BRB No. 04-0862 BLA

ROBERT C. RHEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/26/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5382) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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). The administrative law judge credited claimant with twenty-eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4). Further, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (iv). Lastly, claimant contends that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[1] The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.[2]

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

Claimant contends that the administrative law judge erred in finding the pulmonary function study evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). The record consists of two pulmonary function studies, dated January 27, 2003 and February 12, 2004. Director's Exhibit 14; Claimant's Exhibit 3. The January 27, 2003 pulmonary function study administered by Dr. Cali produced pre-bronchodilator values of 2.53 on FEV1, 2.89 on FVC, and 60.9 on MVV. Director's Exhibit 14. This study produced post-bronchodilator values of 2.09 on FEV1, 2.45 on FVC, and 41.3 on MVV. *Id*. Dr. Cali noted claimant's height as 70 inches and his age as 64 years. *Id*. The February 12, 2004 pulmonary function study administered by Dr. Kraynak produced pre-bronchodilator values of 2.24 on FEV1, 2.81 on FVC, and 73.4 on MVV.[3] Claimant's Exhibit 3. Dr.

[1]Claimant contends that the administrative law judge committed harmless error in finding only twenty-eight years of coal mine employment because the difference in the years of coal mine employment he alleged and the length of coal mine employment found by the administrative law judge would not affect the outcome of the case. Claimant's Brief at 2. Claimant alleged over thirty-five years of coal mine employment. Director's Exhibit 2.

[2]Since the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(ii) and (iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]In considering the FEV1, FVC, and MVV values of the February 12, 2004 pulmonary function study, the administrative law judge used the highest values under each category from the trials. Claimant's Exhibit 3. However, all of the FEV1 values in the February 12, 2004 study exceed the relevant table value.

Kraynak noted claimant's height as 71 inches and his age as 65 years.[4] *Id*. The administrative law judge stated that "[c]laimant's values on both pulmonary function studies exceed the regulatory values set forth in the regulations." Decision and Order at 7.

Claimant asserts that the administrative law judge mischaracterized the February 12, 2004 pulmonary function study by finding that it did not produce qualifying values.[5] In order to be qualifying, a pulmonary function study must initially produce FEV1 values that are equal to, or less than, the applicable table values in Appendix B of 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(i). Based on a height of 71 inches and an age of 65 years, the FEV1 value of a pulmonary function study must be 2.07 or less. Because the FEV1 value of the February 12, 2004 pulmonary function study is above the applicable table value in the regulations, this study is non-qualifying. Claimant's Exhibit 3. Thus, we reject claimant's assertion that the administrative law judge mischaracterized the February 12, 2004 pulmonary function study by finding that it did not produce qualifying values.[6] Since it is supported by substantial evidence, we further affirm the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in weighing Dr. Kraynak's opinion. Dr. Kraynak opined that claimant suffers from a totally disabling

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[4]Dr. Cali noted claimant's height as 70 inches, Director's Exhibit 14, while Dr. Kraynak noted claimant's height as 71 inches, Claimant's Exhibit 3. The administrative law judge, however, did not resolve the conflicting heights that were recorded on the pulmonary function studies. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Nonetheless, we hold that any error by the administrative law judge in failing to resolve the height discrepancy in this case is harmless because that discrepancy does not affect whether the pulmonary function studies are qualifying. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]A "qualifying" pulmonary function study or 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 exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i) and (ii).

[6]Based on a height of 70 inches and an age of 64 years, the FEV1 value of a pulmonary function study must be 2.00 or less. With regard to the January 27, 2003 pulmonary function study, both the pre-bronchodilator and post-bronchodilator values of the FEV1 are above the applicable table values in Appendix B of 20 C.F.R. Part 718. Director's Exhibit 14. Consequently, the January 27, 2003 pulmonary function study is non-qualifying.

respiratory impairment. Claimant's Exhibit 1. In contrast, Dr. Cali opined that claimant does not suffer from a pulmonary or respiratory impairment. Director's Exhibit 14. The administrative law judge properly accorded greater weight to the opinion of Dr. Cali than to the contrary opinion of Dr. Kraynak because Dr. Cali's opinion is better supported by the objective tests of record. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986)("[T]he [administrative law judge] should reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation."); *see Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002); *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). In considering the opinions of Drs. Cali and Kraynak, the administrative law judge stated:

> Dr. Cali's conclusions are well supported by all the objective results on laboratory pulmonary testing. Dr. Kraynak's conclusions, in contrast, are not supported by the test results from his own examination or from the test results of record. Dr. Kraynak stated that the results of the pulmonary function study performed by Dr. Cali demonstrate that [c]laimant could not perform his usual coal mine employment, but he does not explain the basis for this conclusion in light of the fact these results and the results on his own pulmonary function test were non-qualifying under the regulations.

Decision and Order at 7. As discussed *supra*, the January 27, 2003 and February 12, 2004 pulmonary function studies produced non-qualifying values. Director's Exhibit 14; Claimant's Exhibit 3. In addition, the January 27, 2003 arterial blood gas study produced non-qualifying values. Director's Exhibit 14. Dr. Kraynak did not explain how the pulmonary function study values he cited established that the claimant could not perform his usual coal mine employment. He merely stated his conclusion. Thus, we reject claimant's assertion that the administrative law judge erred in his weighing of Dr. Kraynak's opinion. *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Claimant additionally asserts that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Kraynak based on his status as claimant's treating physician. Contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). 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). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment

relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In this case, the administrative law judge noted that he must consider Dr. Kraynak's opinion pursuant to 20 C.F.R. §718.104(d). Because Dr. Kraynak only examined claimant on one occasion *for his breathing condition*, the administrative law judge found that Dr. Kraynak's opinion is not entitled to controlling weight. The administrative law judge stated, "[a]s noted above, on cross examination, Dr. Kraynak stated he had treated the miner for his intestinal problems and had only noted breathing problems in February 2004." Decision and Order at 5. The administrative law judge further stated:

> Although Dr. Kraynak has been treating the miner since June 2000, I note that he has had only one medical examination with the miner concerning his breathing problems. Under these circumstances, I find no basis to consider his opinion under §718.104(d).

Id. at 6. Moreover, as discussed *supra*, the administrative law judge properly accorded greater weight to the opinion of Dr. Cali than to the contrary opinion of Dr. Kraynak because Dr. Cali's opinion is better supported by the objective tests of record. *Minnich*, 9 BLR at 1-90 n.1; *Wetzel*, 8 BLR at 1-141; *Pastva*, 7 BLR at 1-832. Thus, we reject claimant's assertion that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Kraynak based on his status as claimant's treating physician. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Since claimant failed to establish total disability at 20 C.F.R. §718.204(b), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[7] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[7]In view of our disposition of this case at 20 C.F.R. §718.204(b), we decline to address claimant's contentions at 20 C.F.R. §718.202(a)(1) and (4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge