BRB No. 93-1458 BLA

LYDIA ZEVENEY (Widow of STANLEY ZEVENEY) 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa (Cometa and Cappellini), Kingston, Pennsylvania, for claimant.

Elizabeth Lopes (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant,[1] appeals the Decision and Order (92-BLA-0904) of

[1]The miner, Stanley Zeveney, died on November 11, 1992. The instant claim constitutes his living miner's claim, and is being prosecuted by his widow, Lydia Zeveney, the claimant. The miner first filed for benefits under Part B on February 13, 1973, Director's Exhibit 26. This claim was denied both by the Social Security

Administration on January 31, 1979, and the Department of Labor on April 30, 1981. *Id.* There was no further development of this claim. The miner filed the instant claim on

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

January 22, 1988. Director's Exhibit 1. This claim was administratively denied by the Office of Workers' Compensation Programs on May 16, 1988, Director's Exhibit 23, and the miner requested a formal hearing. Director's Exhibit 25. Pursuant to the Board's decision in *Lukman v. Director, OWCP*, 10 BLR 1-56, 11 BLR 1-71 (*en banc*, Brown and McGranery, JJ., dissenting in part), *reversed*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the district director [formerly titled "deputy commissioner," *see* 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28606 (July 12, 1990)] on February 14, 1992, issued a Memorandum of Informal Conference denying the claim and the miner's request for modification of earlier administrative denials. Director's Exhibit 50. The claim was then referred to the Office of Administrative Law Judges at the miner's request for a formal hearing. Director's Exhibit 51.

Administrative Law Judge Ainsworth H. Brown denying benefits on a claim filed pursuant to the provisions 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 ruled that claimant established a material change in condition on the duplicate claim based on stipulations regarding the existence of pneumoconiosis, causality and the length of the miner's coal mine employment. *See* 20 C.F.R. §725.309; Decision and Order at 2.[2] He then determined that claimant failed to establish that the miner was totally disabled pursuant to the criteria set forth at 20 C.F.R. §718.204(c), denied the claim, and claimant brought this appeal.

On appeal, claimant avers that the administrative law judge erred with respect to his disability findings under Section 718.204(c)(1) and (4). The Director, Office of Workers' Compensation Programs, has filed a Motion to Remand, primarily alleging error in the administrative law judge's handling of the pulmonary function study evidence pursuant to Section 718.204(c)(1), and urging that the Board remand this case to the administrative law judge.[3] Upon consideration of the administrative record as a whole, as well as the pleadings filed by the parties, we conclude that the Decision and Order of the administrative law judge denying benefits in this case must be vacated and the case remanded to the administrative law judge.

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 &*

[2]The administrative law judge did not address whether the district director had erred in denying modification of the earlier administrative denials. In any event, such a determination is "subsumed" into the administrative law judge's decision on the merits. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment, the existence of pneumoconiosis, its coal mine employment derivation and his findings pursuant to 20 C.F.R. §718.204(c)(2), (3) as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]We will accept the Director's Motion to Remand as his response brief and proceed to decide this appeal on the merits.

Grylls Associates, Inc., 380 U.S. 359 (1965).

The administrative law judge, in addressing the remaining issue of whether the miner had been totally disabled due to coal worker's pneumoconiosis, considered only the evidence submitted since the filing of the last miner's claim, specifically discounting the probative value of the early evidence submitted with the miner's Part B claim. *See* Decision and Order at 2.n.2. Of the six pulmonary function studies that had been submitted since 1988, *see* Director's Exhibits 16, 32, 38, 47, 58; Claimant's Exhibit 2, four tests produced qualifying results.[4] The first and the last of the studies yielded nonqualifying figures.

[4]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(c)(1), (2). *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

The administrative law judge specifically discussed the final three of the six ventilatory studies: the January 2, 1992 test, administered by Dr. Sahillioglu, which yielded qualifying results, Director's Exhibit 47; the August 27, 1992 qualifying test taken by Dr. Levinson, Claimant's Exhibit 2; and the latest test, the nonqualifying October 29, 1992 study administered by Dr. Sahillioglu, Director's Exhibit 58. The administrative law judge also considered the various validation and invalidation reports by Drs. Levinson and Sahillioglu that related to these studies to find total disability not demonstrated pursuant to Section 718.204(c)(1). *See* Director's Exhibits 53, 55; Claimant's Exhibit 1, 2, 3.[5]

With regard to the last two pulmonary function studies, the administrative law judge stated that

> [w]hen the last results were in the normal range there is substantial doubt created as to the validity of the earlier results. Therefore, I find that Dr. Sahillioglu's opinion that the August 27 values are not in substantial compliance with the quality standards is persuasive and that the best index of the miner's pulmonary capacity as measured by pulmonary function testing is the testing done on October 29, 1992.

Decision and Order at 4. The administrative law judge also discredited Dr. Levinson's August 1992 test not only because of Dr. Sahillioglu's invalidation, but also because of Dr. Levinson's "shifting" views on the FEV1 and FVC trials of the January 1992 test, and because of the nonqualifying results of the October 1992 test. Decision and Order at 4. No inquiry was made as to whether each test was in "substantial compliance" with the regulations. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

Claimant initially contests the administrative law judge's determination that the evidence is insufficient to demonstrate total disability pursuant to Section 718.204(c)(1) and (4). Claimant, noting that three of the last four ventilatory tests yielded qualifying results, initially implies that the weight of the pulmonary function

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[5]The January 2, 1992 pulmonary function study was considered by Dr. Sahillioglu to show less than desirable effort. Director's Exhibits 47, 48. Dr. Levinson reviewed this pulmonary function study, and noted the irregular MVV trial. Director's Exhibit 53. Nevertheless, Dr. Levinson felt that the FEV1 and FVC results were valid, and indicated disability. *See* Claimant's Exhibit 1. Dr. Levinson later concluded that this study was invalid "according to the 718 Part B regulations. . .," yet still believed this test indicative of the poor state of the miner's pulmonary capacity. *See* Claimant's Exhibit 3.

study evidence contradicts the administrative law judge's findings that total disability was not demonstrated pursuant to Section 718.204(c)(1). Claimant's Brief at p.4 (unpaginated).

This argument is without merit, to the extent that it urges the Board to reweigh the evidence of record. The administrative law judge may properly rely on the invalidation opinions of consulting physicians to discount the probative value of certain pulmonary function studies. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Company v. Director, OWCP* [*Brinkley*], 972 F.2d 882, 16 BLR 2-129 (7th Cir. 1992); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting); *accord Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Because the administrative law judge must weigh the medical evidence and draw appropriate inferences, *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *see also Summers v. Freeman United Coal Mining Company*, 14 F.3d 1220, BLR (7th Cir. 1994), and could properly weigh the pulmonary function results taking into account consultants' reports, we reject claimant's argument that the weight of the pulmonary function study evidence should require a finding of total disability. *See generally Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Claimant questions the administrative law judge's deference to the invalidation opinions of Dr. Sahillioglu over Dr. Levinson, when the latter has better credentials. The administrative law judge is not required to defer to the better qualified physician; this inquiry is committed to his discretion. *See Scott v. Mason Coal Company*, 14 BLR 1-37 (1990).[6]

We do agree, however, with claimant that the administrative law judge's finding of no total disability under Section 718.204(c)(1) cannot be affirmed. The administrative law judge did not adequately explain why Dr. Levinson's January test invalidation rendered all of Dr. Levinson's conclusions suspect, entitling diminished weight to all of his disability opinions. Moreover, the administrative law judge, in rendering a finding about the August qualifying test's reliability under the Section 718.103 pulmonary function study regulations, should judge whether the August 1992 pulmonary function study is in substantial compliance with regulations pursuant to the parameters set forth in Section 718.103 and Part 718

[6]Claimant challenges the administrative law judge's reliance on the results of the last, nonqualifying, study, because the Department of Labor had failed to test this study's reliability. The short answer to this contention is that the reliability of this study is not challenged by any evidence in the record. *See* 20 C.F.R. §718.103(a).

Appendix B, and not make this decision based on whether the final pulmonary function study administered in October, 1992, yielded qualifying values. *See Siwiec*; *see generally* 20 C.F.R. §718.103.

Moreover, while the administrative law judge may discount a qualifying test because its results are "disparately low" in comparison with a later test, *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984), no specific finding to this effect was made here. In addition, the administrative law judge appears to have mechanically applied the later evidence rule in crediting the latest nonqualifying pulmonary function study. This rule should be applied with caution, where the interval is only two months in duration, and certainly should not be applied mechanically. *Cf. Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

The Director has filed a Motion to Remand, also alleging error in the administrative law judge's pulmonary function study findings, and contends that, as a result, a remand is in order for the administrative law judge to reconsider his disability findings. According to the Director, the administrative law judge erred by failing to determine whether the January 1992 pulmonary function study was in "substantial compliance" with the quality standards set forth at Section 718.103. *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). The administrative law judge's errors under Section 718.204(c)(1) thus adversely affected his consideration of the medical opinion evidence under 718.204(c)(4), the Director states. We concur with the Director in this instance.

This claim arises within the territorial jurisdiction of the United States Court of Appeals for the Third Circuit. That court has ruled that the quality standards set forth at Section 718.103 are mandatory, and that the administrative law judge must determine whether clinical tests are in substantial compliance with the regulations. *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).

We therefore vacate the administrative law judge's finding that claimant had not demonstrated total disability pursuant to Section 718.204(c)(1), and will remand this case to the administrative law judge for a reconsideration of the pulmonary function study evidence under that provision.

Because the administrative law judge's analysis of the medical opinion evidence under Section 718.204(c)(4) was based in part on his evaluation of the ventilatory tests, we will vacate his derivative finding that total disability was not

demonstrated pursuant to that Section as well, and need not address the parties' specific contentions pursuant to Section 718.204(c)(4) in detail. We note in passing, however, that, in evaluating the medical opinion evidence under Section 718.204(c)(4), the administrative law judge should also consider the effect of claimant's testimony on the credibility of the medical opinions, because lay evidence constitutes relevant evidence in determining whether claimant has established total disability under Section 718.204(c). *See* 20 C.F.R. §718.204(d)(2); *Salyers v. Director, OWCP*, 12 BLR 1-193, 1-196 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Matteo v. Director, OWCP*, 8 BLR 1-200, 1-203 (1985).

Moreover, the administrative law judge must consider the effect of Dr. Pelczar's status as a long time treating physician on the credibility of his findings on physical examination.[7]

If the administrative law judge finds that the evidence establishes total disability under Section 718.204(c), weighing all contrary probative evidence, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), he must then determine whether claimant has established that pneumoconiosis was a substantial contributor to the miner's total disability. 20 C.F.R. §718.204(b); *see Bonessa v. United States Steel Corp.*, 884

[7]Dr. Shiffman examined the miner in 1988, and, after administering nonqualifying arterial blood gas and pulmonary function studies, pronounced the miner minimally impaired. Director's Exhibit 17. Dr. Sahillioglu examined the miner on January 2, 1992, and opined that the miner did not appear to have any significant respiratory impairment to prevent him from performing his last coal mine work. Director's Exhibit 48. Dr. Levinson concluded that the miner's pulmonary impairment would preclude further coal mine work. Claimant's Exhibit 2. Dr. Pelczar, who testified at the hearing, first examined the miner in 1988 and saw him about once a month until the miner's death in 1992. Hearing Transcript at 15, 20.

F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *see generally* 20 C.F.R. §725.310; *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge