BRB No. 02-0423 BLA

WILLIAM W. WHALEN	)	
	)	
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 - Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Helen H. Cox (Eugene Scalia, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0360) of Administrative Law Judge Paul H. Teitler denying claimant's request for modification of the denial of a duplicate 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).[2] In the initial Decision and

[1] Claimant, William W. Whalen, filed the present application for benefits on November 2, 1998. Director's Exhibit 1. Claimant's prior claim, filed on October 28, 1980,was finally denied on July 24, 1981. Director's Exhibit 16.

[2] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All

Order, Administrative Law Judge Ralph A. Romano adjudicated the duplicate claim pursuant to 20 C.F.R. Part 718, credited claimant with ten years of qualifying coal mine employment, and found that because the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis or total respiratory disability, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c) (2000). Accordingly, benefits were denied. Thereafter, claimant filed a petition for modification and supporting evidence on August 23, 2000. Director's Exhibit 36.

On November 20, 2001, Administrative Law Judge Paul H. Teitler (administrative law judge) conducted a formal hearing on modification. The administrative law judge found that because claimant failed to establish the existence of pneumoconiosis and total respiratory disability, he failed to establish a basis for modification of the denial of his duplicate claim. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray evidence under Section 718.202(a)(1) and total respiratory disability under Section 718.204(b)(2)(i), (iv). The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of benefits because the administrative law judge properly found that total disability was not established.[3]

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

[3] We affirm the administrative law judge's determinations pursuant to 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(b)(2)(ii)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5, 7.

In light of the Director's statement that if the Board determines that the administrative law judge properly found that total disability was not established, the denial in this case can be affirmed, we will first address claimant's argument on total disability. Claimant contends that his most recent pulmonary function study of July 5, 2001 supports a finding of total disability as it resulted in qualifying values and was conducted in compliance with the regulations and that the administrative law judge erred in relying on the consulting report of Dr. Sherman, who invalidated the test for noncompliance with the regulations. Specifically, claimant contends that the Appendix B standards require that the FEV_1 and FVC effort continue for at least seven seconds or until a plateau has been obtained for at least two seconds, and that a review of the tracings of the July 5, 2001 study clearly shows that the FEV_1 and FVC maneuvers continued for a period of at least two seconds after a plateau had been reached.[4] Claimant's Exhibits 7, 8. It is not clear, without the interpretation of a medical expert, however, whether claimant's FEV_1 and FVC maneuvers continued for the time required by the regulations. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Contrary to claimant's argument, the administrative law judge could permissibly rely on the opinion of Dr. Sherman that the July 5, 2001 study was invalid because of a "less than six second effort with less than two second plateau." Director's Exhibit 58; *see* 20 C.F.R. Part 718, App. B (2)(ii)(C); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *see Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Marcum*, *supra*; *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985)(Brown, J., dissenting). The administrative law judge found the analysis of the tracings of the May 17, 2000 and July 5, 2001 studies by Drs. Levinson and Sherman, both highly qualified pulmonary specialists, to be better supported than the statements by Dr. Kraynak regarding these tests. This was rational. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Siegel*, *supra*; Decision and Order at 6; Director's Exhibits 43, 58. The administrative law judge further found that the non-qualifying pulmonary function test administered by Dr. Rashid on April 19, 2001 which resulted in higher values than the May

[4] The standards set forth in Appendix B require that "[t]he subject will than [sic] make a maximum inspiration from the instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort." 20 C.F.R. §718.204, Appendix B (2)(ii).

2000 and July 2001 studies conducted by Dr. Kraynak, further supported the opinions of Drs. Levinson and Sherman that the May 2000 and July 2001 studies were flawed and their results invalid. *See Mangifest*, *supra*; *Alexander*, *supra*; Decision and Order at 6. Thus, the administrative law judge's weighing of the pulmonary function study evidence was rational and supported by substantial evidence and we affirm his determination that total disability was not demonstrated under Section 718.204(b)(2)(i). *See Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000, 1-1002 (1984).

Claimant next argues that the administrative law judge erred in rejecting the well-reasoned opinion of Dr. Kraynak, claimant's treating physician, which was based on numerous physical examinations, diagnostic studies, and notations regarding the changes in claimant's physical condition and his ability to perform on pulmonary tests. Instead, claimant contends that the administrative law judge should have rejected the opinion of Dr. Rashid, a highly-qualified Board-certified internist, as neither well-reasoned nor well-documented. In support, claimant asserts: Dr. Rashid conducted only two physical examinations of claimant in a twenty-six month period; he reviewed only the pulmonary testing administered under his direction, not other positive testing; he failed to review records from claimant's treating physician, and he provided only generalized statements concerning claimant's condition.

In assessing the medical opinion evidence submitted in support of the request for modification along with the evidence submitted in support of the previously denied duplicate claim, the administrative law judge determined that Dr. Kraynak's opinion, that claimant was totally and permanently disabled due to coal workers' pneumoconiosis, was undermined by several factors: Dr. Kraynak incorrectly analyzed the results of claimant's May 2000 and July 2001 pulmonary function studies; he relied on invalid pulmonary function study evidence; he merely reiterated prior statements he had made regarding claimant's pulmonary condition; and he stated that claimant's wheezing was getting worse as evidence that claimant's pulmonary condition was getting worse, without discussing changes seen on claimant's laboratory studies or examination results. Instead, the administrative law judge found Dr. Rashid's conclusions well-supported and well-reasoned since his conclusions were consistent with earlier, credible medical opinion reports and objective laboratory studies. This was rational. *See Lango v. Director, OWCP*, 104 F.3d 573, 2 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Church v. Eastern Association Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). We, therefore, affirm the administrative law judge's finding that the opinion of Dr. Rashid, that claimant was not disabled from performing his usual coal mine work was well-reasoned and documented and more credible than the opinion of Dr. Kraynak. *See Trumbo*, *supra*; *King*, *supra*; *Lucostic v.*

U.S. Steel Corp., 8 BLR 1-46 (1985); Decision and Order at 7. Moreover we note, as the Director contends, even if the administrative law judge had not credited Dr. Rashid's opinion, the administrative law judge's rejection of Dr. Kraynak's opinion as incredible would preclude a finding of total disability. Director's Brief at 10; *see Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). The administrative law judge's finding that the medical opinion evidence in this case was insufficient to establish total disability at Section 718.204(b)(2)(iv) is, therefore, affirmed. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, *supra*. Consequently, because we affirm the administrative law judge's determination that claimant failed to establish total disability pursuant to Section 718.204(b) based on a consideration of the evidence of record, we must affirm the administrative law judge's denial of claimant's request for modification of the denial of his duplicate claim, *see* 20 C.F.R. §725.309 (2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also Hess v. Director, OWCP*, 21 BLR 1-141 (1998), and we need not consider claimant's argument on the existence of pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order - Denying Request for Modification and Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge