

BRB No. 99-0230 BLA

EILEEN PURCELL )  
(Widow of RICHARD PURCELL) )

Claimant-Petitioner )

v. )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )

Respondent )

DATE ISSUED:

DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan.  
Administrative Law Judge, United States Department of Labor.

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

Dorothy L. Page (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1806) of Administrative Law Judge Robert D. Kaplan with respect to 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 involves a duplicate claim.<sup>1</sup> The administrative law judge accepted the parties' stipulation of 10.15 years of coal mine employment and the concession of the Director, Office of Worker's Compensation Programs (the Director), that a material change in conditions had been established as the evidence now established that the miner had suffered from pneumoconiosis arising out of coal mine employment. Weighing the evidence pursuant to 20 C.F.R. §718.204(c), the administrative law judge determined that the evidence of record was insufficient to establish that the miner had been totally disabled due to pneumoconiosis. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the pulmonary function studies and medical opinions of record. The Director has responded and urges affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup>The miner filed his first claim for benefits on August 16, 1989. The claim was finally denied on October 20, 1989 for failure to establish pneumoconiosis or total disability. Director's Exhibit 17. The miner filed the instant claim on November 1, 1996. Director's Exhibit 1. The district director denied the claim on April 14, 1997, and following an informal conference, again denied benefits, on June 17, 1997. Director's Exhibits 12, 15. The miner requested a hearing on July 7, 1997, but died on December 13, 1997. Director's Exhibit 16; Claimant's Exhibit 8. Claimant, the miner's widow, is pursuing the miner's claim. Hearing Transcript at 5 - 6.

With respect to Section 718.204(c)(1), claimant contends that the administrative law judge erred in accepting the non-qualifying pulmonary function study of February 20, 1997 administered by Dr. Rashid and in rejecting the qualifying pulmonary function studies of October 22, 1997 and November 12, 1997 administered by Dr. Kraynak, based upon the consulting opinions of Dr. Sahillioglu.<sup>2</sup> Decision and Order at 5; Director's Exhibits 7, 19, 23; Claimant's Exhibits 6, 9. The administrative law judge found that Dr. Kraynak invalidated Dr. Rashid's February 20, 1997 study because it was erratic and showed frequent breaks in the tracings. Decision and Order at 5; Claimant's Exhibit 9. The administrative law judge further noted, however, that Dr. Rashid twice stated that the study resulted in normal values, and thus, the administrative law judge inferred that Dr. Rashid was of the opinion that the study conforms to the regulatory requirements and is valid. Moreover, the administrative law judge determined that if the miner's effort had been poor, better effort would only have resulted in even higher values. Relying on Dr. Rashid's superior credentials, the administrative law judge accorded greater weight to the physician's non-qualifying results over Dr. Kraynak's invalidation of those results.<sup>3</sup> With

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<sup>2</sup>The record also contains the results of a pulmonary function study conducted by Dr. Cubler on September 25, 1989. Director's Exhibit 17. Although the administrative law judge stated that he considered the study, see Decision and Order at 3, the administrative law judge did not discuss the weight he accorded this study. Claimant, however, suggests that the study was not considered "given the remoteness in time when the study was performed." Claimant does not challenge the administrative law judge's failure to discuss this evidence. Claimant's Brief at 4 - 5.

<sup>3</sup>The record indicates that Dr. Rashid has been Board-certified in Internal Medicine since 1973. Director's Exhibit 22. Dr. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 5.

respect to the studies performed by Dr. Kraynak on October 22, 1997 and November 12, 1997, the administrative law judge found that Dr. Sahillioglu, who reviewed the studies, opined that the miner exerted less than optimal effort, and that Dr. Kraynak disagreed with Dr. Sahillioglu's assessment. Because the administrative law judge found Dr. Sahillioglu's credentials to be superior to those of Dr. Kraynak, the administrative law judge found the studies to be invalid.<sup>4</sup> Decision and Order at 5.

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<sup>4</sup>The record indicates that Dr. Sahillioglu is Board-eligible in Internal Medicine and Pulmonary Diseases. Dr. Sahillioglu has been the Medical Director of Pulmonary Laboratory and Respiratory Therapy at Mercy Hospital in Wilkes-Barre, Pennsylvania since 1972. Director's Exhibit 20.

Claimant contends that the administrative law judge's inference that Dr. Rashid found the February 20, 1997 study to be valid based on Dr. Rashid's statements that the study resulted in normal values, see Director's Exhibits 8, 21, constitutes an impermissible medical opinion by the administrative law judge.<sup>5</sup> Claimant's Brief at 6 - 8. Claimant also contends that the administrative law judge committed error in speculating as to the values that may have been obtained if the miner had exerted better effort. Claimant's Brief at 8. We disagree. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,<sup>6</sup> has held that the quality standards found at 20 C.F.R. §§718.102-107 are mandatory and where the objective tests do not strictly conform to the applicable standards, the administrative law judge may, nevertheless, consider an objective test if the test is found to be in substantial compliance with the quality standards. *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). In the instant case, the administrative law judge rationally found that Dr. Rashid's reference twice to "normal values" indicated the physician's validation of the study, and thus, served as a proper basis for the administrative law judge's determination that the study conforms to the regulatory quality requirements and is valid. *Siwiec, supra; Mangifest, supra*; Decision and Order at 5. Contrary to claimant's contention, the administrative law judge properly relied on Dr. Rashid's evaluation of the study and did not arrive at his own medical conclusions regarding the validity of the February 20, 1997 study. See *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Furthermore, the administrative law judge permissibly found that improved cooperation and comprehension could only improve values of the already non-qualifying test. See *Crapp v. United States Steel Corp.*, 6 BLR 1-476 (1983). As the administrative law judge properly noted that Dr. Rashid's qualifications are superior to those of Dr. Kraynak, we affirm the administrative law judge's finding that the February 20, 1997 study was non-qualifying and valid. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant next contends that Dr. Kraynak, as the administering physician of the October 22, 1997 and November 12, 1997 tests, was in a better position than Dr. Sahillioglu to assess the validity of the tests, and that the latter physician's reasons for invalidating the studies are not supported by the regulations. Claimant's Brief at 8 - 14. Dr. Sahillioglu invalidated the October 22, 1997 test, checking the boxes on the United States Department of Labor's "Validation of Pulmonary Function and Arterial Blood Gas

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<sup>5</sup>The February 20, 1997 study contains a notation that the miner demonstrated good comprehension and effort. Director's Exhibit 7.

<sup>6</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Studies” form, indicating that the “vents” are not acceptable due to less than optimal effort and because the studies were improperly performed. Director’s Exhibit 19. As further explanation, the physician stated that there was no demonstration of inspiratory effort, there was extremely poor effort, hesitancy, and inconsistency in the FVC and MVV, and that the restrictive defect needed to be verified by valium determination. *Id.* Dr. Sahillioglu invalidated the November 12, 1997 test on a similar form, indicating that the “vents” are not acceptable due to less than optimal effort, cooperation and comprehension. Director’s Exhibit 23. Dr. Sahillioglu’s explanatory comments indicated that there was inconsistent effort on the FVCs, extremely poor effort on MVV, and that the restrictive defect need be verified by TLC determination. *Id.* Dr. Kraynak refuted Dr. Sahillioglu’s opinion regarding the miner’s effort on both studies. Claimant’s Exhibits 7, 10. The relevant quality standards mandate that a miner’s effort is judged unacceptable if the miner has not reached full inspiration before the forced expiration, has not used maximal effort during the entire forced expiration, or has an unsatisfactory start of expiration, ... as characterized by excessive hesitation... See Appendix B to 20 C.F.R. Part 718, Section (2)(ii)(A), (B), (F). While claimant is correct that some of Dr. Sahillioglu’s reasons for invalidating the October 22, 1997 and November 12, 1997 studies are not regulatory requirements, Dr. Sahillioglu nevertheless offered a valid reason for invalidating the studies, namely that the results indicate that the miner exerted extremely poor effort. See 20 C.F.R. §718.103(c); *Siwiec, supra*; *Mangifest, supra*. Moreover, as the administrative law judge permissibly relied on Dr. Sahillioglu’s superior credentials in determining that the physician was more credible on the issue of the miner’s effort, we affirm the administrative law judge’s decision to credit Dr. Sahillioglu’s invalidation of Dr. Kraynak’s qualifying studies. See *Clark, supra*; *Dillon, supra*; *Siegel v. Director, OWCP*, 8 BLR 1-156 (1984). In light of this appropriate determination, the administrative law judge was not required to defer to Dr. Kraynak’s opinion merely on the ground that he was the miner’s treating physician and the physician who administered two of the pulmonary function studies in question. See *Siegel, supra*; see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Because the administrative law judge properly weighed the pulmonary function studies, we affirm his finding that the weight of the pulmonary function studies do not establish total respiratory disability pursuant to Section 718.204(c)(1).

With respect to the administrative law judge’s findings under Section 718.204(c)(4), claimant contends that the administrative law judge erred in according greater weight to Dr. Rashid’s opinion. Claimant asserts that the administrative law judge should have credited Dr. Kraynak’s opinion that the miner was totally disabled due to pneumoconiosis as the physician reviewed the entire record and relied on several factors besides the pulmonary function studies in formulating his conclusions. Claimant’s Brief at 18 - 21.

In considering the evidence at 20 C.F.R. §718.204(c)(4), the administrative law judge initially found that a November 3, 1997 report by Dr. Munir did not state an opinion on disability and that Dr. Cubler’s September 25, 1989 medical opinion was too remote in

time to be relevant to the miner's later pulmonary condition. Decision and Order at 6; Director's Exhibit 17; Claimant's Exhibit 2. The administrative law judge then found that the remaining two opinions in the record, by Drs. Rashid and Kraynak, are reasoned and documented, but that Dr. Rashid's opinion was supported by normal blood gas studies and the valid, non-qualifying February 20, 1997 pulmonary function study. Director's Exhibit 8; Claimant's Exhibit 4; Decision and Order at 6. Because Dr. Rashid additionally possessed qualifications superior to those of Dr. Kraynak, the administrative law judge found Dr. Rashid's opinion entitled to greater weight. Decision and Order at 6.

Regarding the administrative law judge's consideration of Dr. Kraynak's opinion, the administrative law judge acted within his discretion in finding that the credibility of Dr. Kraynak's diagnosis of a totally disabling respiratory impairment was diminished because the doctor based his determination, in part, upon invalid pulmonary function studies. Decision and Order at 6; see *Siwec, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel, supra*; *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Moreover, the administrative law judge, in a rational exercise of his discretion, permissibly relied on Dr. Rashid's superior credentials in according the physician's opinion determinative weight. See *Clark, supra*. Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4) as this finding is supported by substantial evidence. As claimant has failed to establish total pulmonary or respiratory disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge