BRB No. 11-0718 BLA

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| WILLIAM RAYMOND REINER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 07/25/2012 |
| | ) | |
| Respondent | ) | DECISION and ORDER |

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

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (09-BLA-5640) of Administrative Law Judge Ralph A. Romano on a claim[1] 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that

[1] Claimant, William Raymond Reiner, filed his application for benefits on July 30, 2008. Director's Exhibit 2.

therefore, claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to render a length of coal mine employment determination. In addition, claimant challenges the administrative law judge's weighing of the pulmonary function study evidence and medical opinion evidence in finding that claimant failed to establish total respiratory disability under Section 718.204(b)(2)(i) and (iv). In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits.[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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the

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[2] Relevant to this living miner's claim, under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, 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, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] We affirm the administrative law judge's determinations that total disability was not established 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. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7.

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

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Initially, claimant argues that the administrative law judge erred in failing to render a specific length of coal mine employment determination. Claimant acknowledges the Director's concession that he worked in qualifying coal mine employment for a period of eighteen years, but argues that the evidence of record, namely claimant's Social Security earnings records and testimony from the formal hearing, demonstrates a duration that exceeds twenty-one years.[5] Claimant has not explained how this omission has prejudiced his case. Although the administrative law judge did not render an independent assessment of the length of claimant's coal mine employment, he determined that the provisions of amended Section 411(c)(4) are applicable to this claim because it was filed after January 1, 2005, and it was pending on or after March 23, 2010. Decision and Order at 3. As claimant has failed to demonstrate any error resulting from the administrative law judge's omission, any error in the administrative law judge's failure to determine claimant's length of coal mine employment from the record evidence is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant next challenges the administrative law judge's weighing of the pulmonary function study evidence of record in finding that it was insufficient to establish total respiratory disability at Section 718.204(b)(2)(i). Claimant maintains that the administrative law judge erred in finding that the non-qualifying pulmonary function study obtained by Dr. Dittman on October 17, 2008 was valid, despite Dr. Kraynak's invalidation of the test. Claimant also asserts that the administrative law judge erred in finding that the qualifying pulmonary function study obtained by Dr. Kraynak on September 25, 2009 was invalid, based on his crediting of Dr. Spagnolo's invalidation of the test over the validations provided by Drs. Kraynak and Similaro.[6] Claimant's Brief at 3-5. Some of claimant's arguments have merit.

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[5] At the hearing, the Director, Office of Workers' Compensation Programs, conceded that claimant worked in qualifying coal mine employment for eighteen years. Hearing Transcript at 10-11; Director's Response Brief at 3 n.1.

[6] Claimant does not challenge the administrative law judge's finding that the qualifying pulmonary function study obtained by Dr. Kraynak on February 27, 2009 was invalid. Decision and Order at 5-6; Director's Exhibits 16, 29; Claimant's Exhibit 5.

In assessing the probative value of the non-qualifying October 17, 2008 pulmonary function study, the administrative law judge acknowledged the regulatory requirement that "[a] calibration check shall be performed on the instrument each day before use," 20 C.F.R. Part 718, Appendix B(2)(iv), and noted that Dr. Dittman did not indicate the date on which the instrument had been calibrated most recently. Although Dr. Kraynak opined that this test was invalid because the spirometer was not calibrated and produced abnormally high values,[7] the administrative law judge recognized that compliance with the requirements of Appendix B is presumed in the absence of evidence to the contrary, and concluded that Dr. Dittman's failure to indicate the date of calibration was not tantamount to an actual failure to calibrate the spirometer in accordance with the regulatory mandate.[8] Decision and Order at 5-6; 20 C.F.R. §718.103(c). The administrative law judge also found that Dr. Kraynak's opinion, that the study was invalid because the results were too high, was conclusory and unpersuasive because Dr. Kraynak did not explain "how the high results were brought about," nor did he describe "any portion of the test that inaccurately led to those high results." Decision and Order at 6; Claimant's Exhibit 4; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). As claimant has not demonstrated an abuse of the administrative law judge's discretion, we affirm the administrative law judge's finding that the October 17, 2008 non-qualifying pulmonary function study was valid.

With regard to the qualifying pulmonary function study of September 24, 2009, however, we agree with claimant's argument that the administrative law judge provided invalid reasons for discounting the validations of this study by Drs. Similaro and Kraynak. In evaluating the credibility of the conflicting opinions regarding the study's validity, the administrative law judge acknowledged that the eight reasons listed by Dr.

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[7] Dr. Kraynak reviewed Dr. Dittman's October 17, 2008 pulmonary function study, Director's Exhibit 14, and testified that it was invalid because it was not conducted on a "calibrated apparatus," in violation of the regulatory mandate that the spirometer be calibrated prior to testing. Claimant's Exhibit 4 at 8-10. Based on his finding that the values reflected a pre-bronchodilator $FEV_1$ that was 145% of predicted, a post-bronchodilator $FEV_1$ that was 144% of predicted, a pre-bronchodilator FVC that was 119% of predicted, a post-bronchodilator FVC that was 120% of predicted, and an MVV that was 95% of predicted, Dr. Kraynak postulated that "two healthy people collectively couldn't produce values jointly this high," which "bolster[s] my statement that the study is grossly invalid." Claimant's Exhibit 4 at 9.

[8] Dr. Dittman noted good cooperation and understanding of the directions, and concluded that claimant's pulmonary function study results were normal. Director's Exhibit 14; Decision and Order at 5.

Spagnolo to support his finding that the study was invalid[9] were identical to the reasons he provided for invalidating the September 24, 2009 pulmonary function study. Decision and Order at 7; Director's Exhibits 28, 29. The administrative law judge took "one slight issue" with Dr. Spagnolo's incorrect notation that "predicted values are not referenced," but determined that the physician's opinion was well-reasoned and entitled to the most weight, "in that [Dr. Spagnolo] still provides seven other reasons for the study being invalid." *Id.* By contrast, the administrative law judge found that the validation opinions of Drs. Simelaro and Kraynak were not well-reasoned and were entitled to less weight because Dr. Simelaro "provided no reasoning on why he considered the tests to be valid," and Dr. Kraynak "did not address the defects in the study that were pointed out by Dr. Spagnolo." Decision and Order at 7. A review of Dr. Simelaro's validation report reveals that he checked a box indicating that the "Vents are acceptable," Claimant's Exhibit 2, on a duplicate of the standard pre-printed form used by the Department of Labor for an expert's review of pulmonary function studies and blood gas studies. Such a form requires an explanation for finding that a given test is invalid, but does not require an explanation in the event that the physician indicates that the test is valid. Consequently, because it was not incumbent upon Dr. Simelaro to explain why he found that the September 24, 2009 pulmonary function test was valid, we cannot affirm the administrative law judge's determination that Dr. Simelaro's opinion was not well-reasoned. The administrative law judge's treatment of Dr. Kraynak's validation is, likewise, problematic. At his deposition on January 8, 2010, Dr. Kraynak testified that the pulmonary function study he administered on September 24, 2009 was valid. Claimant's Exhibit 4 at 13. Because Dr. Spagnolo did not render his report until January 30, 2010, *see* Director's Exhibit 28, Dr. Kraynak was unaware of the deficiencies noted by Dr. Spagnolo and, thus, could not address them. As the administrative law judge's findings must be supported by the record, we vacate his weighing of the relevant evidence under Section 718.204(b)(2)(i). *See* 30 U.S.C. §932(a), 20 C.F.R. §802.301(a); *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1, 2-8 (3d Cir. 1986).

On remand, the administrative law judge must reassess the opinions of Drs. Simelaro, Kraynak and Spagnolo with regard to the validity of the September 24, 2009 pulmonary function study; consider the documentation underlying each physician's

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[9] Dr. Spagnolo found that the September 24, 2009 pulmonary function study was not acceptable due to the following: unsatisfactory FVC and $FEV_1$ maneuvers; a cough with hesitation and cessation of flow on the inspiratory and expiratory portions of the flow/volume loop; a space between inspiration and expiration on the flow volume loop; tracings are outside of the graphic display; flow/volume tracings suggest that total lung capacity was not achieved during the trials; predicted values were not referenced; and inconsistent effort that rendered all FVC and $FEV_1$ values unreliable and irreproducible. Director's Exhibit 28.

conclusions; and fully explain his rationale in determining whether each physician's opinion is well-reasoned and credible. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Moreover, the administrative law judge must evaluate the validity of the study in light of the controlling law of the United States Court of Appeals for the Third Circuit, as enunciated in *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987), and further explained in *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990), requiring the administrative law judge to determine whether a pulmonary function study is in substantial compliance with the quality standards at 20 C.F.R. §718.103. If a pulmonary function study is in substantial compliance with the quality standards, the administrative law judge must determine whether an invalidation report has demonstrated that the study is not credible evidence of claimant's pulmonary function. The administrative law judge must then weigh the valid pulmonary function studies of record to determine whether the evidence is sufficient to establish total respiratory disability under Section 718.204(b)(2)(i).

Because the administrative law judge's findings with regard to the pulmonary function study evidence pursuant to Section 718.204(b)(2)(i) influenced his credibility determinations with regard to the medical opinions of record, *see* Decision and Order at 9-10, we must also vacate his finding that the medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). On remand, in reassessing the probative weight of the conflicting medical opinions, the administrative law judge is directed to reconsider whether Dr. Kraynak is entitled to treating physician status in light of the factors set forth at 20 C.F.R. §718.104(d).[10] After considering the pulmonary function study evidence and medical opinion evidence separately at Section 718.204(b)(2)(i) and (iv) to determine whether it demonstrates total respiratory disability, the administrative law judge must consider whether the record evidence, when weighed together, establishes total respiratory disability at Section 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). If, on remand, the administrative law judge finds that claimant has established total respiratory disability and is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he must then determine whether employer has established rebuttal by proving

[10] Claimant maintains that the administrative law judge's failure to grant Dr. Kraynak treating physician status is without basis in the record, as Dr. Kraynak testified at his deposition on January 8, 2010 that he had been treating claimant since February of 2009, a period of almost a year, and that he performed multiple physical examinations of claimant, administered diagnostic testing, reviewed claimant's social, occupational and medical histories, and prescribed breathing medications. Claimant's Brief at 5-6; Claimant's Exhibit 4.

that claimant does not have either clinical or legal pneumoconiosis, or that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment.

Accordingly, the Decision and Order of the administrative law judge 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge