BRB Nos. 01-0877 BLA
and 01-0877 BLA-A

JACK L. GOTTSHALL	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE
	)	ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	
Cross-Respondent	)	

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Jennifer U. Toth (Eugene Scalia, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers? Compensation Programs (the Director), appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2001-BLA-00096) of Administrative Law Judge Ralph A. Romano rendered 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] Claimant filed his application for benefits on April 11, 2000. Director's Exhibit 1. The District Director of the Office of Workers? Compensation Programs denied benefits and claimant requested a hearing, which was held on March 23, 2001. Director's Exhibits 22, 23.

In the ensuing Decision and Order Awarding Benefits, the administrative law judge credited claimant with eleven and one-half years of coal mine employment, and found that both the x-ray evidence and the medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ??718.202(a), 718.203(b). Additionally, the administrative law judge credited the medical opinion of claimant?s treating physician, Dr. Raymond Kraynak, to find that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. ?718.204. Accordingly, the administrative law judge awarded benefits.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, the Director contends that substantial evidence does not support the finding that claimant is totally disabled. The Director argues that the administrative law judge erred in discounting medical reports addressing whether claimant is totally disabled by a respiratory or pulmonary impairment merely because the authoring physicians did not diagnose pneumoconiosis. The Director further asserts that the administrative law judge erred in crediting Dr. Kraynak?s conclusions regarding disability without considering whether his opinion was based on reliable medical evidence. Additionally, the Director contends that the administrative law judge failed to analyze Dr. Kraynak?s opinion under the guidelines set forth at revised 20 C.F.R. ?718.104(d) governing the weighing of treating physicians? opinions. Claimant responds, urging affirmance of the award of benefits. However, claimant also cross-appeals, alleging that the administrative law judge erred by failing to permit claimant to rebut evidence submitted twenty days before the hearing, mischaracterized the pulmonary function study evidence of record, and failed to weigh conflicting blood gas study evidence. The Director responds to claimant?s cross-appeal, agreeing that the administrative law judge erred in his analysis of the pulmonary function and blood gas study evidence. Claimant has filed a reply brief reiterating his contentions.[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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ?921(b)(3), as incorporated into the Act by 30 U.S.C. ?932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon review, we conclude that the administrative law judge?s total disability finding is not supported by substantial evidence or in accordance with law. Accordingly, we must vacate in part the administrative law judge?s Decision and Order Awarding Benefits and remand this case for further consideration. We will address the issues on appeal in the order they arise in the administrative law judge?s Decision and Order Awarding Benefits, regardless of whether raised by the Director on appeal or by claimant on cross-appeal.

[2] We affirm as unchallenged on appeal the administrative law judge?s findings of eleven and one-half years of coal mine employment, and that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. ??718.202(a), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Initially, claimant contends that the administrative law judge erred by failing to permit claimant to submit evidence in rebuttal to Dr. John Michos?s March 5, 2001 report invalidating a pulmonary function study administered by Dr. Kraynak. Review of the hearing transcript reveals that claimant objected to Dr. Michos?s report on the ground that it was not submitted by the Director at least twenty days before the hearing as required by 20 C.F.R. ?725.456(b)(1)(2000), but the administrative law judge found that the report was timely submitted and admitted it into evidence. Hearing Transcript (Tr.) 5, 6. Thereafter, claimant proffered a March 13, 2001 letter by Dr. Kraynak addressing Dr. Michos?s report. Tr. at 12. The administrative law judge sustained the Director?s objection to the letter as untimely submitted and excluded it. *Id*. Review of the record reflects that, despite claimant?s assertion of a resultant inability to respond to Dr. Michos?s report, claimant in fact submitted an April 27, 2001 deposition by Dr. Kraynak, who reviewed Dr. Michos?s March 5, 2001 invalidation report and disagreed with Dr. Michos?s observations and conclusions. Deposition Transcript (Dep. Tr.) 11 (unstamped exhibit).[3] Because claimant submitted rebuttal to Dr. Michos?s report via Dr. Kraynak?s testimony, we need not address whether the administrative law judge abused his discretion by excluding Dr. Kraynak?s March 13th letter. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(*en banc*). Accordingly, we now turn to the administrative law judge?s consideration of the medical evidence.

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 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).

[3] At the hearing, the administrative law judge granted claimant?s unopposed request to hold the record open for the post-hearing submission of Dr. Kraynak?s deposition. Tr. at 32.

Pursuant to Section 718.204(c)(1)(2000),[4] the administrative law judge found that none of the three pulmonary function studies of record yielded qualifying[5] values. As the parties correctly point out, however, two of the three studies were qualifying, and the technical validity of each study was questioned by physicians who reviewed the study tracings. Director's Exhibits 10, 20, 34; Claimant's Exhibits 3, 7; Dep. Tr. 11, 12. Although the administrative law judge found total disability established by the medical opinions despite his mischaracterization of the pulmonary function studies as non-qualifying, the administrative law judge?s error in failing to address the validity of the studies was not harmless. As the Director argues *infra*, the administrative law judge found Dr. Kraynak?s opinion that claimant is totally disabled to be well reasoned without considering whether the pulmonary function studies Dr. Kraynak relied upon were valid. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-235 (3d Cir. 1987)(?A medical test administered incorrectly may very well be completely unreliable.?) Because the administrative law judge did not determine whether the pulmonary function studies were reliable, we must vacate his finding and remand the case for him to reassess the pulmonary function studies, this time resolving the conflicting evidence as to the reliability of each study.

Pursuant to 20 C.F.R. ?718.204(c)(2)(2000), the administrative law judge noted correctly that there were two blood gas studies of record, one qualifying and one non-qualifying. Director's Exhibits 15, 30. Both claimant and the Director contend that the administrative law judge failed to weigh this conflicting evidence and determine whether the blood gas studies support a finding of total disability. This contention has merit. The administrative law judge stated that because neither physician who administered a blood gas study explained why the two tests conflicted, the administrative law judge could not find total disability. Contrary probative evidence, both like and unlike, must be weighed. *See* 20 C.F.R. ?718.204(b)(2); *Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11,

[4] The regulation applied by the administrative law judge, Section 718.204, has been restructured. The methods of establishing disability cited by the administrative law judge at 20 C.F.R. ?718.204(c)(1)-(4)(2000) are now set forth at 20 C.F.R. ?718.204(b)(2)(i)-(iv), and the standard for disability causation cited by the administrative law judge at 20 C.F.R. ?718.204(b)(2000) is now set forth at 20 C.F.R. ?718.204(c).

[5] A ?qualifying? objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A ?non-qualifying? study exceeds those values. *See* 20 C.F.R. ?718.204(b)(2)(i),(ii).

1-14 (1991); *see also Lafferty v. Cannelton Industries, Inc*. 12 BLR 1-190, 1-192 (1989)(the administrative law judge is charged with resolving conflicting evidence). Moreover, despite the administrative law judge?s inconclusive analysis of the blood gas study evidence, he found Dr. Kraynak?s opinion that claimant is disabled to be well reasoned because Dr. Kraynak relied on blood gas studies. Decision and Order Awarding Benefits at 9. Consequently, we must vacate the administrative law judge?s finding and remand the case for him to weigh the conflicting blood gas studies and determine whether they support a finding of total disability. *See Beatty, supra*.

Pursuant to 20 C.F.R. ?718.204(c)(4)(2000), the administrative law judge considered the conflicting opinions of three physicians. Dr. Kraynak, who is Board-eligible in Family Medicine and is claimant?s treating physician, opined that a respiratory impairment prevents claimant from performing his previous coal mine employment as a truck driver. Director's Exhibit 14; Claimant's Exhibit 4; Dep. Tr. at 5, 7, 13. Dr. Michael Green, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and diagnosed a mild impairment that he concluded was insufficient to prevent claimant from performing his last coal mine job. Director's Exhibits 31, 32. Dr. Michos, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence and concluded that claimant retains the respiratory capacity to perform his last coal mine employment. Director's Exhibits 20, 32.

The Director contends that the administrative law judge erred in discounting the opinions of Drs. Green and Michos merely because neither physician diagnosed pneumoconiosis. We agree. The question of whether claimant is totally disabled by a respiratory or pulmonary impairment is analytically separate from the question of whether he has the disease pneumoconiosis. *See* 20 C.F.R. ?718.204(b)(i)(the issue at disability is whether ?the miner has a pulmonary or respiratory impairment which . . . prevents . . . the miner? from performing his usual coal mine work). Doctors Green and Michos concluded that claimant?s pulmonary function studies, blood gas studies, and physical examinations reflect that he is not totally disabled by a respiratory or pulmonary impairment. Yet, the administrative law judge found their opinions unreasoned because neither physician diagnosed pneumoconiosis. Decision and Order Awarding Benefits at 10. Because the administrative law judge did not provide a valid reason for according less weight to the opinions of Drs. Green and Michos, we must vacate his finding and instruct him to reweigh the medical opinions on remand.

Additionally, there is merit in the Director?s argument that the administrative

law judge erred in finding Dr. Kraynak?s disability opinion well reasoned without considering whether the pulmonary function studies Dr. Kraynak based his opinion upon were reliable. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-267 (3d Cir. 1990)(A report based upon unreliable medical data ?does not constitute a well reasoned medical judgment. . . .?) On remand, the administrative law judge must examine the validity of the reasoning of each medical opinion ?in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.? *Id*.

Finally, we agree with the Director that on remand, the administrative law judge must consider the ?treating physician rule? at revised 20 C.F.R. ?718.104(d) in weighing Dr. Kraynak?s opinion. Section 718.104(d) requires the officer adjudicating the claim to ?give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.? 20 C.F.R. ?718.104(d). Under this rule, ?the adjudication officer shall take into consideration? the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. *Id*.; *see also Nat?l Mining Ass?n v. Department of Labor*, --- F.3d ---, 2002 WL 1300007 *8 (D.C. Cir., June 14, 2002)(discussing Section 718.104(d)), *aff?g in part and rev?g in part Nat?l Mining Ass?n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). In ?appropriate cases,? the treatment relationship ?may constitute substantial evidence in support of the adjudication officer?s decision to give that physician?s opinion controlling weight,? but the weight accorded ?shall also be based? on the opinion?s credibility ?in light of its reasoning and documentation, other relevant evidence and the record as a whole.? 20 C.F.R. ?718.104(d)(5).

The ?treating physician rule? is contained in the quality standard governing physical examination reports, 20 C.F.R. ?718.104. In turn, 20 C.F.R. ?718.101(b) provides, in relevant part, that ?[t]he standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part.? 20 C.F.R. ?718.101(b).

The record reflects that Dr. Kraynak conducted a physical examination of claimant in connection with this claim on February 14, 2001, and gave deposition testimony on April 27, 2001. Claimant's Exhibit 4; Dep. Tr. On these facts, Section 718.104(d) applies to this case. Therefore, on remand the administrative law judge must weigh Dr. Kraynak?s opinion pursuant to Section 718.104(d).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge