BRB No. 07-0377 BLA

| | | |
|---|---|---|
| W.S. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 01/18/2008 |
| | ) | |
| 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.

Helen H. Cox (Gregory F. Jacob, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05309) of Administrative Law Judge Ralph A. Romano (the administrative law judge) on a subsequent 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] The

[1] Claimant filed his first claim for benefits on October 21, 1992, Director's Exhibit 1, which Administrative Law Judge Frank D. Marden denied on March 8, 1994, because claimant failed to establish the presence of pneumoconiosis. Claimant filed a request for modification on May 4, 1995. Administrative Law Judge Ainsworth H. Brown found that claimant established the presence of pneumoconiosis arising out of his coal mine employment, but denied the request for modification on March 6, 1997, because claimant

administrative law judge credited claimant with ten years of qualifying coal mine employment, based on the parties' stipulation, and adjudicated this subsequent claim, filed on January 21, 2005, pursuant to the provisions at 20 C.F.R. Part 718. Although the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant suffered from pneumoconiosis arising out of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish that claimant suffered from a totally disabling respiratory impairment, the element of entitlement previously adjudicated against claimant. Thus, claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in concluding that the newly submitted evidence of record failed to establish the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Specifically, claimant argues that the administrative law judge erred in concluding that the pulmonary function study evidence and medical opinion evidence were insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). The Director responds urging affirmance of the denial of benefits.[2]

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

---

failed to establish that he suffered from a totally disabling respiratory impairment. The Board affirmed the decision on March 26, 1998.

[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(b). These findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Third Circuit is applicable as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Claimant initially challenges the administrative law judge's determinations regarding the validity of the newly submitted pulmonary function study evidence[4] at Section 718.204(b)(2)(i), arguing that the determinations fail to comport with the requirement of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c), 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), that an administrative law judge provide adequate explanation and rationale for his determinations. Claimant's Brief at 9-10. Claimant specifically argues that the administrative law judge impermissibly substituted his own opinion for that of the physicians of record in finding the March 30, 2006, and April 19, 2006, pulmonary function studies to be invalid; and, improperly rejected the June 22, 2006, pulmonary function study based on Dr. Rashid's superior qualifications when Dr. Rashid "is neither Board Certified nor Board Eligible in pulmonary medicine." *Id*. at 7-15. Claimant additionally argues that a remand of the case is necessary as the administrative law judge mischaracterized the record and failed to consider relevant evidence before finding that "no evidence was submitted that challenged the validity of the [April 5, 2005, pulmonary function] test results," Decision and Order at 6. Claimant specifically references Dr. Kraynak's deposition testimony, in which he opined that the April 5, 2005, non-qualifying pulmonary function study was invalid. Claimant's Brief at 6-7. Claimant's arguments are without merit.

In considering the pulmonary function study evidence, the administrative law judge permissibly credited the opinion of pulmonary expert, Dr. Michos, that the qualifying pulmonary function studies of March 30, 2006, and April 19, 2006 were invalid because "there was a greater than 5% variation between the two best FEV1 values," Director's Exhibits 30, 31, over the opinion of the less qualified Dr. Kraynak that the studies were valid, despite the two best FEV1 values varying by more than 5%, because the values did not vary by more than 100 milliliters, Claimant's Exhibit 7.[5] *See*

[4] The pulmonary function study evidence of record consists of one non-qualifying pulmonary function study conducted by Dr. Stemlach on April 5, 2005, and three qualifying pulmonary function studies conducted on March 30, 2006, by Dr. Kraynak, Claimant's Exhibit 1; on April 19, 2006, by Dr. Kruk, Claimant's Exhibit 4; and on June 22, 2006, by Dr. Rashid, who noted that claimant's effort was very poor and very inconsistent, Director's Exhibit 35. Dr. Michos opined that the March 30, 2006 and April 19, 2006, studies were invalid, Director's Exhibits 30, 31, contrary to Dr. Kraynak's opinion that both studies were valid, Claimant's Exhibit 7. Dr. Kraynak also opined that the June 22, 2006, qualifying study was valid, but that the April 5, 2005, non-qualifying study was not valid.

[5] Claimant argues that the administrative law judge improperly substituted his own opinion for that of the medical experts, because the administrative law judge calculated the variation between the two best FEV1 values of the March 30, 2006, and April 19,

*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). Thus, we reject claimant's assertion that the administrative law judge's discrediting of the March 30, 2006, and April 19, 2006, pulmonary function studies 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 to assess the probative value given to evidence. *See Siwiec*, 894 F.2d at 639, 13 BLR at 2-267. Similarly, we reject claimant's assertion that the administrative law judge abused his discretion in finding the June 22, 2006, pulmonary function study to be invalid, as this finding was based on Dr. Rashid's superior qualifications[6] and his opinion that claimant's effort during the administration of the test was poor and inconsistent. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Accordingly, we affirm the administrative law judge's weighing of the evidence at Section 718.204(b)(2)(i), as supported by substantial evidence and within his discretion.

Further, we reject claimant's argument that a remand is necessary for the administrative law judge to consider Dr. Kraynak's deposition testimony. As the Director correctly asserts, any error by the administrative law judge in failing to acknowledge Dr. Kraynak's review of the April 5, 2005, non-qualifying pulmonary function study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because the administrative law judge properly determined that the record contained no valid qualifying pulmonary function studies, and the opinion of Dr. Mariglio, who was the only physician to rely on the April 2005 non-qualifying study, was given no weight, consideration of Dr. Kraynak's testimony would not affect the disposition of the case. Accordingly, the administrative law judge's determination that the pulmonary function study evidence is insufficient to establish total disability is affirmed. *See* 20 C.F.R. §718.204(b)(2)(i).

---

2006, pulmonary function tests, and noted that the differential exceeded 100ml in both instances. Decision and Order at 7. Although the results of the calculations undermine Dr. Kraynak's opinion, contrary to claimant's assertion, the administrative law judge did not improperly rely on the calculation to discredit the opinion of Dr. Kraynak, as he permissibly found Dr. Michos's opinion more persuasive in light of his superior qualifications. Decision and Order at 7.

[6] Contrary to claimant's assertion, we note that a review of Dr. Rashid's *curriculum vitae* indicates that he has been Board-certified in Internal Medicine since 1973. Director's Exhibit 35.

Claimant next challenges the administrative law judge's weighing of the newly submitted medical opinion evidence of record[7] at Section 718.204(b)(2)(iv), arguing that the administrative law judge improperly rejected the opinions of Drs. Kraynak and Kruk and improperly accepted Dr. Rashid's opinion. Claimant's Brief at 16-27. Specifically, claimant argues that the administrative law judge improperly discounted the opinions of Drs. Kraynak and Kruk for relying on invalid pulmonary function studies where their opinions were "based upon a multitude of factors," and that the administrative law judge failed to provide a "legitimate basis for failure to accord Dr. Kraynak's opinion appropriate weight as longstanding treating physician of the Claimant." Claimant's Brief at 23-26. We disagree. The administrative law judge acknowledged Dr. Kraynak's status as claimant's treating physician, but declined to accord controlling weight to his opinion as "relevant evidence in the record substantially contradicts the physician." Decision and Order at 10 n. 3; *see* 20 C.F.R. §718.104(d)(5). The administrative law judge properly

[7] The record contains the medical opinions of Drs. Mariglio, Kraynak, Kruk, and Rashid. Dr. Mariglio diagnosed simple pneumoconiosis based on the chest x-ray and stated that he suspected mild impairment due to interstitial restrictive lung disease but noted he needed additional pulmonary function tests to support this conclusion. Director's Exhibit 11. Dr. Kraynak noted that the April 19, 2006, and March 30, 2006, pulmonary function studies produced qualifying results and concluded that claimant was totally and permanently disabled from all employment due to coal workers' pneumoconiosis. Claimant's Exhibit 3. Dr. Kruk stated that claimant's April 19, 2006, pulmonary function test showed "changes consistent with restrictive defect," and concluded that claimant was totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 5. Lastly, Dr. Rashid noted that claimant's effort on the June 22, 2006, qualifying pulmonary function test was poor, and opined, despite the inconsistent pulmonary function test results, that claimant had no pulmonary disability, basing his opinion on his physical examination of claimant, and claimant's normal blood gas study. Director's Exhibit 35.

Assessing the weight and credibility of each opinion, regarding the miner's disability, the administrative law judge determined that the opinion of Dr. Mariglio was equivocal and, therefore, entitled to no weight; the opinion of Dr. Kraynak was entitled to no weight, because the physician relied heavily on pulmonary function tests that were found to be invalid and failed to support his conclusion with any other evidence; and, likewise, the opinion of Dr. Kruk was entitled to little weight, as the physician relied in part upon an invalid pulmonary function test and failed to support his conclusion with any other evidence. Decision and Order at 10. Lastly, the administrative law judge determined that Dr. Rashid's opinion was entitled to substantial weight, because the physician based his diagnosis that claimant was not totally disabled on a physical examination of claimant, pulmonary function test, and arterial blood gas study. *Id*.

rejected the opinions of Drs. Kraynak and Kruk for relying on invalid pulmonary function studies. *Siwiec*, 894 F.2d at 638-39, 13 BLR at 2-265.[8] Moreover, Dr. Kraynak's status as claimant's treating physician does not afford his discredited conclusions additional weight. *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-21 (3d Cir. 1997). Claimant's assignment of error is therefore rejected.

Claimant additionally argues that the administrative law judge improperly found Dr. Rashid's opinion well reasoned and documented, when he, like Drs. Kraynak and Kruk, relied on an invalid pulmonary function study. Claimant's Brief at 20. We disagree. The administrative law judge acted within his discretion in finding Dr. Rashid's opinion well reasoned and documented, because, unlike Drs. Kraynak and Kruk, whose opinions were premised on the validity of invalid pulmonary function tests, Dr. Rashid invalidated his own pulmonary function study due to claimant's poor effort and based his opinion on the normal arterial blood gas study and physical examination of claimant. Decision and Order at 10; Director's Exhibit 35. Claimant further argues that the administrative law judge should have found Dr. Rashid's opinion less credible, because he failed to diagnose pneumoconiosis and displayed no knowledge of the physical requirements demanded by claimant's coal mine work, Claimant's Brief at 18. We reject claimant's contentions as little more than a request to reweigh the evidence. *See Anderson*, 12 BLR at 1-113. Dr. Rashid did not need to diagnose pneumoconiosis for his disability opinion to be credible, as disease and disability are different inquiries under the regulations. *See* 20 C.F.R. §§718.202(a), 718.204(b). Nor was it necessary for Dr. Rashid to relate his diagnosis to the specific physical requirements of claimant's job, as he did not diagnose claimant with any pulmonary impairment. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Contrary to claimant's contention, therefore, the administrative law judge acted within the bounds of his discretion as the trier-of-fact in weighing Dr. Rashid's opinion, and his findings are hereby affirmed. *See Kuchwara v. Director*, OWCP, 7 BLR 1-167 (1984).

We thus reject claimant's arguments that the administrative law judge erred in weighing the medical opinion evidence of record at Section 718.204(b)(2)(iv). Accordingly, the administrative law judge's determination that the newly submitted medical opinion evidence is insufficient to support a finding of total disability is

[8] Although claimant states that Drs. Kraynak and Kruk relied on other data in rendering their disability assessments, he fails to support his assertion with evidence from the record. Moreover, the only clinical evidence that Dr. Kraynak referenced in his opinion was the March 30, 2006, and April 19, 2006, pulmonary function test evidence that the administrative law judge properly found to be invalid. Claimant's Exhibit 3. Likewise, although Dr. Kruk examined claimant, the only clinical evidence that he referenced in his disability opinion was the invalid April 19, 2006, pulmonary function test. Claimant's Exhibit 4.

affirmed. Consequently, we affirm the administrative law judge's finding that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial pursuant to Section 725.309(d), and affirm the denial of benefits.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge