BRB No. 02-0675 BLA

JOSEPH J. BLAZINA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:_____
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	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.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Denying Benefits (01-BLA-1086) of Administrative Law Judge Robert D. Kaplan rendered on claimant's request for modification 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]

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the

Claimant filed his first application for benefits on June 10, 1988. Director's Exhibit 23. Claimant took no further action on this claim after the final denial by the district director on December 6, 1988, based on the fact that claimant had failed to establish any element of entitlement. *Ibid*. Claimant subsequently filed a duplicate application for benefits on September 25, 1997, which was denied by Administrative Law Judge Ralph A. Romano on March 23, 1999, because claimant failed to establish total disability and total disability due to pneumoconiosis although he had established a material change in conditions and the existence of pneumoconiosis arising out of coal mine employment. Director's Exhibit 44. Subsequently, claimant filed a petition for modification with supporting evidence on July 19, 1999. Director's Exhibit 45. Administrative Law Judge Robert D. Kaplan denied benefits on modification in a Decision and Order issued on August 17, 2000. Director's Exhibit 76. Claimant filed another petition for modification with supporting evidence on April 27, 2001. Director's Exhibit 77. Subsequent to a formal hearing on January 9, 2002, Administrative Law Judge Kaplan again denied modification. This Decision and Order is the subject of the instant appeal. In this request for modification, the administrative law judge found that the parties stipulated that claimant worked in qualifying coal mine employment for five and one-half years and that claimant failed to establish a basis for modification of the denial of his claim, because he failed to establish total disability or causation, elements previously adjudicated against him. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that the pulmonary function study and medical opinion evidence demonstrated the presence of total respiratory disability, in failing to discuss all the medical evidence of record when determining whether a mistake in a determination of fact was established, and in selectively analyzing the medical opinions of record. The Director, Office of Workers' Compensation Programs (the Director), responds, filing a Motion to Remand[2] the case to the administrative law judge, because he agrees with claimant's argument that the administrative law judge erred in weighing the pulmonary function study evidence.[3]

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amended regulations.

[2] The Board considers the Director's Motion to Remand to be his response brief and accepts such as part of the record. 20 C.F.R. §802.212.

[3] We affirm the administrative law judge's determinations regarding the length of coal mine employment and pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii) as these determinations 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 2, 8.

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).

Claimant first argues that the administrative law judge mischaracterized the pulmonary function study evidence when he found that Drs. Simelaro and Venditto reported that the values on the October 11, 2001 pulmonary function study were acceptable when, in fact, both physicians clearly indicated that the values were "not acceptable." Claimant's Exhibits 17, 18.[4] Therefore, claimant urges that, because the administrative law judge relied on this invalidated, nonconforming pulmonary function study as the "most reliable indicator of the [c]laimant's current lung function," the claim must be remanded to the administrative law judge for a proper review of this study and the other pulmonary function study evidence. Decision and Order at 7. The Director agrees with claimant, asserting, "the judge mistakenly reported that Drs. Simelaro and Verditto [sic] found the October 11, 2001 qualifying study to be 'acceptable'," when "[i]n truth, the doctors found the study not acceptable." Director's Motion to Remand at 1-2 [emphasis in original]. Hence, the Director contends that the administrative law judge's mischaracterization of evidence relevant to this study, which the administrative law judge relied on, requires that the case be remanded. Yet the Director also maintains that ultimately the pulmonary function study evidence is still insufficient to demonstrate total respiratory disability under Section 718.204(b)(2)(i).

Under the summary of the newly submitted pulmonary function study

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[4] A review of the record reveals five newly submitted pulmonary function studies consisting of four qualifying tests and one non-qualifying test. The pulmonary function study dated March 8, 2001 yielded qualifying values and was validated by Drs. Prince and Kraynak and invalidated by Dr. Michos. Director's Exhibits 77, 78; Claimant's Exhibits 5, 6. The pulmonary function study dated May 29, 2001 yielded qualifying values and Drs. Prince, Venditto, Simelaro, and Kraynak validated this test while Dr. Michos invalidated it. Director's Exhibit 93; Claimant's Exhibits 1, 2, 8, 21, 22. The sole non-qualifying pulmonary function study is dated October 11, 2001and was invalidated by Drs. Venditto and Simelaro. Director's Exhibit 88; Claimant's Exhibits 17, 18. The most recent test taken on October 22, 2001 was qualifying and validated by Dr. Kraynak and invalidated by Dr. Sherman. Director's Exhibit 95; Claimant's Exhibits 4, 9.

evidence, the administrative law judge listed the results of each test and summarized the opinions of consulting physicians who either validated and invalidated the studies. With respect to the opinions of the consulting physicians who reviewed the October 11, 2001 non-qualifying pulmonary function study, the administrative law judge found that even though Drs. Simelaro and Venditto each noted that there was an excess of "100 cc variation in FEV[1]," both physicians opined that the values on this test were "acceptable." Decision and Order at 7.

A review of the reports of Drs. Simelaro and Venditto, which are both dated December 18, 2001, however, reveals that Drs. Simelaro and Venditto opined that the October 11, 2001 pulmonary function study values were "not acceptable." Claimant's Exhibits 17, 18. Furthermore, there is no physician's opinion of record opining that this test is valid.[5] Because the administrative law judge mischaracterized the opinions of the consulting physicians, Drs. Simelaro and Venditto, by finding that the physicians reported that the values on the October 11, 2001 pulmonary function study were "acceptable" when both physicians had, in fact, reached contrary conclusions, we must vacate the administrative law judge's finding that this study was the most reliable indicator of claimant's current lung function and that the pulmonary function study evidence failed to establish total disability under Section 718.204(b)(2)(i), *see Prater v. Director, OWCP,* 8 BLR 1-461, 1-462 (1986) (administrative law judge improperly evaluated pulmonary function study evidence requiring remand for reweighing); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985), and remand the case for further consideration of the pulmonary function study evidence.

Claimant also argues that the administrative law judge failed to comply with his duty under 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), by limiting his discussion of the pulmonary function study evidence to the non-qualifying October 11, 2001 test, but failed to provide a complete analysis and discussion of all the other qualifying pulmonary function studies and consulting physicians' opinions regarding the validity of these studies.

In his analysis of the pulmonary function study evidence, the administrative law judge cited *Andruscavage v. Director, OWCP*, No. 93-3291, slip op. at 9-10 (3d Cir., Feb. 22, 1994)("medical literature supports…the conclusion that [pulmonary function studies] which return disparately higher values tend to be more reliable indicators of an individual's respiratory capacity than those with

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[5] Dr. Green, the physician who performed this study noted that claimant's effort and cooperation were only "fair" and that claimant demonstrated poor effort on the MVV portion of the study. Director's Exhibits 88, 91.

lower values"), and concluded that because the October 11, 2001 pulmonary function study was the most recent test that produced non-qualifying values, it was "the most reliable indicator of Claimant's current lung function." Decision and Order at 7. The administrative law judge noted that this was especially true since all of the pulmonary function studies, which were performed within a ten month period, were "practically contemporaneous," and the two studies performed shortly following the October 11, 2001 test, dated October 22, 2001 and November 15, 2001, which produced lower values, were invalidated by Dr. Sherman, whose credentials outweighed those of Dr. Kraynak, who validated the test results. The administrative law judge also found Dr. Sherman's reports to be better reasoned and more detailed. Decision and Order at 8. Absent from the discussion section of the administrative law judge's Decision and Order, however, is any discussion of the two qualifying pulmonary function studies taken on March 8, 2001 and May 29, 2001 and the opinions of Drs. Kraynak, Prince, Michos, Venditto, and Simelaro, who reviewed these tests and rendered opinions as to their validity. Decision and Order at 7-8; Director's Exhibits 77, 78, 93; Claimant's Exhibits 1, 2, 5, 6, 8, 21, 22.

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a chief, cogent, reason why an administrative decision should be accompanied by a clear and satisfactory explication of the basis on which it rests is the need for the appellate court to perform its statutory function of judicial review. When a satisfactory explanation from the administrative law judge as to the degree of consideration accorded to probative evidence in support of a claim is absent, a reviewing court cannot determine whether the administrative law judge simply disregarded significant evidence or reasonably chose not to credit it. *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356, 21 BLR 2-83, 2-90-91 (3d Cir. 1997). In light of our decision to vacate the administrative law judge's Section 718.204(b)(2)(i) determination because the administrative law judge mischaracterized evidence concerning the validity of claimant's October 11, 2001, pulmonary function study, we also instruct the administrative law judge to weigh all of the newly submitted pulmonary function studies, determine their probative value and the weight assigned to them, and clearly state why he credits or discredits specific evidence in reaching his findings and conclusions in compliance with the requirements of the APA. *See Marx v. Director, OWCP*, 870 F.2d 114, 119, 12 BLR 2-199, 2-207 (3d Cir. 1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Similarly, claimant argues that, while the administrative law judge compared the medical credentials of Dr. Sherman to those of Dr. Kraynak in determining that Dr. Sherman's invalidation of the October 22, 2001 and November 15, 2001 pulmonary function studies outweighed Dr. Kraynak's

validation of these tests, the administrative law judge failed to compare the medical qualifications of Drs. Prince, Venditto, and Simelaro to those of the Director's consultants.

The administrative law judge determined that the opinion of Dr. Sherman, that the October 22, 2001 and November 15, 2001 pulmonary function studies were invalid due to significant variation in expiratory efforts as demonstrated by the FEV[1] values, irregularity in the volume time curves and flow volume loops, and uneven effort during the tests, was entitled to greater weight than the opinion of Dr. Kraynak validating these studies because Dr. Sherman possessed superior medical expertise and rendered detailed and better reasoned opinions. Director's Exhibits 95, 101; Claimant's Exhibits 9, 23. Accordingly, claimant is correct that the administrative law judge limited his evaluation of demonstrated medical expertise to only Dr. Sherman and Kraynak in his assessment of the pulmonary function study evidence, and therefore, on remand the administrative law judge should compare the medical qualifications of all the administering and consulting physicians in determining the probative value of each physician's opinion and the relative credibility of the corresponding pulmonary function test. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Alexander v. Island Creek Coal Co.,* 12 BLR 1-44, 1-47 (1988); *Burich v. Jones and Laughlin Steel Corp.,* 6 BLR 1-1189, 1-1191 (1984); Decision and Order at 8.

Next claimant argues that the administrative law judge erred in finding that the medical opinion evidence failed to establish total disability. Claimant argues that the administrative law judge failed to provide an adequate explanation both for his rejection of the opinion of Dr. Raymond Kraynak, who opined that claimant was totally and permanently disabled, and for crediting the contrary opinion of Dr. Green, who opined that claimant was able to perform his usual coal mine employment. Claimant contends that the administrative law judge irrationally rejected Dr. Raymond Kraynak's opinion because claimant was treated more frequently by Dr. Matthew Kraynak than by Dr. Raymond Kraynak, who has been claimant's treating physician since 1977 and treats claimant every other month. Claimant also contends that the administrative law judge's error with respect to the pulmonary function study evidence affected his credibility determinations regarding the physicians' opinions.

We agree that the administrative law judge's weighing of the medical opinion evidence was affected by his erroneous analysis of the pulmonary function study evidence; the administrative law judge's finding that the medical opinion evidence did not establish total disability must be vacated and the case remanded for reconsideration of the medical opinions. Further, we agree with

claimant that the administrative law judge's rejection of Dr. Raymond Kraynak's opinion because claimant "sees Dr. Matthew Kraynak more regularly that he does Dr. Raymond Kraynak," Decision and Order at 9,was not rational since Dr. Raymond Kraynak has testified in three depositions that he is claimant's treating physician, notwithstanding the administrative law judge's determination that Dr. Matthew Kraynak similarly treats claimant, Director's Exhibit 33 at 15, Director's Exhibit 72 at 16; Claimant's Exhibit 10 at 7, and Dr. Raymond Kraynak relied on multiple, qualifying pulmonary function studies, including four of the five newly submitted tests, claimant's medical and employment histories, physical examinations, x-rays interpretations, and arterial blood gas studies to reach his determination. Director's Exhibits 10, 23, 24, 26, 27, 43, 53, 72, 77; Claimant's Exhibits 1, 4, 7; *see* 20 C.F.R. §718.104(d); *see Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997). *see also Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The fact that claimant has been frequently treated by Dr. Matthew Kraynak, in addition to Dr. Raymond Kraynak, does not alter Dr. Raymond Kraynak's status as a treating physician and does not undermine the probative value of his opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 9. Similarly, in addressing the medical opinion evidence on remand, the administrative law judge must consider whether the physicians understood the exertional requirements of claimant's usual coal mine employment in rendering their opinions on total disability. *See Eagle v. Armco, Inc.*, 943 F.2d 590, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Finally, claimant contends that the administrative law judge's one-sentence conclusion that the evidence of record failed to demonstrate a mistake in a determination of fact lacked any explanation for the administrative law judge's determination and therefore did not comply with the APA. Since we must vacate the administrative law judge's finding at Section 718.204(b)(2)(i) and (iv), because the administrative law judge did not correctly characterize all of the evidence, we must also vacate his finding that claimant failed to establish a mistake in a determination of fact and a change in conditions. The administrative law judge must on remand reconsider the pulmonary function and medical opinion evidence and determine whether claimant has established a basis for modifications. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL