BRB No. 04-0844 BLA

WEDO SCICCHITANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/22/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM**:**

Claimant appeals the Decision and Order (03-BLA-0266) of Administrative Law Judge Janice K. Bullard 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 a Decision and Order dated April 30, 1997, Administrative Law Judge Ainsworth H. Brown initially noted that the Director, Office of Workers'

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[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Compensation Programs (the Director), had conceded the issue of total disability at 20 C.F.R. §718.204(c) (2000). Director's Exhibit 101. After crediting claimant with five years and three months of coal mine employment, Judge Brown 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). *Id.* Judge Brown further found that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) (2000). *Id.* Judge Brown also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, Judge Brown awarded benefits. *Id.*

By Decision and Order dated April 16, 1998, the Board affirmed Judge Brown's length of coal mine employment finding and his finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Scicchitano v. Director, OWCP*, BRB No. 97-1177 BLA (Apr. 16, 1998) (unpublished). However, the Board held that Judge Brown erred in finding that the Director had conceded the issue of total disability. *Id.* The Board, therefore, vacated Judge Brown's finding pursuant to 20 C.F.R. §718.204(c) (2000) and remanded the case for further consideration. *Id.* The Board also vacated Judge Brown's findings pursuant to 20 C.F.R. §§718.203 (2000) and 718.204(b) (2000). *Id.*

In an Order of Remand dated April 18, 1999, Judge Brown remanded the case to the district director with instructions to secure an examination by a Board-certified pulmonologist who had not previously examined claimant. Director's Exhibit 145. Judge Brown also subsequently denied claimant's motion for reconsideration. Director's Exhibit 146. By Decision and Order dated June 29, 2000, the Board held that Judge Brown did not properly exercise his discretion in remanding the case for further evidentiary development. *Scicchitano v. Director, OWCP*, BRB No. 99-1018 BLA (June 29, 2000) (unpublished). The Board, therefore, vacated Judge Brown's Order on Remand and his Order Denying Reconsideration and remanded the case for further consideration. *Id.*

In an Order dated November 21, 2000, Judge Brown ordered further development of the evidence, including the Director's examination of claimant. Director's Exhibit 173. By Order dated September 28, 2001, the Board dismissed claimant's appeal of Judge Brown's November 21, 2000 Order as interlocutory. *Scicchitano v. Director, OWCP*, BRB No. 01-0311 BLA (Sept. 28, 2001) (Order) (unpublished).

Due to Judge Brown's unavailability, the case was reassigned to Administrative Law Judge Robert D. Kaplan. Director's Exhibit 193. In a Decision and Order on Remand dated October 29, 2002, Judge Kaplan found that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant

to 20 C.F.R. §718.203(c) (2000). Director's Exhibit 215. However, Judge Kaplan found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Kaplan denied benefits. *Id.*

Claimant filed an appeal with the Board on November 5, 2002. Director's Exhibit 216. However, claimant subsequently requested that the Board remand the case for modification proceedings. Director's Exhibit 220. By Order dated March 5, 2003, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings.[2] *Scicchitano v. Director, OWCP,* BRB No. 03-0171 BLA (Mar. 5, 2003) (Order) (unpublished).

Claimant subsequently filed a timely 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), Administrative Law Judge Janice K. Bullard (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv).[3] Claimant also argues that the administrative law judge erred in finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The Director responds in support of the administrative law judge's denial of benefits.

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).

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[2]The Board informed claimant that his appeal would be reinstated only if he requested reinstatement. *Scicchitano v. Director, OWCP,* BRB No. 03-0171 BLA (Mar. 5, 2003) (Order) (unpublished). The Board further informed claimant that his request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 03-0171 BLA. *Id.*

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

Change in Conditions

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),[4] an administrative law judge must 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 that defeated entitlement in the prior decision. *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 the prior decision, Judge Kaplan found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Director's Exhibit 215. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

Claimant contends that the administrative law judge erred in finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[5] The record contains three newly submitted pulmonary function studies. While claimant's July 16, 2003 and July 23, 2003 pulmonary function studies produced qualifying values, *see* Claimant's Exhibits 1, 2; claimant's November 6, 2003 pulmonary function study produced non-qualifying values. Director's Exhibit 239.

In her consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability, the administrative law judge recognized that in *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22,

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[4]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001. Similarly, the evidentiary limitations set forth at 20 C.F.R. §725.414 do not apply to this claim because it was filed before the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[5]Because no party challenges the administrative law judge's findings that the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge also properly found that there is no evidence of cor pulmonale with right-sided congestive heart failure, thereby precluding a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See* Decision and Order at 5.

1994) (unpublished),[6] the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that pulmonary function studies which return disparately higher values tend to be more reliable indicators of an individual's capacity than those with lower values. Decision and Order at 6-7. The Third Circuit has recognized that spuriously low values are unreliable because pulmonary function testing is effort dependent and that spurious high values are not possible. *Andruscavage*, slip op. at 10.

In this case, the administrative law judge found that because the non-qualifying values from claimant's November 6, 2003 pulmonary function study are higher than the values obtained on claimant's July 16, 2003 and July 23, 2003 qualifying studies, they are more indicative of claimant's true pulmonary capacity and are, therefore, entitled to greater weight. Decision and Order at 6-7. The administrative law judge, therefore, found that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant argues that the administrative law judge erred in her consideration of Dr. Raymond Kraynak's (R. Kraynak's) invalidation of claimant's non-qualifying November 6, 2003 pulmonary function study. In questioning the validity of the November 6, 2003 study, Dr. R. Kraynak stated that:

> There is not a flow volume loop to accompany each tracing. [Claimant] had stated that he only performed three FVC maneuvers. Given the tracings, we see that there were trials three, four and five listed. We do not have trials one and two. In addition, the tracings do not start at the zero point, but rather at a distance down the horizontal axis. This could result in a computer error in the interpretation of the volume and flow, arriving at values that would be higher than obtained if proper technique and equipment were used.
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> When one reviews this study, compared to the other studies of

[6]In its Internal Operating Procedures, the United States Court of Appeals for the Third Circuit has provided:

> The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not recirculate to the full court before filing.

U.S. Ct. of App. 3rd Cir. App. I, IOP 5.7, 28 U.S.C.A., CTA3 App. I, IOP 5.7.

> record, I am at a loss as to how these values could be obtained. There must be some computer error or technical problem in the generation of these tracings and values.

Claimant's Exhibit 20.

In reviewing Dr. R. Kraynak's comments, the administrative law judge merely noted that "it appear[ed] that there actually is a flow volume loop for each of the three tests in conformance with regulation requirements." Decision and Order at 6 (citing 20 C.F.R. §718.103).

Claimant contends that the administrative law judge erred in not fully addressing Dr. R. Kraynak's findings. We agree. The administrative law judge did not address Dr. R. Kraynak's statement that "the tracings do not start at the zero point, but rather at a distance down the horizontal axis." Dr. R. Kraynak explained that this could result in a computer error in the interpretation of the volume and flow, resulting in artificially high values.

Contrary to claimant's contention, however, the administrative law judge did not substitute her opinion for that of Dr. R. Kraynak regarding whether a flow volume loop existed for each tracing.[7] An administrative law judge may properly examine the validity of a doctor's conclusions in light of the evidence on which it is based. However, in this case, the administrative law judge did not make a definitive finding as to the existence of flow volume loops, noting only that it "*appears* that there actually is a flow volume loop for each of the three tests…." Decision and Order at 6 (emphasis added). Consequently, we vacate the administrative law judge's finding that claimant's November 6, 2003 pulmonary function study is more reliable and, therefore, entitled to greater weight than claimant's July 16, 2003 and July 23, 2003 pulmonary function studies. We, therefore, vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). On remand, the administrative law judge is instructed to reconsider whether claimant's November 6, 2003 pulmonary function study is valid, in light of Dr. R. Kraynak's invalidation. The administrative law judge is further instructed to address the significance of the various validations of claimant's July 16, 2003 and July 23, 2003

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[7]The Director, Office of Workers' Compensation Programs, contends that the administrative law judge's decision not to accept Dr. Raymond Kraynak's (R. Kraynak's) invalidation of claimant's November 6, 2003 pulmonary function study is supported by substantial evidence "in view of the fact that Dr. Kraynak does not possess expert credentials in pulmonary medicine which would give him an advantage over Dr. Rashid in validating the results of this study." Director's Brief at 5.

qualifying pulmonary function studies contained in the record.[8]

Claimant next argues 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(b)(2)(iv). While Drs. R. Kraynak, Matthew Kraynak (M. Kraynak), Kruk and Romanic opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibit 226; Claimant's Exhibits 3, 13, 15, 17, Dr. Rashid opined that claimant was not disabled due to a respiratory condition. Director's Exhibit 238.

Although the administrative law judge noted that Dr. Romanic was claimant's treating physician, she properly discredited his opinion because the doctor failed to provide any reasoning or rationale for his conclusion that claimant's anthracosilicosis prevented him from performing his former coal mine employment.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 8; Claimant's Exhibit 13.

In her consideration of the remaining newly submitted medical opinion evidence, the administrative law judge found that the opinions of Drs. M. Kraynak, R. Kraynak, and Kruk were entitled "to diminished weight because of their collective reliance on

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[8]Drs. Simelaro and Venditto validated claimant's July 16, 2003 and July 23, 2003 pulmonary function studies. Claimant's Exhibits 5, 7, 10, 11. Although Dr. Michos also validated each of these studies, he opined that claimant's MVV performance on these studies was suboptimal. Director's Exhibit 236. Drs. Simelaro, Venditto and R. Kraynak each countered Dr. Michos's observation regarding claimant's performance on the MVV maneuver. *See* Claimant's Exhibits 20, 21.

[9]Although Dr. Romanic explained that he had seen claimant four to five times a year since 1997, he limited his discussion of claimant's pulmonary impairment to a one page letter that he sent to claimant's attorney on October 30, 2003. In this letter, Dr. Romanic states:

> Based on [claimant's] past medical history, physical findings, care and treatment, it is my opinion that [claimant's] anthracosilicosis prevents him from performing his past customary coal mine employment or similarly arduous work.

Claimant's Exhibit 13.

Dr. Romanic provided no explanation or documentation to support his findings.

questionable pulmonary function studies." Decision and Order at 10. The administrative law judge, therefore, found that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

In light of our decision to vacate the administrative law judge's finding that claimant's November 6, 2003 pulmonary function study is more reliable than claimant's July 16, 2003 and July 23, 2003 pulmonary function studies, we also vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On remand, should the administrative law judge find the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and/or (iv), she 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, a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *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*).

Mistake in a Determination of Fact

Claimant also argues that the administrative law judge erred in failing to find that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). There is no need for a smoking-gun factual error, changed conditions, or startling new evidence. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

The administrative law judge initially addressed whether the previous administrative law judge, Judge Kaplan, had erred in finding that the pulmonary function study evidence was insufficient to establish total disability.[10] *See* 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered the results of nine previously submitted pulmonary function studies conducted on December 4, 1995, February 6, 1996,

[10]Because no party challenges the administrative law judge's finding that the previously submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), this finding is affirmed. *Skrack v. Island Creek Coal Co.*¸6 BLR 1-710 (1983). The administrative law judge properly found that there is no evidence of cor pulmonale with right-sided congestive heart failure in this case. 20 C.F.R. §718.204(b)(2)(iii); *see* Decision and Order at 5.

November 21, 1996, June 26, 1998, June 30, 1998, December 11, 1998, February 10, 1999, February 14, 2002 and June 26, 2002. With the exception of claimant's June 26, 1998 pulmonary function study, all of these studies produced qualifying values.

December 4, 1995 Pulmonary Function Study

In regard to claimant's December 4, 1995 pulmonary function study, the administrative law judge noted that Dr. Ranavaya, a physician Board-certified in Occupational Medicine, invalidated the results of that pulmonary function study. Decision and Order at 11. In his 2002 Decision and Order, Judge Kaplan previously found that:

> Here, Dr. Ranavaya explained his conclusion was based on Claimant's suboptimal effort and an insufficient amount of efforts, which lead him to find the study to be invalid. (DX 8). Dr. R. Kraynak does not provide the reasoning for his conclusion that the pulmonary function study is valid. Therefore, I give greater weight to Dr. Ranavaya's conclusion that the study is invalid.

Judge Kaplan's 2002 Decision and Order at 8.

In the decision currently before the Board on appeal, the administrative law judge stated that:

> I find that ALJ Kaplan's previous assessment of this study in his 2002 D&O is accurate. He found the study to be invalid as Claimant had put forth poor effort. I agree and find that this study is invalid.

Decision and Order at 11.

Claimant accurately notes that, contrary to Judge Kaplan's previous characterization, Dr. R. Kraynak provided a basis for finding that claimant's December 4, 1995 pulmonary function study was valid.[11] Consequently, we hold that the

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[11]In a letter dated November 12, 1996, Dr. R. Kraynak responded to Dr. Ranavaya's comments. Dr. Kraynak stated that:

> Dr. Ranavaya states that the study did not meet the Niosh/ATS validation criteria. This is not a legitimate reason for invalidation. The regulations governing quality criteria are found in Appendix B, Section 718. Notwithstanding, the two largest FEV1's vary by 80 ml. In addition, there was maximum effort contrary to Dr. Ranavaya's findings.

administrative law judge erred in her consideration of claimant's December 4, 1995 pulmonary function study. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

February 6, 1996 Pulmonary Function Study

Dr. Kraynak administered a qualifying pulmonary function study on February 6, 1996. Director's Exhibit 9. In her consideration of that pulmonary function study, the administrative law judge stated that:

> Dr. Ranavaya invalidated the February 6, 1996 study in a report dated March 14, 1998. DX-70. Dr. Michos also reviewed this same study in a report dated March 27, 1996. He noted as follows: "unable to ascertain if full inspiratory and expiratory effort obtained. Would recommend repeat […] w/flow volume loops." In a letter dated March 27, 1996, Dr. Michos added that this study also "may represent a suboptimal effort in that a full inspiratory and then expiratory effort may not have been accomplished, especially in the face of the values which approximate the 12/4/95 study." DX 11, 14. In a letter dated November 12, 1996, Dr. Kraynak disputed Dr. Michos' invalidation of the December 4, 1995 study. DX-56. Based on Dr. Michos' superior qualifications, however, ALJ Kaplan previously gave more weight to Dr. Michos' invalidation. I agree with this assessment and I find that this study is invalid.

Decision and Order at 11.

Contrary to the administrative law judge's characterization, Dr. Michos did not invalidate the results of claimant's February 6, 1996 pulmonary function study. Although

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> This study is valid.

Director's Exhibit 56.

During a January 31, 1997 deposition, Dr. Kraynak again responded to Dr. Ranavaya's comments. Dr. R. Kraynak stated that:

> [Dr.] Ranavaya states that the [December 4, 1995] study was not valid in his opinion because there was [sic] not at least three acceptable efforts within five percent. From my review of the tracings, the two largest FEV1's vary by 80 milliliters which would correspond to the regulatory regulations. There was clearly good effort throughout the study.

Director's Exhibit 89 at 8.

Dr. Michos, on a form dated March 27, 1996, noted that he was unable to ascertain whether full inspiratory and expiratory efforts were obtained, he nevertheless indicated that the February 6, 1996 study was "acceptable." *See* Director's Exhibit 11. In an accompanying letter dated March 27, 1996, Dr. Michos, while again stating that the February 6, 1996 study "may represent a suboptimal effort," nevertheless acknowledged that the study was "valid by DOL criteria." Director's Exhibit 14.

The newly submitted evidence also includes validations of claimant's February 6, 1996 pulmonary function study prepared by Drs. Simelaro and Venditto, each of whom is Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibits 19, 20. The administrative law judge erred in failing to address the significance of this evidence. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (holding that an administrative law judge's failure to discuss relevant evidence requires remand). Consequently, we hold that the administrative law judge erred in his consideration of claimant's February 6, 1996 pulmonary function study.

November 21, 1996 Pulmonary Function Study

In his consideration of claimant's November 21, 1996 pulmonary function study, Judge Kaplan credited Dr. Michos's assessment of the study over that of Dr. R. Kraynak based upon Dr. Michos's superior qualifications.[12] Decision and Order at 11; *see also* Judge Kaplan's 2002 Decision and Order at 8; Director's Exhibit 87. An administrative law judge may properly question the validity of a pulmonary function study that is invalidated by a better qualified physician. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Claimant, however, argues that the administrative law judge erred in not addressing Dr. R. Kraynak's reasons for disagreeing with Dr. Michos's opinion. During a January 31, 1997 deposition, Dr. Kraynak responded to Dr. Michos's assessment of the November 21, 1996 pulmonary function study. *See* Director's Exhibit 89 at 11. Consequently, we hold that the administrative law judge, in her consideration of claimant's November 21, 1996 pulmonary function study, erred in not addressing all of the relevant evidence. *McCune*, *supra*.

June 26, 1998 Pulmonary Function Study

In her consideration of claimant's non-qualifying June 26, 1998 pulmonary function study, the administrative law judge properly credited Dr. Green's assessment of

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[12]Dr. Michos is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 11. Dr. R. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 18.

the study[13] over that of Dr. R. Kraynak, based upon Dr. Green's superior qualifications.[14] *Siegel*, *supra*; *Dillon*, *supra*; Decision and Order at 12; *see also* Judge Kaplan's 2002 Decision and Order at 9. Consequently, we hold that the administrative law judge properly found that claimant's June 26, 1998 pulmonary function study is invalid.

June 30, 1998 Pulmonary Function Study

In her consideration of claimant's June 30, 1998 pulmonary function study, the administrative law judge stated that:

> Dr. Ranavaya invalidated the June 30, 1998 study in a report dated August 19, 1998. DX-129, 130. He reported that there were an insufficient number of tracings and that the studies were improperly performed. As ALJ Kaplan noted previously, the pulmonary function study performed just four days earlier produced much higher results, thus calling into question the validity of this study. He found the study to be invalid and I agree with this assessment.

Decision and Order at 12.

The administrative law judge found that because the non-qualifying values from claimant's June 26, 1998 pulmonary function study are higher than the values obtained on claimant's June 30, 1998 study, it is more indicative of claimant's true pulmonary capacity and is therefore, entitled to greater weight. *Andruscavage*, *supra*; Decision and Order at 12. The administrative law judge, therefore, properly questioned the reliability of claimant's June 30, 1998 pulmonary function study.[15]

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[13]Dr. Green concluded that claimant provided suboptimal effort on the June 26, 1998 pulmonary function study. Director's Exhibit 121. Dr. Green opined that:

> [W]e have a mild degree of airflow obstruction reflected by the above parameters with suboptimal effort. Maximum ventilatory ventilation is also effort related and is likely an underestimate of the true measurements.

Director's Exhibit 121.

[14]Dr. Green is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 121. As noted previously, Dr. R. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 18.

[15]Although the administrative law judge found that claimant's June 26, 1998 pulmonary function study is invalid, she noted that it was found invalid because claimant

December 11, 1998 Pulmonary Function Study

In her consideration of claimant's December 11, 1998 pulmonary function study, the administrative law judge stated that:

> In a report dated December 15, 1998, Dr. Green wrote that this study showed "suboptimal effort on the part of the patient, particularly as reflected by the flow volume loops." DX-136. Dr. Green felt that this poor effort "skewed" the results. Based on this appraisal, ALJ Kaplan invalidated this study. I agree with this assessment.

Decision and Order at 12.

Claimant contends that the administrative law judge erred in failing to discuss Dr. R. Kraynak's review of the tracings of this study. Claimant's Brief at 40. In a letter dated March 23, 1999, Dr. R. Kraynak opined that claimant's December 11, 1998 pulmonary function study was valid and conforming. *See* Director's Exhibit 143. Because the administrative law judge failed to address Dr. R. Kraynak's assessment, we hold that she erred in failing to address all of the relevant evidence of record regarding claimant's December 11, 1998 pulmonary function study. *McCune*, *supra*.

February 10, 1999 Pulmonary Function Study

In her consideration of claimant's February 10, 1999 pulmonary function study, Judge Kaplan properly credited Dr. Sherman's invalidation of the study over the validations of Drs. R. Kraynak and M. Kraynak based upon Dr. Sherman's superior qualifications.[16] *Siegel*, *supra*; *Dillon*, *supra*; Judge Kaplan's 2002 Decision and Order at 10. The administrative law judge noted her agreement with Judge Kaplan's assessment of claimant's February 10, 1999 pulmonary function study. Decision and Order at 12.

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provided less than optimal effort on the study. Decision and Order at 12. As previously noted, Dr. Green, in his review of claimant's June 26, 1998 pulmonary function study, observed that because the maximum ventilation maneuver is effort-related, claimant's values were likely an "underestimate" of the true measurements. Director's Exhibit 121. Thus, if claimant had provided optimal effort, the values of the non-qualifying June 26, 1998 pulmonary function study could have only been greater.

[16]Dr. Sherman is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 166. As noted previously, Dr. R. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 18. Dr. M. Kraynak is Board-certified in Family Medicine. Claimant's Exhibit 16.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's February 10, 1999 pulmonary function study is invalid.

February 14, 2002 Pulmonary Function Study

In her consideration of claimant's February 14, 2002 pulmonary function study, the administrative law judge stated that:

> Dr. Green administered the February 14, 2002 study and reported that it was performed with suboptimal effort. He also wrote, however, that "[t]his suboptimal effort is attributed to the patient's dyspnea and difficulty with breathing." Dr. Green wrote that he did not believe that this was intentional, but that Claimant was unable to put forth his best effort, even though his "cooperation was otherwise considered to be good." DX-199. ALJ Kaplan inferred from this summary that Dr. Green found this study to be invalid. I find that Dr. Green's report is actually ambiguous as to whether he found that this study was invalid and I disagree with ALJ Kaplan's inference. Dr. Kraynak validated this study in a letter dated July 3, 2002, and wrote that "the pulmonary function study shows that the effort given was somewhat decreased. This was not intentional. It was due to shortness of breath and difficulty breathing. These values show severe disability." DX-203, 205. Dr. Simelaro and Dr. Venditto validated this same study in respective reports dated July 2, 2002. DX-205. I find that this study is not reliable because the most recent study performed in November 2003 produced significantly higher values than this study performed almost two years earlier.

Decision and Order at 12-13.

Thus, although the administrative law judge found that claimant's February 14, 2002 pulmonary function study was not invalidated by any reviewing physician, she questioned the reliability of the study in light of the higher values obtained during claimant's November 6, 2003 non-qualifying pulmonary function study. However, in light of our decision to hold that the administrative law judge erred in her consideration of claimant's November 6, 2003 pulmonary function study, the administrative law judge's basis for questioning claimant's February 14, 2002 pulmonary function study cannot stand.

June 26, 2002 Pulmonary Function Study

The administrative law judge noted that although Drs. Simelaro and Venditto validated claimant's June 26, 2002 pulmonary function study, Dr. Sherman found that the

study was invalid. Decision and Order at 13. The administrative law judge further stated:

> ALJ Kaplan found that, again, because there was a pulmonary function study performed just four months earlier which produced higher results, the study was invalid. I also note that the most recent study performed in November of 2003 - a year and a half later – produced higher results. This lends credence to Dr. Sherman's assessment. I find that this study is invalid.

Decision and Order at 13.

The administrative law judge questioned the reliability of claimant's June 26, 2002 pulmonary function study in part based upon the results of claimant's November 6, 2003 pulmonary function study. However, in light of our decision to remand the case to the administrative law judge for her to reconsider whether claimant's November 6, 2003 pulmonary function study is valid and entitled to the most weight, the administrative law judge's basis for questioning claimant's June 26, 2002 pulmonary function study cannot stand.

In light of the above-referenced errors committed by the administrative law judge in her consideration of the previously submitted pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i), we cannot affirm her determination that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

Claimant also argues that the administrative law judge erred in failing to find a mistake in a determination of fact in regard to Judge Kaplan's previous finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The previously submitted medical opinion evidence consists of the opinions of Drs. R. Kraynak and Green. While Dr. R. Kraynak opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibits 12, 89, 203, Dr. Green opined that claimant was not totally disabled from a pulmonary standpoint. Director's Exhibits 124, 199, 202. In her consideration of the previously submitted medical opinion evidence, the administrative law judge found that Dr. R. Kraynak's opinion was entitled to less weight because of his reliance upon invalidated pulmonary function studies. *See* Decision and Order at 15. However, because the administrative law judge erred in her consideration of the previously submitted

pulmonary function study evidence,[17] the administrative law judge's basis for discrediting Dr. R. Kraynak's opinion cannot stand. Consequently, we cannot affirm the administrative law judge's finding that the previously submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

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.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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[17]Administrative Law Judge Robert D. Kaplan noted that Dr. R. Kraynak based his opinion in part upon the results of claimant's December 4, 1995 and February 6, 1996 pulmonary function studies. Judge Kaplan's 2002 Decision and Order at 11. As previously noted, the reasons provided by Judge Kaplan (and relied upon by the administrative law judge) for finding that claimant's December 4, 1995 and February 6, 1996 pulmonary function studies are invalid cannot stand.