director, OWCP*, BRB No. 99-1111 BLA, slip op. at 4 n.3 (July 24, 2000)(unpub.); Claimant's Exhibit 3. Since the Board's prior disposition of this issue constitutes the law of the case, as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue, *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993), we decline to revisit this issue.

[12]Citing *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), claimant argues that Dr. Green's opinion is not reasoned since, claimant asserts, Dr. Green was not aware of the exertional requirements of claimant's usual coal mine employment. Contrary to claimant's assertion, Dr. Green opined that "[claimant] can perform [his] last coal mine job in section B1a." Director's Exhibit 13. In Section B1a of Dr. Green's opinion, Dr. Green stated that claimant's job duties involve "repairing coal tracks." *Id*. The administrative law judge stated that "Dr. Green's...[opinion] is patently well documented and well reasoned based on the documentation that his opinion was based upon." Decision and Order on Remand at 3. Dr. Green's opinion that claimant is not totally disabled is based upon an examination, smoking and coal mine employment histories, x-ray evidence, and pulmonary function study and arterial blood gas study evidence. Director's Exhibit 13. In contrast, the administrative law judge stated that Dr. Bower's opinion "is neither well documented or well reasoned." Decision and Order on Remand at 3. The administrative law judge observed that "[Dr. Bower's] terse report is found in the record at CX 7." *Id*. The administrative law judge also observed that "[Dr. Bower's] second and final sentence is that a recent heart cath reveals stable and adequate function so that he wrote that anthracosilicosis played a role, significant one, in [claimant's] shortness of breath with mild exertion." *Id*. The administrative law judge further observed, "[i]t is noteworthy that the statement does not contain a history and physical; nor, any reference to studies to ascertain the level of dysfunction attributable to the respiratory disease." *Id*.

Gibraltar Coal Corp., 6 BLR 1-1291 (1984). Finally, we reject claimant's assertion of bias by the administrative law judge in weighing the conflicting medical evidence because there is no evidence in the record to support this assertion. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). Thus, since the administrative law judge permissibly discredited the only medical opinions of record that could support a finding that claimant suffers from a totally disabling respiratory impairment, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv).

Since claimant failed to establish total disability, *see* 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent 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 denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge