BRB No. 00-0976 BLA

GRADY G. BURSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAGOFFIN COAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

John T. Chafin (Kazee, Kinner, Chafin, Heaberlin & Patton), Prestonsburg, Kentucky, for employer.

Rita Roppolo (Howard M. Radzely, Acting 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 DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0878) of Administrative Law Judge Daniel J. Roketenetz denying benefits 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).[1] In the initial Decision and Order, the administrative law judge credited claimant with ten years and one month of coal mine employment. Applying the "true doubt" rule, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). However, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated January 11, 1994, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000) and 718.204(c)(1), (c)(2) and (c)(3) (2000) as unchallenged on appeal. *Burson v. Magoffin Coal, Inc.*, BRB No. 90-1875 BLA (Jan. 11, 1994) (unpublished). The Board also affirmed the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Id.* The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. The administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000). The administrative law judge also found that the newly submitted evidence, when considered in conjunction with the previously

[1]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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

submitted evidence, was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge, therefore, denied benefits. By Decision and Order dated May 29, 1997, the Board affirmed the administrative law judge's finding that the newly submitted evidence, when considered in conjunction with the previously submitted evidence, was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Burson v. Magoffin Coal, Inc.*, BRB No. 90-1875 BLA (May 29, 1997) (unpublished). The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.*

Claimant subsequently filed a second request for modification. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge denied claimant's second request for modification. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000).[2] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 18, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[3] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 18, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.[4] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In his prior decision, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), a finding subsequently affirmed by the Board. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence is sufficient to establish total disability.[5] *See* 20 C.F.R. §718.204(b)(2).

Claimant argues that the administrative law judge committed numerous errors in finding the newly submitted medical opinion evidence insufficient to establish total disability. In finding the newly submitted medical opinion evidence insufficient to support a finding of total disability, the administrative law judge credited the opinions of Drs. Dahhan, Fino and Branscomb over the opinions of Drs. Myers and Sundaram. Decision and Order at 9-10. Claimant initially argues that the administrative law judge erred in discrediting Dr. Myers's opinion. The administrative law judge discredited Dr. Myers' opinion regarding the extent of claimant's pulmonary disability because it was based in part upon the results of an April 4, 1998 pulmonary function study that was invalidated by Dr. Burki. Decision and Order at 9; Director's Exhibit 113. An administrative law judge may properly accord less weight to a physician's opinion regarding the extent of a miner's disability if it is based in part upon a discredited pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). However, when determining the validity of a pulmonary function study, an administrative law judge must provide a rationale for crediting the opinion of a consulting

[4]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

[5]Inasmuch as no party has challenged the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see* 20 C.F.R. §718.204(b)(2)(i), (ii) and (iii).

physician over that of an administering physician. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge, in the instant case, failed to provide such a rationale.[6]

[6]Dr. Myers relied upon the results of an April 4, 1998 pulmonary function study. Director's Exhibit 113. Dr. Myers specifically indicated that the study was valid. *Id.* Dr. Burki invalided claimant's April 4, 1998 pulmonary function study because he determined that the paper speed was too slow. Director's Exhibit 116. Although not referenced by the administrative law judge, Dr. Fino also invalidated claimant's April 4, 1998 pulmonary function study. Employer's Exhibit 1.

The administrative law judge also noted that Dr. Myers failed to specifically state that claimant could not perform his previous coal mine employment. Decision and Order at 9. However, before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, he must identify the employment that is or was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities.[7] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Dr. Myers opined that claimant's April 4, 1998 pulmonary function study revealed a moderate restrictive defect in ventilation or a Class III impairment under "AMA Guidelines," an assessment which could support a finding of total disability, depending upon the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 13 BLR 1-46 (1986)(*en banc*); Director's Exhibit 113.

Claimant also argues that the administrative law judge erred in discrediting Dr. Sundaram's opinion. The administrative law judge discredited Dr. Sundaram's finding of a totally disabling respiratory impairment because he relied upon a non-qualifying June 14, 1999 pulmonary function study. Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 6. We note that test results which exceed the applicable table values may be relevant to the overall evaluation of a claimant's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). Moreover, the determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The report listing the results of claimant's June 14, 1999 pulmonary function study includes an interpretation of a "mild restriction." Claimant's Exhibit 1. Dr. Sundaram interpreted the results of claimant's non-qualifying June 14, 1999 pulmonary function study as being at the lower limits of normal for claimant's age. Employer's Exhibit 6.

Moreover, Dr. Sundaram indicated that his opinion, that claimant was not physically

[7]It is the miner's burden to establish the exertional requirements of his usual coal mine employment in order to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988)*; Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

able, from a pulmonary standpoint, to do his usual coal mine employment, was based upon the fact that claimant became short of breath even with limited activity. Claimant's Exhibit 1. Dr. Sundaram indicated that he had observed claimant climbing steps in his office. Employer's Exhibit 6 at 7. The administrative law judge erred in discrediting Dr. Sundaram's opinion because he did not base his opinion upon the results of objective tests. S*ee generally Fuller, supra* (An administrative law judge may not reject a medical report on grounds that objective test results do not support his conclusions or because the physician did not perform objective tests).

Finally, we note that, contrary to the administrative law judge's characterization, Dr. Dahhan's opinion supports a finding that claimant suffers from a totally disabling respiratory impairment. Dr. Dahhan clearly opined that claimant did not retain the respiratory capacity to return to his previous coal mining work. Director's Exhibits 119, 124. The fact that Dr. Dahhan attributed claimant's respiratory impairment to his obesity is irrelevant at 20 C.F.R. §718.204(b)(2)((iv). The issue at 20 C.F.R. §718.204(b)(2)(iv) is whether claimant is totally disabled from a respiratory or pulmonary impairment from any cause whatsoever. The etiology of a miner's totally disabling respiratory or pulmonary impairment is a separate element of entitlement properly addressed at 20 C.F.R. §718.204(c).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability and remand the case for further consideration.[8] *See* 20 C.F.R. §718.204(b)(2)(iv).

On remand, should the administrative law judge find the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b), and thus whether a change in conditions is established.[9] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

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[8]On remand, the administrative law judge is advised to note that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that an administrative law judge may not credit medical opinions that a claimant is not totally disabled without considering whether the rendering physicians had knowledge of the exertional requirements of claimant's usual coal mine work. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

[9]Inasmuch as no party has challenged the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack*, *supra*.

Should the administrative law judge, on remand, find the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), he should consider claimant's 1986 claim on the merits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge