BRB No. 11-0717 BLA

ERNEST K. WERTZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 07/25/2012
	)	
INTERNATIONAL ANTHRACITE CORPORATION	)	
	)	
and	)	
	)	
STATE WORKERS' 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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Daniel A. Miscavige (Gillespie, Miscavige, Ferdinand & Baranko, LLC), Hazleton, Pennsylvania, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5428) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-

148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a claim filed on March 10, 2009.

After crediting claimant with at least ten years of coal mine employment,[1] the administrative law judge noted that employer stipulated to the existence of pneumoconiosis. 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b). However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant was not entitled to benefits under 20 C.F.R. Part 718.

In considering the claim, the administrative law judge also noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying Section 411(c)(4), the administrative law judge found that, because claimant failed to establish fifteen years of qualifying coal mine employment, and failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant was not entitled to invocation of the presumption. Accordingly, the administrative law judge found that claimant was also not entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

[1] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant also argues that the administrative law judge erred in finding that claimant was not entitled to invocation of the amended Section 411(c)(4) presumption. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[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 rational, supported by substantial evidence, and 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).

To establish entitlement 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).

Claimant argues that the administrative law judge erred in his consideration of the pulmonary function study evidence pursuant to 20 C.F.R. §718.202(b)(2)(i). The record contains four pulmonary function studies conducted on June 16, 2009, January 14, 2010, February 18, 2010, and March 1, 2010. While the June 16, 2009 pulmonary function study produced non-qualifying values,[3] Director's Exhibit 12, the pulmonary function studies conducted on January 14, 2010, February 18, 2010, and March 1, 2010 produced qualifying values. Claimant's Exhibits 1, 3; Employer's Exhibit 3.

In considering the pulmonary function study evidence, the administrative law judge found that, while Dr. Simelaro invalidated the results of the qualifying June 16, 2009 pulmonary function study, the doctor's basis for questioning the validity of the

[2] Because claimant does not challenge the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

study was improper. Decision and Order at 7. The administrative law judge, therefore, found that the June 16, 2010 non-qualifying pulmonary function study was valid.[4] *Id.*

The administrative law judge next found that the qualifying January 14, 2010 and February 18, 2010 pulmonary function studies were not in substantial compliance with the quality standards. Decision and Order at 7. Consequently, the administrative law judge found that these studies were unreliable. *Id.* Finally, the administrative law judge found that the qualifying March 1, 2010 pulmonary function study was not entitled to any weight because the administering physician indicated that claimant provided poor effort during the test, thereby affecting the accuracy of the results. *Id.* Having found that the record does not contain any valid, qualifying pulmonary function studies, the administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* at 7-8.

Claimant contends the administrative law judge erred in her consideration of the January 14, 2010 and February 18, 2010 qualifying pulmonary function studies. We disagree. Because the pulmonary function studies of record were developed after January 19, 2001, they are subject to the quality standards set forth in the regulations. *See* 20 C.F.R. §§718.101, 718.103; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). If a pulmonary function study is not conducted or reported in compliance with the standards, it does not "constitute evidence of the presence or absence of a respiratory or pulmonary impairment…." 20 C.F.R. §718.103(c). In assessing whether the January 14, 2010 and February 18, 2010 pulmonary function studies were conducted in accordance with the quality standards, the administrative law judge found that each study contained the same "technical flaw." Decision and Order at 7. The administrative law judge specifically found that, because a "portion of each flow volume loop extend[ed] to the edge of the page's printable area,"[5] the tracings failed "to display the entire maximum inspiration and the entire maximum forced expiration." *Id.* Because the quality standards require that the flow-volume loop display "the entire maximum inspiration and the entire maximum forced expiration," 20 C.F.R. Part 718, App. B (1)(v), the administrative law judge permissibly found that the January 14, 2010 and February 18, 2010 pulmonary function studies were not conducted or reported in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Mangifest*,

[4] The administrative law judge found that, even if the June 16, 2009 pulmonary function study was invalid, it "would have some probative value because the values obtained exceed the disability standards." Decision and Order at 7.

[5] Claimant does not dispute the administrative law judge's characterization of the tracings as containing loops that extend to the edge of the page's printed area.

826 F.2d at 1327, 10 BLR at 2-233. We, there, affirm the administrative law judge's determination that these studies could not be relied upon to support a finding of total disability.

We also reject claimant's contention that the administrative law judge erred in her consideration of the March 1, 2010 pulmonary function study. The administrative law judge noted that Dr. Levinson, the administering physician, indicated that claimant provided poor effort on the March 1, 2010 pulmonary function study, and questioned whether the results were indicative of claimant's actual pulmonary capacity. Decision and Order at 7; Employer's Exhibit 3. Although the administrative law judge noted that Dr. Kraynak, during an August 27, 2010 deposition, indicated that the March 1, 2010 pulmonary function study was valid, Decision and Order at 10; Claimant's Exhibit 3 at 15, the administrative law judge permissibly relied upon the opinion of Dr. Levinson, the administering physician, that claimant provided poor effort during the study.[6] The administrative law judge, therefore, appropriately found that the results from the May 1, 2010 pulmonary function study are unreliable. *See Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Mangifest*, 826 F.2d at 1327, 10 BLR at 2-233; Decision and Order at 7.

Because the administrative law judge, within a proper exercise of her discretion, found that all three of the qualifying studies were flawed and lacked sufficient reliability to render the results credible, we affirm the administrative law judge's determination that the pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[7]

Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Kraynak, Talati, and Levinson. Dr. Kraynak opined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2. However, Dr. Talati opined that claimant

[6] In her decision, the administrative law judge found that Dr. Levinson's qualifications are superior to those of Dr. Kraynak. Decision and Order at 11. While Dr. Levinson is Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibit 4, Dr. Kraynak is only Board-eligible in Family Practice. Claimant's 3 at 5.

[7] Claimant contends that the administrative law judge erred in her consideration of the non-qualifying pulmonary function study conducted on June 16, 2009. However, because this study is non-qualifying, it is not supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Consequently, the administrative law judge's error, if any, in her consideration of this study, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

has "no pulmonary impairment," and Dr. Levinson opined that, from a pulmonary standpoint, claimant retains the pulmonary capacity to return to his previous coal mine employment. Employer's Exhibit 3.

In considering whether the medical opinion evidence established total disability, the administrative law judge accorded less weight to Dr. Kraynak's opinion because his opinion was based, in part, upon invalid pulmonary function studies. Decision and Order at 10. The administrative law judge also credited the opinions of Drs. Talati and Levinson, that claimant is not totally disabled, over Dr. Kraynak's contrary opinion, based upon the their superior qualifications. *Id.* at 11. The administrative law judge also found that the opinions of Drs. Talati and Levinson were better reasoned than Dr. Kraynak's opinion. *Id.* The administrative law judge, therefore, found that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Claimant argues that the administrative law judge erred in her consideration of Dr. Kraynak's opinion. We disagree. The administrative law judge permissibly discounted Dr. Kraynak's opinion, since it was based, in part, on the January 14, 2010, February 18, 2010, and March 1, 2010 pulmonary function studies, which the administrative law judge had found unreliable.[8] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10-11. Because Dr. Kraynak's opinion is the only medical opinion of record supportive of a finding of total disability, we affirm the administrative law judge's finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[8] Claimant contends that Dr. Kraynak's opinion should have been accorded greater weight based upon the doctor's status as claimant's treating physician. Section 718.104(d) provides that a treating physician's opinion may be given controlling weight, "provided that the weight given to the opinion shall be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). In this case, the administrative law judge acknowledged Dr. Kraynak's purported status as claimant's treating physician, but permissibly found that the doctor's disability assessment was unreasoned because it was based upon faulty data. Consequently, the administrative law judge properly found that Dr. Kraynak's opinion was not entitled to controlling weight as the miner's treating physician pursuant to 20 C.F.R. §718.104(d).

In light of our affirmance of the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718, *see Trent*, 11 BLR at 1-27, as well as her finding that claimant did not establish invocation of the Section 411(c)(4) presumption.[9] 30 U.S.C. §921(c)(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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[9] Because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), he is precluded from invoking the Section 411(c)(4) presumption. 30 US.C. §921(c)(4). Consequently, we decline to address claimant's contention that the administrative law judge erred in not crediting claimant with the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278