BRB No. 06-0739 BLA

JAMES L. LENIG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/28/2007
	)	
DIRECTOR, OFFICE OF WORKERS' 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.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-6255) 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). The administrative law judge credited claimant with 23.63 years of coal mine employment, and considered the claim, filed on October 12, 2004, pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found

[1] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 3, 5, 6. Accordingly, this case arises within the

that the medical evidence did not establish the existence of pneumoconiosis or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish that he has pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Claimant also argues that the administrative law judge abused his discretion in excluding evidence submitted by claimant on the ground that it exceeded the limitations set forth at 20 C.F.R. §725.414. Claimant further maintains that the administrative law judge applied an inconsistent standard of review and failed to explain adequately his rationale for various findings, as required by the Administrative Procedure Act (APA), 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). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[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 supported by substantial evidence, is rational, and is in accordance with applicable 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, 363 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

We first address claimant's argument that the administrative law judge erred in finding that total disability was not established pursuant to Section 718.204(b)(2)(i) and (iv). With respect to Section 718.204(b)(2)(i), the administrative law judge considered

---

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*).

[2] The parties do not challenge the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). This finding is, therefore, affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the pulmonary function studies conducted on December 4, 2004, October 19, 2005, November 1, 2005, December 15, 2005, and December 28, 2005. Director's Exhibits 11, 41. The administrative law judge determined that only Dr. Rashid's December 15, 2005 pre-bronchodilator study produced qualifying values.[3] Decision and Order at 9; Director's Exhibit 41. The administrative law judge observed that:

> Dr. Rashid noted that a post-bronchodilator study was delayed from December 15 to December 28 because on the earlier date claimant's blood pressure became elevated. However, the post-bronchodilator test on December 28, 2005 was found to be normal, and Dr. Rashid stated, the 'obstruction [was] completely resolved after bronchodilators' were given to claimant. (DX 41: report of 12/28/05 testing)

Decision and Order at 9. The administrative law judge concluded that because the qualifying study of December 15, 2005 was preceded by three non-qualifying studies and followed by a non-qualifying study, the pulmonary function study evidence did not support a finding of total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 10.

Claimant alleges that the administrative law judge should have rejected the post-bronchodilator study that Dr. Rashid administered on December 28, 2005, as the test was not conducted the same day as the December 15, 2005 pre-bronchodilator test administered by Dr. Rashid, and the date and time recorded on the test sheet were altered.[4] Claimant also contends that the administrative law judge should have discredited the test as nonconforming because there is no paper speed indicated on the report, as is required under 20 C.F.R. §718.103(b)(6). Director's Exhibit 41. Claimant, however, did not dispute the validity of this pulmonary function study when this claim was pending before the administrative law judge. Such challenges will not be considered for the first time on appeal to the Board. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Oreck v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987)(Levin, J., concurring). We therefore decline to address claimant's contention that the

---

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set forth in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[4] The computer-generated time, printed on the reports of the December 15 and December 28, 2005 studies, is obscured by a handwritten notation changing the time to 8:50 a.m.. Director's Exhibit 41. The computer-generated test date, printed on the report of the post-bronchodilator study, has been altered by a handwritten notation to read "12/28/05." *Id*.

administrative law judge erred in treating the December 28, 2005 pulmonary function study as valid.

Claimant further argues that the administrative law judge erred by "discounting every single study" based upon the non-qualifying results produced in the December 28, 2005 post-bronchodilator study and by rejecting the "unrebutted" qualifying pulmonary function study conducted by Dr. Rashid on December 15, 2005, solely because "claimant returned, thirteen days later, for a post-bronchodilator test which was normal." Claimant's Brief at 21-22. These allegations of error are without merit. The administrative law judge rationally determined that the pulmonary function study evidence did not support a finding of total disability in light of the preponderance of the non-qualifying values and their proximity in time. Decision and Order at 6, 10; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). He reasonably relied on Dr. Rashid's statement that the obstructive impairment observed on the qualifying pre-bronchodilator study dated December 15, 2005, was "completely resolved" by the administration of bronchodilators prior to the December 28, 2005 study, to support his finding that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).[5] This finding is, therefore, affirmed as it is supported by substantial evidence.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Kruk, Mariglio, Rashid, and Kraynak. Director's Exhibits 10, 43; Claimant's Exhibits 8, 11, 15. Dr. Kruk examined claimant on October 19, 2005 and opined that claimant's pulmonary function study was consistent with obstructive and

---

[5] The administrative law judge indicated that the record contained four non-qualifying pulmonary function studies and one qualifying pulmonary function study. Decision and Order at 6. The administrative law judge did not, however, accurately record the results of the study obtained by Dr. Kruk on October 19, 2005. The best FVC performed by claimant on that date was 1.80, not 3.52. *Compare* Decision and Order at 6 and Director's Exhibit 41. It appears that the administrative law judge transposed the predicted FVC with the actual FVC. With an actual FVC of 1.80, the October 19, 2005 study is qualifying, as this value, in addition to claimant's FEV1 of 1.30 and MVV of 54, is below the Table values set forth in Appendix B to 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(i). Remand is not required, however, as claimant has not raised this error on appeal and, moreover, the administrative law judge's determination that the preponderance of the pulmonary function study evidence is non-qualifying, a point that claimant has conceded, remains correct. Claimant's Brief at 21; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

restrictive defects. Claimant's Exhibit 8. Dr. Kruk concluded that claimant is totally disabled due to pneumoconiosis. *Id.* Dr. Mariglio examined claimant on January 26, 2005. Director's Exhibit 10. Based on the physical examination and pulmonary function study values, Dr. Mariglio opined that claimant had no respiratory impairment and was capable of working as a foreman. *Id.* Dr. Rashid examined claimant on December 15, 2005. Director's Exhibits 41, 43. Dr. Rashid observed that claimant's x-ray, arterial blood gas study, and electrocardiogram were all normal, although the pre-bronchodilator study that he obtained on December 15, 2005, produced qualifying values. *Id.* However, Dr. Rashid noted that the pulmonary function test results indicated that claimant's obstruction was "completely resolved" after the administration of bronchodilators in the follow-up study dated December 28, 2005. *Id.* Dr. Rashid concluded that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibt 43.

Dr. Kraynak has treated claimant since 1987. Director's Exhibit 11. The record contains treatment records, a report dated November 7, 2005, and Dr. Kraynak's deposition testimony. Claimant's Exhibits 7, 11, 15. Taking into account claimant's occupational and medical history, complaints, physical examinations, diagnostic studies, and other records reviewed, Dr. Kraynak opined that claimant was totally and permanently disabled by coal workers' pneumoconiosis due to his history of coal mine employment. Claimant's Exhibits 11, 15 at 16-17.

In assessing the medical opinion evidence under Section 718.204(b)(2)(iv), the administrative law judge determined that Dr. Kruk's opinion was unreasoned and undocumented and entitled to no weight because Dr. Kruk was not aware of the other non-qualifying objective studies of record. Decision and Order at 10-11. The administrative law judge further found that the opinions of Drs. Mariglio and Rashid were reasoned and documented and outweighed the opinion of Dr. Kraynak, based upon their superior qualifications. Decision and Order at 11. In rendering this finding, the administrative law judge determined that Dr. Kraynak's opinion was not entitled to any additional weight based upon his status as claimant's treating physician. *Id.*

Claimant argues that the administrative law judge erred in rejecting Dr. Kruk's opinion, that claimant was totally disabled, on the ground that Dr. Kruk was not aware of the objective test results that conflicted with his diagnosis of a totally disabling respiratory impairment. Claimant asserts that because Drs. Mariglio and Rashid also relied on their own testing in rendering their opinions, the administrative law judge applied an inconsistent standard of review to these opinions. This contention is without merit. The administrative law judge permissibly determined that the probative value of Dr. Kruk's diagnosis of total disability was diminished by the fact that Dr. Kruk was not aware of the other blood gas and pulmonary function studies of record that produced values in excess of those reflected in his report. Decision and Order at 10-11; Claimant's Exhibit 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (*en banc*); *Lucostic v.*

United States Steel Corp., 8 BLR 1-46, 1-47 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985). Because the opinions of Drs. Rashid and Mariglio are consistent with the administrative law judge's determination that the objective studies of record do not support a finding of total disability, the rationale that the administrative law judge provided for discrediting Dr. Kruk's opinion does not apply to their opinions. The administrative law judge did not, therefore, engage in a selective analysis of the medical opinion evidence. *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

Claimant also argues that the administrative law judge erred by failing to recognize Dr. Kraynak's status as his treating physician, and by failing to accord Dr. Kraynak's opinion additional weight. In support of this argument, claimant argues that the administrative law judge erred by excluding two pulmonary function studies that appear in Dr. Kraynak's treatment records. Claimant maintains that he sought to introduce these test results only as bearing on Dr. Kraynak's status as claimant's treating physician, rather than on the issue of total disability.

Contrary to claimant's argument, the administrative law judge addressed Dr. Kraynak's status as claimant's treating physician and acted within his discretion as fact-finder in concluding that Dr. Kraynak's opinion was not entitled to additional weight on this basis. *See* 20 C.F.R. §718.104(d) (2001); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394 (3d Cir. 2002). The administrative law judge noted correctly that, according to Dr. Kraynak's records and deposition testimony, Dr. Kraynak treated claimant intermittently from 1987 until 2005, for problems such as gout and hypertension. Decision and Order at 8; Director's Exhibit 15 at 11-19; Claimant's Exhibit 13. The administrative law judge also indicated accurately that Dr. Kraynak first reported that claimant had shortness of breath in an office note dated August 4, 2005, at which time Dr. Kraynak conducted a pulmonary function test. Decision and Order at 8; Claimant's Exhibit 13. The administrative law judge further observed that the next office note, pertaining to a visit by claimant on November 1, 2005, was also the last one in the record. Decision and Order at 8; Claimant's Exhibit 13. Based upon this information, the administrative law judge rationally determined that because Dr. Kraynak's records do not contain any references to claimant's respiratory or pulmonary condition until the last two visits to his office, Dr. Kraynak's status as claimant's treating physician did not give him special knowledge of claimant's respiratory or pulmonary health. Decision and Order at 8, 11; 20 C.F.R. §718.104; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

With respect to the administrative law judge's exclusion from the record of two pulmonary function studies that appear in Dr. Kraynak's records, these studies, dated August 4, 2005 and November 22, 2005, were obtained during the short period that Dr.

Kraynak was attempting to diagnose the cause of claimant's shortness of breath.[6] Claimant's Exhibit 13. The fact that Dr. Kraynak obtained two additional pulmonary function studies during this period, dated October 19, 2005 and November 1, 2005, does not impact upon the administrative law judge's rational determination that Dr. Kraynak's treatment of claimant's breathing problems was too brief to give him an advantage over the other physicians of record. Thus, we decline to find merit in claimant's allegation that the administrative law judge erred in excluding the August 4, 2005 and November 22, 2005 pulmonary function studies from the record as error, if any, is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant further maintains that the administrative law judge erred in crediting Dr. Rashid's opinion, that claimant does not have a totally disabling respiratory or pulmonary impairment, as Dr. Rashid failed to explain the qualifying pre-bronchodilator tests, and was unaware of the exertional requirements of claimant's coal mine employment. Contrary to claimant's assertion, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Rashid's opinion was reasoned and documented on the grounds that his diagnosis that claimant is not totally disabled was supported by his findings on examination and the objective studies that he obtained. Decision and Order at 10; *Clark*, 12 BLR at 1-155 (*en banc*); *Lucostic*, 8 BLR at 1-47; *Peskie*, 8 BLR at 1-128. Dr. Rashid's notation that the obstructive impairment revealed on the December 15, 2005 pulmonary function study was "completely resolved" after bronchodilators were administered for the pulmonary function study conducted December 28, 2005, obviated the need for an explanation of the qualifying results of the December 15, 2005 study. Decision and Order at 9. Moreover, because Dr. Rashid stated that claimant does not have a respiratory or pulmonary impairment, whether or not he had knowledge of the exertional requirements of claimant's usual coal mine employment is irrelevant. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc). We affirm, therefore, the administrative law judge's determination that Dr. Rashid's diagnosis of no impairment was reasoned and documented.

---

[6] At the hearing, the administrative law judge determined that because claimant had already submitted two other pulmonary function studies into evidence, dated October 19, 2005 and November 1, 2005, the studies in question exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2)(i). Hearing Transcript at 5, 10. In his Decision and Order, the administrative law judge found that the excluded pulmonary function tests "were not legitimate treatment records." Decision and Order at 6 n. 3.

Finally, we reject claimant's argument that the administrative law judge erred in relying on the physicians' qualifications in finding that the opinions of Drs. Mariglio and Rashid were entitled to greater weight than Dr. Kraynak's opinion.[7] Decision and Order at 11. This is a factor upon which an administrative law judge may rely in resolving conflicts in the medical opinion evidence. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). Because claimant has not identified any errors requiring remand in the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability under Section 718.204(b)(2)(iv), we affirm this finding.

Because we have affirmed the administrative law judge's determination that the evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. We need not address, therefore, claimant's arguments regarding the administrative law judge's findings pursuant to Section 718.202(a).[8]

[7] Dr. Rashid is Board-certified in Internal Medicine, and Dr. Mariglio is Board-certified in Internal Medicine and Pulmonary Medicine. Decision and Order at 7; Director's Exhibits 10, 43. Dr. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 15 at 5.

[8] We also decline to address claimant's argument that the administrative law judge erred in summarily rejecting claimant's testimony establishing forty years of coal mine employment and, instead, crediting claimant with a coal mine employment history of only 23.63 years. Claimant does not allege, nor is there indication in the record, that the administrative law judge relied on claimant's length of coal mine employment to assess the relative weight of the physicians' opinions. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS5
Administrative Appeals Judge