BRB No. 00-0786 BLA

DOMENICK C. NATALE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: _____
INTERNATIONAL ANTHRACITE CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-BLA-1244) of Administrative Law Judge Robert D. Kaplan rendered 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).[1] Claimant's initial application for benefits filed on January 13, 1984 was denied by the administrative law judge on March 14, 1991, because he found that although claimant had pneumoconiosis arising out of coal mine employment, the evidence did not establish that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 22. The Board affirmed the administrative law judge's decision on August 21, 1992. *Id*. On February 17, 1999, claimant filed the current claim, which is a duplicate claim because it was filed more than one year after the previous denial.[2] Director's Exhibit 1; 20 C.F.R. §725.309(d)(2000). The Office of Workers' Compensation denied the claim and claimant requested a hearing, which was held on February 15, 2000.

The administrative law judge credited claimant with nineteen and one-quarter years of coal mine employment pursuant to the parties' stipulation, and found that the medical evidence developed since the prior denial did not establish the presence of a totally disabling respiratory or pulmonary impairment. Consequently, the administrative law judge concluded that the new medical evidence did not establish a material change in conditions as required by 20 C.F.R. §725.309(d)(2000), and he therefore denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the new pulmonary function studies and medical opinions when he found that total disability was not established. Employer has filed a response brief urging affirmance, which the Board hereby accepts as part of the record. The Director, Office of

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a citation to the regulations is followed by "(2000)," the reference is to the old regulations.

[2] Claimant filed a second claim on October 13, 1994, but withdrew that claim on January 24, 1996. Director's Exhibit 22. Thus, his second claim is considered not to have been filed. 20 C.F.R. §725.306(b).

Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which all parties have responded. The parties agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed with the adjudication of this appeal.

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

To be entitled 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, and the subsequent claim is filed prior to January 20, 2001, 20 C.F.R. §725.2(c), the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least

[3] We affirm as unchallenged on appeal the administrative law judge's finding of nineteen and one-quarter years of coal mine employment, and his findings that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §§718.204(c)(2), (3)(2000). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318, 20 BLR 2-76, 2-96 (3d Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.*

Claimant's prior claim was denied because the record did not establish the presence of a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge properly considered whether the evidence developed since the prior denial established total disability.

Pursuant to 20 C.F.R. §718.204(c)(1)(2000),[4] the administrative law judge found that the four new pulmonary function studies of record did not establish total disability. Of the four studies, one yielded qualifying[5] values and three were non-qualifying. Director's Exhibit 5; Claimant's Exhibits 3, 16; Employer's Exhibit 1. The physicians disagreed as to the technical validity of three of these studies.

On the April 1, 1999 pulmonary function study administered during Dr. Abdul Rashid's examination, claimant's comprehension and cooperation were recorded as "Good." Director's Exhibit 5. Dr. Rashid, who is Board-certified in Internal Medicine, interpreted this non-qualifying study as "Normal." Director's Exhibit 6 at 3. Subsequently, Dr. Sander Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed this study's tracings and concluded that it was a valid pulmonary function study. Employer's Exhibit 6. Thereafter, Dr. Raymond J. Kraynak, who is Board-eligible in Family Medicine and who is claimant's treating physician, testified that the study was invalid because the tracings were "erratic," and because it would be "impossible" for claimant to "blow 145 percent of predicted." Claimant's Exhibit 25 at 16.

Claimant contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as 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), because he did not explain why he credited the opinions of Drs. Levinson and Rashid. Contrary to claimant's contention, however, the administrative law judge explained that "[b]ased

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[4] The regulation applied by the administrative law judge, Section 718.204, has been restructured. The methods of establishing disability cited by the administrative law judge at 20 C.F.R. §718.204(c)(1)-(4)(2000) are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv).

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

upon the superior qualifications of Drs. Levinson and Rashid, I find that their opinions that the study is valid outweigh the contrary opinion of Dr. Kraynak." Decision and Order at 5. The administrative law judge's finding is not only sufficiently explained under the APA, *see Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000)(*en banc*), it is a permissible finding supported by substantial evidence. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*). Claimant's contention that the administrative law judge mischaracterized Dr. Rashid's opinion in this regard lacks merit. The administrative law judge rationally inferred that Dr. Rashid viewed the April 1, 1999 pulmonary function study as a valid test, since Dr. Rashid interpreted the study without expressing any reservations as to its validity. Director's Exhibit 5. Accordingly, we affirm the administrative law judge's finding that the April 1, 1999, non-qualifying pulmonary function study is a valid, conforming study.

On the July 1, 1999 pulmonary function study administered during Dr. Levinson's examination, claimant's cooperation and comprehension were recorded as "Fair." Employer's Exhibit 1. Upon review of this non-qualifying study's tracings, Drs. Levinson, Kraynak, Michael A. Venditto, and John P. Simelaro agreed that the study was invalid. Claimant's Exhibits 21, 23, 25; Employer's Exhibit 6. Neither claimant nor employer challenges the administrative law judge's finding that the July 1, 1999, non-qualifying study is invalid.

On the October 13, 1999 pulmonary function study administered by Dr. J. Cable at the Good Samaritan Regional Medical Center, claimant's comprehension and effort were recorded as "good." Claimant's Exhibit 16. Upon review of this non-qualifying study's tracings, Dr. Levinson concluded that it was a valid pulmonary function study. Employer's Exhibit 6. The administrative law judge also considered Dr. Kraynak's view that the October 13, 1999 study was invalid because the tracings showed "excessive variability," Claimant's Exhibit 25 at 39, but permissibly found that Dr. Levinson's opinion outweighed that of Dr. Kraynak "based upon the superior qualifications of Dr. Levinson." Decision and Order at 6; *see Clark, supra*.

We find no merit in claimant's contention that the administrative law judge erred in considering Dr. Levinson's deposition testimony regarding the validity of the October 13, 1999 pulmonary function study. Employer's Exhibit 4. Contrary to claimant's contention, the administrative law judge did not exclude from the record all of Dr. Levinson's deposition testimony, but rather, excluded Levinson's testimony solely "with respect to his ultimate opinions regarding [c]laimant's disability and disability causation. . . ." Decision and Order at 7 n.4 (Granting claimant's motion to strike Dr. Levinson's testimony "to the extent that he reviewed or relied on any records from March 12, 1984 through 1995," which were not provided to claimant. Claimant's Letter, Mar. 16, 2000). Moreover, Dr. Levinson's deposition testimony regarding the validity of the pulmonary function studies merely reiterated the opinions already set forth in his written report dated

December 29, 1999, which the administrative law judge also considered. Employer's Exhibit 6. Consequently, we affirm the administrative law judge's finding that the October 13, 1999, non-qualifying pulmonary function study is valid.

Finally, on the October 21, 1999 pulmonary function study administered by Dr. Kraynak, claimant's comprehension, cooperation, and effort were recorded as good. Claimant's Exhibit 3. Dr. Kraynak interpreted this qualifying study as demonstrating a severe airflow defect. *Id*. Upon review of the tracings, Dr. Levinson concluded that this study was invalid because it was improperly performed. Employer's Exhibit 6. Dr. Levinson detected "evidence of exhalation occurring before the zero point . . . so that the results reported . . . do not represent the true and complete capacities" of claimant. *Id*. Dr. Levinson also noted that this study was "out of line" with the studies done on April 1, July 1, and October 13, 1999. *Id*. Dr. Kraynak responded that his review of the tracings revealed that the starting point of exhalation occurred on the zero point, and stated that the other pulmonary function study values were irrelevant to the validity of this study. Claimant's Exhibits 19, 25 at 10-11. Subsequently, Dr. David S. Prince, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the tracings and reported that the study was valid. Claimant's Exhibit 26.

The administrative law judge considered all of this evidence and, contrary to claimant's contention, permissibly questioned the qualifying values of the October 21, 1999 pulmonary function study because they were disparately low compared to the non-qualifying values obtained on the April 1, July 1, and October 13, 1999 studies. Decision and Order at 6; *see Baker v. North American Coal Corp*., 7 BLR 1-79, 1-80 (1984). Finding "substantial doubt" as to "the validity of the qualifying test results" on this basis, the administrative law judge also reasonably deferred to Dr. Levinson's opinion that the test had been improperly performed.[6] *Id*.; *see* 20 C.F.R. §718.103(c)(2000); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987). Therefore, we affirm the administrative law judge's finding that the October 21, 1999, qualifying pulmonary function study is not a valid objective test. Consequently, we also affirm the administrative law judge's finding that "there is no valid[,] qualifying pulmonary function study" to establish total disability. Decision and Order at 9.

Pursuant to 20 C.F.R. §718.204(c)(4)(2000), the administrative law judge found that the new medical opinions did not establish that claimant is totally disabled. The administrative law judge deferred to the opinion of Dr. Rashid, who examined and tested claimant and concluded that he has no respiratory or pulmonary impairment. Decision

[6] Claimant argues that Dr. Prince possesses equivalent credentials, but Dr. Prince did not discuss the "zero point" issue; he merely checked a box indicating that the study was acceptable. Claimant's Exhibit 26.

and Order at 9; Director's Exhibit 6. Claimant argues that the administrative law judge did not accord proper weight to the contrary opinions of the miner's treating physicians, Dr. Kraynak and Dr. Marlene Terlingo.[7] Claimant's Brief at 17-19; Claimant's Exhibits 14, 15, 25.

An administrative law judge may, but is not required to, accord greater weight to a treating physician's opinion. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Berta v. Peabody Coal Co*., 16 BLR 1-69, 1-70 (1992). Here, the administrative law judge considered the treating status of Drs. Terlingo and Kraynak, but permissibly accorded greater weight to Dr. Rashid's opinion based upon Dr. Rashid's superior qualifications in Internal Medicine, *see Clark, supra*, and because the administrative law judge found within his discretion that Dr. Rashid's opinion was better supported by the valid, non-qualifying objective data.[8] Decision and Order at 9; *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the administrative law judge's permissible credibility determination. Therefore, we affirm the administrative law judge's finding that the new medical opinions did not establish total disability.

Because substantial evidence supports the administrative law judge's finding that the new evidence did not establish total disability, we affirm the administrative law judge's finding that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d)(2000) and that benefits must therefore be denied. *See Swarrow, supra*.

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[7] Dr. Kraynak opined that claimant is totally disabled by a severe respiratory impairment. Claimant's Exhibits 14, 25. Dr. Terlingo, who is Board-certified in Family Medicine, concluded, based on an examination, chest x-ray, and pulmonary function study, that claimant "has black lung and his activities are severely limited." Claimant's Exhibit 15. The administrative law judge interpreted Dr. Terlingo's opinion as a diagnosis of a totally disabling respiratory impairment. Decision and Order at 9.

[8] Because Dr. Rashid interpreted the blood gas study he administered as "Normal," Director's Exhibit 6 at 3, and that study was non-qualifying, we reject claimant's contention that the blood gas study data did not support Dr. Rashid's opinion. Claimant's Brief at 24. In addition, because Dr. Rashid concluded that claimant has no respiratory or pulmonary impairment at all, there was no need for the administrative law judge to determine whether Dr. Rashid knew the physical requirements of claimant's job duties before crediting Dr. Rashid's opinion. Claimant's Brief at 17; *see Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge