BRB No. 99-0983 BLA

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| HERBERT H. KRAUSE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
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| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order - Awarding Benefits on Modification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits on Modification (98-BLA-0326) of Administrative Law Judge Paul H. Teitler on a claim[1] filed pursuant to the provisions of Title IV of the

[1] Claimant, Herbert H. Krause, filed his first application for benefits on October 30, 1991. Director's Exhibit 14. After a formal hearing held on December 2, 1992, the administrative law judge issued a Decision and Order denying benefits on September 8, 1993. Director's Exhibit 14. Thereafter, claimant submitted a petition for modification on May 12, 1994, which the district director denied on December 28, 1994. Director's Exhibit 14. On May 10, 1995, however, the administrative law judge granted claimant's request to withdraw his claim. Director's Exhibit 14. Claimant subsequently filed a new claim on May

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant established seven years of qualifying coal mine employment. The administrative law judge considered claimant's May 1997 claim as a duplicate claim in accordance with 20 C.F.R. §725.309(d) and determined that, because claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b),[2] claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d).[3] Subsequently, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded.

On appeal, the Director challenges the administrative law judge's weighing of the pulmonary function study evidence and argues that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(1). Claimant responds, urging affirmance of the award.[4]

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7, 1997, which is the subject of the instant case. Director's Exhibit 1.

[2] The Director previously conceded the existence of pneumoconiosis in this case. *See* Director's Exhibit 14.

[3] Although the administrative law judge erroneously applied pertinent case law regarding the standard for establishing a change in conditions for modification under 20 C.F.R. §725.310, Decision and Order at 4, he treated claimant's May 1997 claim as a duplicate claim pursuant to 20 C.F.R. §725.309(d), Decision and Order at 3.

[4] We affirm the administrative law judge's findings pursuant to 20 C.F.R.

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

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§§718.203(b) 718.204(c)(2), (c)(3), and 718.204(b) inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5, 9, 11-12.

With respect to Section 718.204(c)(1), the Director argues that the administrative law judge's refusal to accept the invalidation reports of Drs. Levinson and Sahillioglu because their reports[5] were inadequately explained was irrational. The Director argues further that the administrative law judge failed to consider these physicians' superior pulmonary expertise inasmuch as Dr. Levinson is Board-certified in internal and pulmonary medicine and Dr. Sahillioglu is Board-eligible in internal and pulmonary medicine. The Director's contentions are without merit. The administrative law judge, within a proper exercise of his discretion, accorded the opinions of Drs. Levinson and Sahillioglu invalidating the two qualifying pulmonary function studies[6] of record[7] little weight because they were not well reasoned. *See Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). Specifically, the administrative law judge permissibly accorded less weight to Dr. Levinson's invalidation opinion because Dr. Levinson failed to explain his conclusion that claimant did not exert maximal effort on the FVC and MVV's, when the administering technician noted that claimant's effort and cooperation were "good." *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); Decision and Order at 8; Director's Exhibits 3, 9. Similarly, the administrative law judge reasonably accorded little weight to Dr. Sahillioglu's invalidation opinion because Dr. Sahillioglu did not explain why he found inconsistent effort, when Dr. Kraynak, who reviewed this pulmonary function study, opined that the tracings showed good effort and varied by less than the requisite percentages listed in the regulations. *See* 20 C.F.R. Part 718, App. B (2)(iii)(A), (B); Decision and Order at 8. Furthermore, contrary to the Director's contention, the administrative law judge is not automatically required to defer to the opinions

[5] Dr. Levinson invalidated the July 22, 1997 pulmonary function study, which yielded qualifying values, because the entire FVC curves were not displayed, maximal effort was not used throughout the FVC attempt, and poor effort was used during the MVV's. Director's Exhibit 3. Dr. Sahillioglu opined that the March 17, 1998 pulmonary function study, which yielded qualifying values, was invalid due to less than optimal effort, cooperation and comprehension because of inconsistent effort on the FVC's and MVV's. Director's Exhibit 19.

[6] A "qualifying" pulmonary function 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, Appendix B. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(c)(1).

[7] There are six pulmonary function studies of record. The tests conducted on July 22, 1997 and March 17, 1998 yielded qualifying values and the studies conducted on December 18, 1991, March 2, 1994, December 8, 1994, and March 3, 1998 yielded non-qualifying values. Director's Exhibits 3, 17; Claimant's Exhibit 7.

of physicians with greater pulmonary expertise, especially, where, as here, he finds their opinions unreasoned. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Siegel, supra*. We, therefore, affirm the administrative law judge's determination to accord less weight to the invalidation opinions of Drs. Levinson and Sahillioglu inasmuch as his determination that Drs. Levinson and Sahillioglu did not fully explain their conclusions was rational and supported by substantial evidence. *See Alexander, supra*; *Siegel, supra*; *Burich, supra*.

The Director next argues that the administrative law judge erred by crediting Dr. Kraynak's invalidation of the March 3, 1998 non-qualifying pulmonary function study on the basis that these values were "unbelievab[ly] high" and "unobtainable even by Olympic athletes,"[8] in light of the fact that these test results were consistent with those obtained on the 1991 and 1994 tests, which the administrative law judge failed to consider. Claimant's Exhibit 15 at 11-12; Director's Exhibit 17. This argument has merit. In his summary of the previously submitted pulmonary function study evidence, the administrative law judge did not list two non-qualifying pulmonary function studies dated March 2, 1994 and December 8, 1994. Decision and Order at 7; Director's Exhibit 14. Inasmuch as the Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence when making findings of fact and conclusions of law, *see* 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), we vacate the administrative law judge's finding under Section 718.204(c)(1) and remand the case for him to reconsider and reweigh all of the pulmonary function study evidence in accordance with *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23 (1993).

[8] In his invalidation report, Dr. Kraynak opined that the March 3, 1998 pulmonary function study is "clearly suspect" due to the "unbelievable high values." Claimant's Exhibit 16; Director's Exhibit 17. Additionally, Dr. Kraynak testified, during his deposition, that these values were unreliable because notations appear throughout the study indicating that claimant was gagging, unable to complete FVC maneuver, and took the mouthpiece out. Claimant's Exhibit 15 at 11-12.

Relevant to Section 718.204(c)(4), the Director argues that the administrative law judge's discrediting of Dr. Ahluwalia's opinion, that claimant is not totally disabled, because Dr. Ahluwalia relied on an unreliable pulmonary function study must also be vacated. We agree. The administrative law judge discounted Dr. Ahluwalia's opinion because the physician relied on the non-qualifying March 3, 1998 pulmonary function study that the administrative law judge found to be unreliable. Decision and Order at 11; Director's Exhibits 16, 20. Similarly, the administrative law judge credited Dr. Kraynak's opinion that claimant is totally disabled because it was supported by the pulmonary function study evidence of record. Decision and Order at 11; Claimant's Exhibit 15. In light of our decision to vacate the administrative law judge's Section 718.204(c)(1) determination, we therefore vacate his Section 718.204(c)(4) determination inasmuch as the administrative law judge's reweighing of the pulmonary function study on remand may affect the relative credibility of his medical opinion analysis. *See* 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987).

Consequently we vacate the administrative law judge's determination that claimant failed to demonstrate total disability under Section 718.204(c)(1) and (4), and remand the case for the administrative law judge to reconsider all relevant evidence of record. If, on remand, the administrative law judge finds that claimant affirmatively established total disability under either subsection, he must then determine whether the contrary, probative evidence, if any, outweighs the evidence supportive of a finding of total respiratory disability. *See Fields*, *supra*; *Shedlock*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

Accordingly, the Decision and Order - Awarding Benefits on Modification of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.[9]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[9] The Director notes that the administrative law judge committed harmless error by considering claimant's May 1997 claim subject to the duplicate claims provision under Section 725.309(d). Decision and Order at 3. As the Director states, however, because claimant withdrew his earlier October 1991 claim, the 1991 claim has no legal or procedural significance. We agree. *See Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 16 BLR 2-9 (4th Cir. 1992). Inasmuch as this error is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), and does not affect the disposition of this case, we decline the Director's request to instruct the administrative law judge to correct this error on remand.