BRB No. 07-0817 BLA

F.K.	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 06/27/2008
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5012) of Administrative Law Judge Robert D. Kaplan denying benefits on a subsequent claim[1] 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). In the Decision and Order, the administrative

[1] Claimant filed his first application for benefits on November 7, 1996, which was denied by the district director on March 13, 1997, based on claimant's failure to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1. Claimant's second application, the subsequent claim for benefits, was filed on December 15, 2005. Director's Exhibit 3.

law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, credited claimant with eleven years of qualifying coal mine employment, and found that the Director, Office of Workers' Compensation Programs (the Director), conceded the presence of pneumoconiosis arising out of coal mine employment. The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. However, the administrative law judge found that the evidence of record failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), on the merits. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that the pulmonary function study evidence and medical opinion evidence failed to demonstrate total disability under Section 718.204(b)(2)(i) and (iv).[2] Claimant further argues that the administrative law judge's analysis of this evidence fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). In response, the Director urges affirmance of the administrative law judge's denial of benefits.[3]

[2] In order to preserve the issue for appeal purposes, claimant also contends that the administrative law judge erred in crediting claimant with only eleven years of qualifying coal mine employment. Claimant contends that the administrative law judge failed to provide an adequate basis or rationale for failing to credit claimant with at least twenty-eight years of qualifying coal mine employment because the evidence of record, namely claimant's pay stubs, various employment questionnaires, and tax returns, clearly demonstrates this duration of employment. Claimant concedes, however, that this finding could be construed as harmless error as the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment.

[3] We affirm the administrative law judge's determinations that claimant established pneumoconiosis arising out of coal mine employment based on the concession of the Director, Office of Workers' Compensation Programs (the Director), and that claimant demonstrated that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309, 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 4. Likewise, we affirm the administrative law judge's determinations that total disability was not established, on the merits, 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*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 6, 7.

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. 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 pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[4] *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*).

Claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence failed to establish total disability at Section 718.204(b)(2)(i).[5] Claimant argues that the administrative law judge erred in according any weight to the February 22, 2006 non-qualifying pulmonary function study,[6] since both Drs. Simelaro and Kraynak reviewed the study and found that it was invalid. Claimant also contends that the administrative law judge cannot rely on the study because it was non-conforming.

Claimant also argues that the administrative law judge erred in crediting Dr. Spagnolo's invalidation of Dr. Kraynak's January 16, 2007 qualifying pulmonary function study which Dr. Kraynak found to be valid. Dr. Kraynak specifically noted that

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[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.

[5] In assessing the credibility of the pulmonary function studies under Section 718.204(b)(2)(i), the administrative law judge reasonably found that the medical evidence submitted with the pending 2005 claim was more reliable than that submitted with the prior 1996 claim since the older evidence preceded the more recent evidence by a minimum of ten years. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 5.

[6] A "qualifying" pulmonary function study or blood gas 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

claimant exhibited good cooperation and comprehension when performing the study. Claimant contends that the administrative law judge failed to provide an adequate explanation for rejecting this test, in accordance with the APA, because he failed to address the fact that Dr. Kraynak administered the test and reviewed Dr. Spagnolo's invalidation, explaining his disagreement.

In determining that the pulmonary function studies did not establish total disability under Section 718.204(b)(2)(i), the administrative law judge found that the February 22, 2006 non-qualifying pulmonary function study administered by Dr. Talati was not valid because it was non-conforming.[7] Nonetheless, he found it entitled to "some evidentiary weight" because it yielded in non-qualifying values and Dr. Talati, the administering physician, concluded that the results showed that claimant was not totally disabled. The administrative law judge noted that Drs. Simelaro and Kraynak, the reviewing physicians, who found that the non-qualifying study to be invalid, failed to address whether the non-qualifying results could still be useful in determining whether claimant was totally disabled. Thus, contrary to claimant's assertion, the administrative law judge could reasonably accord "some evidentiary weight" to the non-qualifying February 22, 2006 pulmonary function study because the study, even though non-conforming, nonetheless failed to reflect a disabling respiratory condition. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-266 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *see also Andruscavage v. Director, OWCP*, No. 93-3291, *slip op.* at 9-10 (3d Cir. Feb. 22, 1994) (unpub.) (because pulmonary function studies are effort dependent, spuriously low values are possible but spuriously high values are not); Decision and Order at 6; Director's Exhibit 12; Claimant's Exhibit 1.

Regarding the January 16, 2007 qualifying pulmonary function study, the administrative law judge reasonably accorded it less weight based on Dr. Spagnolo's invalidation. The administrative law judge assigned greater weight to Dr. Spagnolo's invalidation of the study because his qualifications were superior to those of Dr. Kraynak, the administering physician, who found the test to be valid. Claimant is incorrect that the administrative law judge failed to address Dr. Kraynak's response to Dr. Spagnolo's invalidation of the study. The administrative law judge discussed Dr. Kraynak's response

[7] Dr. Simelaro's review of the February 22, 2006 pulmonary function study revealed that the test was not acceptable due to the lack of three acceptable curves containing a variation that did not exceed 5% of the largest FEV_1 or 100 ml. Claimant's Exhibit 8. During his deposition on February 9, 2007, Dr. Kraynak opined that the February 22, 2006 pulmonary function study was technically invalid because the flow loops were "very erratic and show[ed] breaks." Claimant's Exhibit 7 at 11. Also, Dr. Kraynak noted, "there's only one flow loop pre and post, when the regulations say you're supposed to have a flow loop with the various tracings to guarantee their validity, and this isn't present in this study." Claimant's Exhibit 7 at 11.

to Dr. Spagnolo's invalidation,[8] but nevertheless determined that Dr. Spagnolo's statements regarding the invalidity of this study were worthy of greater weight due to Dr. Spagnolo's superior qualifications.[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Claimant's Exhibit 1. Accordingly, the administrative law judge's determination that the pulmonary function study evidence failed to establish total disability is affirmed. *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge erred in rejecting Dr. Kraynak's finding of total disability because Dr. Kraynak "placed substantial reliance" on the January 2007 qualifying pulmonary function study, which was subsequently invalidated. Claimant contends that this was a mischaracterization of Dr. Kraynak's report and testimony, as his opinion was based on a review of all the evidence of record, examination findings, histories, and additional relevant testing. Additionally, claimant contends that Dr. Kraynak's opinion should have been credited because he was claimant's treating physician. Likewise, claimant contends that administrative law judge erred in rejecting the opinion of Dr. Tavaria, that claimant was totally disabled, because he was also a treating physician and because his opinion was based on many factors. In contrast, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Talati, who relied on the non-qualifying, but non-conforming February 2006 pulmonary function study because Dr. Talati stated that he had seen claimant on one occasion and did not exhibit any knowledge of the exertional requirements of claimant's usual coal mine employment.

In analyzing the medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge did not accord greater weight to the opinion of Dr. Kraynak because he testified on deposition that he had examined claimant only once. Decision

[8] In a report dated February 13, 2007, Dr. Kraynak opined that his review of the January 16, 2007 pulmonary function study revealed that this test was valid because "[t]he two largest FVC's vary by less than 0.2 ml, corresponding to the regulations." Claimant's Exhibit 10. Noting Dr. Spagnolo's opinion that there was excessive variability with the MVV, Dr. Kraynak opined that "[t]he MVV approaches the percentage of predicted of FEV_1, showing good effort." Claimant's Exhibit 10.

[9] The record reflects that Dr. Spagnolo is Board-certified in internal medicine and pulmonary disease, while Dr. Kraynak is only Board-eligible in family practice medicine. Director's Exhibit 29; Claimant's Exhibit 7.

and Order at 8; Claimant's Exhibits 4, 7 at 23. Contrary to claimant's argument, the administrative law judge recognized Dr. Kraynak's physical examination findings and diagnostic test results, including the presence of a non-qualifying blood gas study. The administrative law judge nonetheless reasonably determined that the credibility of Dr. Kraynak's opinion, that claimant was totally disabled, was diminished because he substantially relied on the January 2007 qualifying pulmonary function study, which was subsequently invalidated by a better qualified physician. *See* 20 C.F.R. §718.104(d)(1)-(5); *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004); *Siwiec*, 894 F.2d at 639, 13 BLR at 2-267; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984) (evidence that calls into question reliability of tests upon which physician's opinion is based is relevant in determining whether that report is documented and reasoned); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8. Thus, because claimant failed to provide any support for his assertion that the administrative law judge engaged in a selective analysis of Dr. Kraynak's opinion, nor does a review of the evidence and the administrative law judge's Decision and Order reflect such an analysis, we reject claimant's argument regarding Dr. Kraynak's opinion. Hence, we affirm the administrative law judge's rejection of Dr. Kraynak's opinion as rational and supported by substantial evidence. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 8.

Likewise, we affirm the administrative law judge's rejection of Dr. Tavaria's opinion, finding claimant totally disabled, because Dr. Tavaria did not state in his report that he had "treated" claimant more than one time, and because he placed substantial reliance on a pulmonary function study dated January 19, 2006 that was not in the record. *See* 20 C.F.R. §718.104(d)(1)-(4); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-233 (2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2006) (*en banc*).

In contrast, the administrative law judge reasonably credited the opinion of Dr. Talati, that claimant had the respiratory capacity to perform his usual coal mine work, because it was supported by objective test results and based on his physical examination findings, claimant's medical history and symptomotology. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Clark*, 12 BLR at 1-149; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 7; Director's Exhibit 12. Further, the record shows that Dr. Talati was aware of claimant's employment history and the exertional requirements of his most recent coal mine employment. Director's Exhibit 12. Thus, the administrative law judge reasonably credited the opinion of Dr. Talati. We, therefore, affirm the administrative law judge's findings that the medical opinion evidence failed to demonstrate total disability pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986) (*en banc*). Since claimant has not otherwise challenged the administrative law judge's weighing of all the evidence relevant to total disability at Section 718.204(b)(2)(i)-(iv), we affirm his determination that the evidence, considered together, failed to establish total disability, on the merits, by a preponderance of the evidence. *See 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*); Decision and Order at 8.

Consequently, as claimant failed to establish total disability on the merits at Section 718.204(b), a requisite element of entitlement under Part 718, we affirm the administrative law judge's determination that benefits are precluded. *See* 20 C.F.R. §718.204(b)(2); *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge