BRB No. 04-0476 BLA

JOHN S. SHIKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 02/17/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order 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; Donald S. Shire, 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 Denying Benefits (03-BLA-5853) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge found that claimant established a coal mine employment history of approximately eight years, and that inasmuch as the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant suffered from pneumoconiosis arising from coal mine employment, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 in this subsequent claim.[1] Considering the merits of entitlement, the

[1] Claimant initially filed a claim for benefits on December 30, 1983, which was denied by the Department of Labor on the basis of claimant having failed to establish any

administrative law judge found that while the pulmonary function study and blood gas study evidence did not establish total disability, the medical opinion evidence did support a finding of total disability. Decision and Order at 10-11. Weighing all of the evidence relevant to total disability together, however, the administrative law judge determined that it failed to establish total disability. 20 C.F.R. §718.2044(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in concluding that the pulmonary function study evidence did not support a finding of total disability. Claimant further argues that the administrative law judge erred in determining that the overall weight of the evidence failed to establish total disability. The Director, in response, has filed a Motion to Remand. In his motion, the Director contends that while the administrative law judge determined correctly that the pulmonary function study evidence did not support a finding of total disability, the administrative law judge failed to explain his bases for concluding that weight of the evidence did not establish a totally disabling respiratory impairment at Section 718.204(b)(2). Accordingly, the Director contends that the administrative law judge's denial must be vacated and the case remanded. The Director further argues that, on remand, the administrative law judge must consider the opinions of claimant's treating physicians in a manner consistent with 20 C.F.R. §718.104(d).[2]

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).

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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. On March 13, 2002, claimant filed the instant claim. Director's Exhibit 2.

[2] No challenge has been made to the administrative law judge's length of coal mine employment determination or his finding regarding the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(c). These findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm, pursuant to the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), the administrative law judge's unchallenged finding that claimant established a material change in conditions subsequent to the previous denial of benefits pursuant to Section 725.309.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues that the administrative law judge committed several errors in his analysis of the pulmonary function evidence. Claimant first argues that in his analysis of the qualifying pulmonary function study[3] of March 7, 1984, the administrative law judge erred in crediting Dr. Cander's invalidation of the study without considering the opinion of Dr. Wagner, the administering physician, who noted good cooperation and understanding by claimant when taking the test. Further, Dr. Wagner certified that the study was done in compliance with the requirements of the Department of Labor. Claimant argues that the failure of the administrative law judge to discuss these conclusions by Dr. Wagner, which, in effect, validate the study is error requiring remand. Claimant also asserts that Dr. Cander did not provide an adequate explanation for his invalidation of the study. Director's Exhibit 1.[4]

Second, claimant asserts that the administrative law judge erred in concluding that the non-qualifying pulmonary function study of June 11, 2002, was a valid study because Dr. Kraynak's review of the study found the tracings to be erratic. Director's Exhibit 11; Claimant's Exhibit 4. Claimant argues that Dr. Kraynak provided a thorough explanation for his invalidation of the study and that the administrative law judge erred in rejecting Dr. Kraynak's reviewing opinion.

Third, claimant argues that the administrative law judge erred in rejecting the qualifying study of March 21, 2002, because it conflicted with a non-qualifying study conducted only three months later, *i.e.*, the aforementioned June 11, 2002 study. Claimant's Exhibit 7. Claimant avers, however, that the administrative law judge erroneously relied on the June 11, 2002 non-qualifying pulmonary function study to invalidate the March 21, 2002 qualifying study inasmuch as the June 11, 2002 study was invalidated by Dr. Kraynak. Further, claimant contends that the administrative law judge impermissibly substituted his judgment for those of medical experts by invalidating the

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] Dr. Cander stated that the study was invalid because the FEV tracings failed to demonstrate a maximum sustained effort. Director's Exhibit 1.

March 21, 2002 without relying on a physician's opinion which did so. Claimant argues that the physician performing the March 21, 2002 study, Dr. Simelaro, unequivocally stated that the study was valid and that the administrative law judge's reliance on an unpublished Third Circuit case, *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994)(unpub.), was misplaced, because the invalidation of the pulmonary function study in that case was performed by a physician, not the administrative law judge.

In considering the pulmonary function study evidence of record, the administrative law judge found that three of the five studies of record produced non-qualifying values, while two produced qualifying values. Director's Exhibits 1, 11, 31; Claimant's Exhibits 2, 7. Contrary to claimant's assertion, the administrative law judge permissibly relied upon the opinion of the pulmonary expert, Dr Cander, to invalidate the qualifying pulmonary function study of March 7, 1984, Director's Exhibit 1. *See 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); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see also Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting). Moreover, contrary to claimant's assertion, review of the opinion of Dr. Wagner, the administering physician, demonstrates that he called into question the validity of the study when he noted that the results were not consistent with clinical findings. Director's Exhibit 1. Accordingly, we affirm the administrative law judge's rejection of the March 7, 1984 qualifying study based on Dr. Cander's invalidation of the study.

Further, we reject claimant's assertion that the administrative law judge impermissibly relied on the non-qualifying study of June 11, 2002, as support for his finding that claimant failed to demonstrate total disability. Contrary to claimant's assertion, the administrative law judge permissibly accorded greater weight to the conclusion of the administering physician, Dr. Talati, that the study was valid, than to the contrary opinion of the reviewing physician, Dr. Kraynak, based on the former's superior credentials as a pulmonary expert. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Likewise, we reject claimant's assertion that the administrative law erred in finding that the non-qualifying June 11, 2002 study cast doubt on the validity of the qualifying March 21, 2002 study. Because pneumoconiosis is a progressive disease, the administrative law judge found that the more recent qualifying study was a more reliable indicator of claimant's condition than the previous non-qualifying one. Decision and Order at 10; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Andruscavage*, No. 93-3291. The administrative law judge permissibly accorded

little weight to the qualifying study of March 21, 2002.[5] Accordingly, the administrative law judge's determination that the pulmonary function study evidence is insufficient to support a finding of total disability is affirmed. *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant and the Director next contend, however, that the administrative law judge erred in concluding that the weight of the evidence failed to establish to total disability. Both parties contend that the administrative law judge's determination in this regard violates the requirement of the Administrative Procedure Act (APA) 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(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 on all material issues of fact, law or discretion presented in the record, as the administrative law judge has failed to articulate fully the bases for his conclusion that claimant failed to carry his burden of establishing a totally disabling respiratory impairment. We agree with parties' assertions and we hold that remand is necessary for compliance with the requirements of the APA.

In considering whether claimant has established a totally disabling respiratory impairment, the administrative law judge must weigh together all relevant evidence at Section 718.204(b)(2)(i)-(iv), *i.e.*, pulmonary function study evidence, blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence, and determine whether claimant has carried his burden of establishing total respiratory disability. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1(1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-14 (1991); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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.* (*en banc*), 9 BLR 1-236 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). In the instant case, the administrative law judge considered all of the evidence relevant to disability,[6] found that the medical opinion evidence was supportive of a finding of total disability, and concluded that:

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[5] We reject claimant's assertion that the administrative law judge's rejection of the March 21, 2002 pulmonary function study constitutes an impermissible substitution of the administrative law judge's opinion for that of the medical experts. It is the role of the administrative law judge is to assess the probative value given to evidence. *See Siwiec*, 894 F.2d at 638-39, 13 BLR at 2-265.

[6] In his summary of the evidence, the administrative law judge, correctly noted that the blood gas study evidence, Director's Exhibits 1, 11, 32, was non-qualifying and

> the [pulmonary function study] evidence does not support a finding that Claimant is totally disabled while the physician opinion evidence does. Weighing all the medical evidence together, Claimant has not preponderantly established total disability under the provision of [20 C.F.R.] §718.204(b)(2)(i)-(iv).

Decision and Order at 11. This conclusory statement, however, fails to explain why the administrative law judge credited the objective studies of record over the medical opinions of record as required by the APA. Accordingly, we must remand the case for reconsideration.

The Director further contends, in his Motion to Remand, that the administrative law judge failed to provide an affirmable basis for according greater weight to the medical reports of claimant's treating physicians, Drs. Kraynak and Simelaro, both of whom opined that claimant suffered from a totally disabling respiratory impairment. Director's Exhibits 14, 17; Claimant's Exhibits 2, 4-6. The Director argues that in according greater weight to the opinions of Drs. Kraynak and Simelaro because they were treating physicians, the administrative law judge failed to address the reasoning and documentation underlying the physicians' opinions as required by Section 718.104(d). The Director argues that because both treating physicians, in this case, relied upon pulmonary function and blood gas study evidence which was found unsupportive of a finding of total disability, the administrative law judge's lack of an explanation for according greater weight to these physicians' opinions constitutes error and requires remand of the case for further consideration of the opinions. Additionally, the Director asserts that the remaining opinion of record, that of Dr. Talati, that claimant suffered from no totally disabling respiratory impairment, was, in fact, more consistent with the underlying evidence. Director's Exhibits 11, 30. We agree. On remand, therefore, the administrative law judge must address the relevant medical opinions of record in light of the requirements at Section 718.104(d).[7]

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that there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 6, 10.

[7] Section 718.104(d) allows an administrative law judge to accord greater weight to the opinion of a treating physician if certain requirements are satisfied. 20 C.F.R. §718.104(d)(1)-(4); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). In pertinent part, Section 718.104(d) requires the administrative law judge to examine:

1) the nature of the relationship between claimant and the physician, i.e., whether the physician has treated claimant for respiratory or pulmonary conditions.

The administrative law judge found that Drs. Kraynak and Simelaro "treated Claimant over several years and on multiple occasions," and thus concluded that their opinions were entitled to preferential weight over the contrary opinion of Dr. Talati. Decision and Order at 10. The administrative law judge further found that even if the opinion of Dr. Talati were to be accorded weight equal to that of Drs. Kraynak and Simelaro, "Dr. Simelaro's opinion would cancel out Dr Talati's and Dr. Kraynak's opinion would support a conclusion that Claimant is totally disabled." Decision and Order at 10-11. This finding fails to satisfy the requirement of Section 718.104(d)(5) that the reasoning and underlying documentation of the treating physician's opinions be considered. 20 C.F.R. §718.104(d)(5); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). Further, the administrative law judge's alternative basis for according greatest weight to Dr. Kraynak's opinion impermissibly constitutes a mere counting of heads and fails to satisfy the administrative law judge's duty under the APA to provide fully explanation for his conclusions. As the Director argues, the opinions of Drs. Kraynak and Simelaro are predicated on conclusions that pulmonary function study evidence supports a finding of total disability. As the administrative law judge permissibly determined that such pulmonary function study evidence did not support a finding of total disability, however, *see infra*, the administrative law judge must specifically determine and discuss whether the conclusions reached by the treating physicians are reasoned. 20 C.F.R. §718.104(d)(5). Accordingly, on remand the administrative law judge must, in weighing the relevant evidence of disability, again consider whether the opinions of Drs. Kraynak and Simelaro are entitled to the treating physician preference under Section 718.104(d). *See Soubik*, 366 F.3d 226, 23 BLR 2-82.

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2) the duration of the relationship between claimant and the physician, *i.e.*, the length of time the physician has treated claimant.

3) the frequency of physician's treatment of claimant, i.e., whether the physician has observed claimant often enough to reach medical conclusions.

4) the extent of the physician's treatment of claimant, i.e., the types of treatment and examinations conducted by the physician.

Section 718.104 also requires an administrative law judge to examine the "credibility of the [treating] physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

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