BRB No. 07-0841 BLA

J.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/30/2008
	)	
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.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2006-BLA-00041) of Administrative Law Judge Janice K. Bullard denying a request for modification of a duplicate 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] Adjudicating the claim pursuant to

[1] Claimant filed applications for benefits in 1978 and 1986, which were denied in 1982 and 1991. Director's Exhibit 25. Claimant's third claim was filed on March 6, 1997, and was denied by Administrative Law Judge Ainsworth H. Brown on August 5, 1999, because the evidence failed to establish any of the elements of entitlement. Director's Exhibits 1, 41. On August 2, 2000, claimant filed another application for benefits which was treated as a request for modification of his denied 1997 claim pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 48. By Decision and Order

20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that claimant had 9.25 years of coal mine employment and that claimant's request for modification was based solely on a change in conditions. Nevertheless, the administrative law judge reviewed the previous denial, in conjunction with the Board's affirmance of that denial, and concluded that there was no mistake in a determination of fact. Pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant established the existence of pneumoconiosis and, thus, that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] The administrative law judge also found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), but did not prove that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge violated his right to due process by denying his request to obtain an additional examination or a pulmonary function study in response to Dr. Dittman's September 24, 2006 report, which was submitted by the Director, Office of Workers' Compensation Programs (the Director), on the eve of the twentieth day before the hearing. Pursuant to 20 C.F.R. §725.456(b)(3), (4), claimant requests that the Board remand the case so that he can obtain this evidence. Claimant also challenges the administrative law judge's findings under 20 C.F.R. §§718.204(b)(2)(i), (iv) and 718.204(c). Claimant further argues that the administrative law judge's analysis of the pulmonary function study evidence does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as

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issued July 19, 2002, Administrative Law Judge Robert D. Kaplan denied claimant's request for modification. Director's Exhibit 72. On January 10, 2003, claimant filed a second request for modification that was denied by Judge Kaplan in a Decision and Order issued on April 13, 2004. Director's Exhibit 97. Judge Kaplan found that claimant did not allege any mistake in a determination of fact in the prior denial, and denied benefits based on his finding that claimant failed to establish a change in conditions. *Id.* The Board affirmed Judge Kaplan's denial of benefits in *[J.R.] v. Director, OWCP*, BRB No. 04-0598 BLA (Mar. 7, 2005) (unpub.). Director's Exhibit 102. On April 1, 2005, claimant filed his third and current request for modification of his denied 1997 claim. Director's Exhibit 103. The administrative law judge held a hearing on this claim on November 3, 2006.

[2] The amended version of 20 C.F.R. §725.310 does not apply in this case, as the claim, filed on March 6, 1997, was pending when the amended regulations became effective on January 19, 2001. *See* 20 C.F.R. §725.2.

incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

The Director has responded and agrees with claimant that the administrative law judge did not properly weigh the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). The Director also concurs with claimant's argument that this case must be remanded for further review of the evidence relevant to total disability. The Director has not responded to claimant's arguments concerning the administrative law judge's denial of his request to procure a physical examination and a pulmonary function test in response to Dr. Dittman's report.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

Procedural Issue

Relying upon *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), claimant argues that the administrative law judge erred in denying his request that he be permitted to obtain an examination, including a pulmonary function study, to rebut Dr. Dittman's September 24, 2006 medical report and pulmonary function study. The hearing in this case was scheduled for November 3, 2006. On October 13, 2006, the Director sent claimant a facsimile of Dr. Dittman's report of the examination and the diagnostic testing that he performed on September 15, 2006. In a letter dated October 19, 2006, claimant requested that the administrative law judge exclude Dr.

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[3] We affirm the administrative law judge's finding of 9.25 years of coal mine employment, and her findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(c) and a change in conditions pursuant to 20 C.F.R.§725.310 (2000), as these findings are unchallenged on appeal. Decision and Order at 3-4, 14; *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983). We also affirm the administrative law judge's findings that the evidence is insufficient to establish total respiratory disability by blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) or by evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii), as these findings are unchallenged on appeal. Decision and Order at 19; *Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1, 3.

Dittman's report and the accompanying evidence as untimely. Claimant requested, in the alternative, that he be allowed to have Dr. Dittman's report reviewed and to procure another physical examination. The Director responded, urging the administrative law judge to deny claimant's request to exclude the report, but had no objection to an enlargement of time for claimant to produce rebuttal evidence. The Director opposed, however, claimant's request to obtain another physical examination and diagnostic testing, stating that the development of new evidence was not necessary.

At the hearing, the administrative law judge determined that because the evidence was exchanged on the twentieth day before the hearing, it was timely, pursuant to 20 C.F.R. §725.456(b)(2). Hearing Transcript at 9-10. The administrative law judge also noted that there was "no real reason to not find good cause." *Id*. at 11. The administrative law judge ordered that the record be held open so that claimant could have the evidence reviewed, but denied claimant's request for another physical examination and pulmonary function testing, as the last testing obtained by claimant was done on August 9, 2006. *Id*. at 12-13. The administrative law judge stated that if she allowed another physical examination and testing, the parties would continue to seek rebuttal of each other's testing. *Id*. at 13. Claimant did not submit any additional evidence. In her Decision and Order, the administrative law judge admitted Dr. Dittman's report into the record as Director's Exhibit 128. Decision and Order at 11.

Because Dr. Dittman's report was submitted in compliance with the twenty-day rule, a fact that claimant does not dispute, the administrative law judge permissibly admitted it into evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). That is not the end of the matter, however, as a finding that the opposing party has complied with the twenty-day rule does not absolve the administrative law judge from the responsibility to insure that claimant receives a full and fair hearing on all the issues presented. *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

In *Miller*, the case cited by claimant in support of his contention that his right to due process was violated, the claimant exchanged a report with the employer exactly twenty days prior to the hearing. The United States Court of Appeals for the Third Circuit held that the administrative law judge's denial of the employer's request for an additional examination of claimant, resulted in a violation of the right to due process acknowledged in the APA, as employer was prevented from fully presenting its case.[5]

[5] Section 556(d) of the Administrative Procedure Act (APA) provides that:

> A party is entitled to present his case or defense by oral or documentary evidence, *to submit rebuttal evidence*, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

See Miller, 870 F.2d at 951-52, 12 BLR at 2-228-29; *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990); *Shedlock*, 9 BLR at 1-200. The facts in this case are virtually identical to those in *Miller* and, significantly, the administrative law judge relied, in large part, upon the pulmonary function study obtained by Dr. Dittman to hold that claimant failed to establish total disability under 20 C.F.R. 718.204(b)(2)(i). Decision and Order at 17-18. The terms of 20 C.F.R. §725.456(b)(4) are also instructive as to the appropriate action to take when a party submits evidence at a point in time that makes it difficult for another party to respond due to the impending date of the hearing. Under 20 C.F.R. §725.456(b)(4), when untimely evidence is admitted into the record, the parties are entitled to "take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4).

In light of the relevant case law and the guidance provided by 20 C.F.R. §725.456(b)(4), we hold that the administrative law judge's denial of claimant's request that he be given an opportunity to procure another examination or additional pulmonary function testing constituted a violation of claimant's right to due process. Accordingly, we vacate the administrative law judge's Decision and Order denying benefits and remand the case to the administrative law judge so that she can allow claimant to respond to Dr. Dittman's report in a manner consistent with his due process right to fully present his case.

The Administrative Law Judge's Findings on the Merits

Although we acknowledge that the admission of additional evidence on remand is likely to alter the administrative law judge's analysis of the relevant elements of entitlement, we will address claimant's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv) and 718.204(c) in the interest of judicial economy.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge determined that the newly submitted pulmonary function studies performed on June 8, 2005, August 30, 2005, August 9, 2006 and September 15, 2006 were valid. Decision and Order at 15-17; Director's Exhibits 106, 110, 128; Claimant's Exhibit 5. The administrative law judge further found that the August 9, 2006 study was the only study to yield qualifying values. Decision and Order at 18; Claimant's Exhibit 5. The administrative law judge

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5 U.S.C. §556(d) (emphasis supplied). The requirements of the APA are incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

determined that the June 8, 2005 and August 9, 2006 FEV1 values were qualifying for a seventy-one year old male who was sixty-eight inches tall. Decision and Order at 17. Because claimant was over the age of seventy-one when the June 8, 2005 and August 9, 2006 studies were performed, and the tables values set forth in Appendix B to 20 C.F.R. Part 718 end at age seventy-one, the administrative law judge extrapolated qualifying FEV1 values. Based on these values, the administrative law judge concluded that the August 9, 2006 pulmonary function study was qualifying. Decision and Order at 18.

Claimant initially argues that the administrative law judge erred in finding that the June 8, 2005 pulmonary function study was non-qualifying. The Director agrees, maintaining, "the qualifying FEV1, FVC and MVV scores that appear in the regulatory table for a miner age 71 must be applied to older miners."[6] Director's Response Letter at 4. Accordingly, the Director concedes that the June 8, 2005 pulmonary function study yielded qualifying values.[7] *Id.* In light of our recent decision in *K.J.M. v. Clinchfield Coal Co.*, BLR , BRB No. 07-0655 BLA (June 30, 2008), in which we held that the Director's view represents a reasonable interpretation of the regulations, we reverse the administrative law judge's determination that the June 8, 2005 pulmonary function study was non-qualifying pursuant to 20 C.F.R. §718.204(b)(2)(i) and 20 C.F.R. Part 718, Appendix B.

Claimant next contends that the administrative law judge erred in finding that the August 30, 2005 and September 15, 2006 pulmonary function studies were valid. The record contains reports in which Drs. Simelaro and Venditto invalidated the pulmonary function studies obtained on August 30, 2005 and September 15, 2006. Claimant's Exhibits 16-18. Dr. Kraynak indicated in his deposition testimony that the August 30, 2005 test was not valid, and he invalidated the September 15, 2006 study in a written report. Claimant's Exhibits 16 at 12-13, 19. The administrative law judge found that the "scrutiny" by Drs. Simelaro and Venditto was "not warranted," as she "personally reviewed" the studies and determined that they "conform[ed] to the applicable quality standards found at 20 C.F.R. §718.103 and Appendix B Part 718." Decision and Order at 17. The administrative law judge did not render a finding regarding Dr. Kraynak's invalidation of these studies. The administrative law judge further stated that in *Revnack*

[6] The Director, Office of Workers' Compensation Programs, acknowledges that "[w]hile an opposing party may offer medical evidence to prove that pulmonary functions studies that qualify under these conditions are actually normal or otherwise do not demonstrate total disability, there was no such evidence in this case." Director's Response Letter at 4.

[7] The Director incorrectly refers to a July 8, 2005 pulmonary function study. The correct date of the pulmonary function study is June 8, 2005. Director's Exhibit 106; Decision and Order at 15-16.

v. Director, OWCP, 7 BLR 1-771 (1985), the Board held that more weight might be given to the observations of technicians who administer the pulmonary function studies than to the reports of physicians who review the tracings. *Id*.

Claimant argues that because these studies were found to be invalid by Drs. Kraynak, Simelaro and Venditto, the administrative law judge "impermissibly" undertook her own review, that she erred in substituting her judgment for that of qualified physicians, and that she erred in relying on *Revnack*. Claimant's Brief at 8-13. The Director concurs with claimant's position. Claimant's allegations of error have merit.

In rendering her finding under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge provided no rationale for rejecting the reports of Drs. Kraynak, Simelaro and, Venditto other than her conclusion that "scrutiny of the stud[ies] is unwarranted" based upon her review of the studies. Decision and Order at 11, 17. The interpretation of medical data is for the medical experts, not the administrative law judge. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In addition, the administrative law judge did not accurately characterize the Board's holding in *Revnack*. The Board indicated in *Revnack*, a case that involved a claim arising under 20 C.F.R. Part 727, that the administrative law judge must consider a reviewing doctor's opinion that a pulmonary function study is unreliable when determining whether the interim presumption has been invoked pursuant to 20 C.F.R. §727.203(a)(2). *Revnack*, 7 BLR at 1-773. Thus, the Board's holding in *Revnack* does not stand for the proposition that comments by an administering physician or technician automatically outweigh the opinion of a reviewing physician.[8] Consequently, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i).

On remand, the administrative law judge must treat the pulmonary function studies obtained on June 8, 2005 and August 9, 2006 as qualifying.[9] In addition, the administrative law judge must reconsider whether the studies dated August 30, 2005 and

[8] The Board held in *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985), that the opinion of a consulting physician regarding the reliability of a pulmonary function study may constitute substantial evidence for its rejection, but the administrative law judge must provide a rationale for preferring the findings of the consulting physician over those of the administering doctor or technician.

[9] The administrative law judge determined that treating the June 8, 2005 study as qualifying would not alter the fact that the preponderance of the pulmonary function study evidence was non-qualifying. Decision and Order at 18. The administrative law judge's conclusion may be changed, however, by her findings on remand regarding the validity of the pulmonary function studies obtained on August 30, 2005 and September 15, 2006.

September 15, 2006 are valid in light of the opinions of Drs. Kraynak, Simelaro and Venditto and the opinions of the administering physicians. Upon rendering her findings, the administrative law judge must set forth the underlying rationale in accordance with the APA. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987) *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Because the administrative law judge's reevaluation of the pulmonary function study evidence on remand could affect her weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and her consideration of whether total disability due to pneumoconiosis was established under 20 C.F.R. §718.204(c), we also vacate her findings thereunder. On remand, the administrative law judge should reconsider her weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) in light of her finding under 20 C.F.R. §718.204(b)(2)(i). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), and fully explain the rationale for her conclusions, *see Wojtowicz*, 12 BLR at 1-165; *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge