BRB No. 97-1077 BLA

HARRY WILLIAM ECKERT	)	
	)	
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1430) of Administrative Law Judge Paul H. Teitler denying benefits 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). Claimant's initial claim for benefits filed on May 9, 1980 was denied on May 25, 1984 by Administrative Law Judge Chester Shatz, who accepted the concession by the Director, Office of Workers' Compensation Programs (the Director), of the existence of pneumoconiosis arising out of claimant's fifteen years of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but found that the medical evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20

C.F.R. §718.204(c). Director's Exhibits 16, 49. Accordingly, he denied benefits. The Board affirmed the administrative law judge's Decision and Order as supported by substantial evidence. *Eckert v. Director, OWCP*, BRB No. 84-1395 BLA (Jun. 20, 1986)(unpub.); Director's Exhibit 52. Claimant's second claim for benefits filed on July 15, 1986 was finally denied on March 1, 1989 by Administrative Law Judge Robert D. Kaplan, who found that the medical evidence failed to establish total respiratory disability pursuant to Section 718.204(c). Claimant filed the third and present claim for benefits on February 8, 1996. Director's Exhibit 1.

Because the miner's third claim was filed more than one year after the denial of his second claim, Administrative Law Judge Paul H. Teitler considered the new evidence in accord with *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) to determine whether it established total respiratory disability pursuant to Section 718.204(c), the element of entitlement previously adjudicated against claimant. The administrative law judge found that the new evidence did not establish this element and concluded that therefore a material change in conditions was not established as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant alleges several errors in the administrative law judge's weighing of the pulmonary function studies and medical opinions pursuant to Section 718.204(c)(1), (4). Claimant's several arguments raise essentially two issues, specifically, whether the administrative law judge permissibly credited the pulmonary function study administered by Dr. Ahluwalia on April 30, 1996 over the pulmonary function study administered by Dr. Tavaria on September 19, 1996, and whether the administrative law judge permissibly credited Dr. Ahluwalia's medical opinion over that of Dr. Tavaria. The Director responds, urging affirmance.[1]

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).

[1] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Two pulmonary function studies were performed after the previous denial of benefits. Dr. Ahluwalia administered a pulmonary function study on April 30, 1996. The physician noted that claimant understood the test instructions, but found claimant's effort "variable." Director's Exhibit 7 at 2. Nevertheless, Dr. Ahluwalia concluded that "[a]t his best effort, the patient had normal flows on spirometry." *Id*. This study yielded non-qualifying[2] values. The record contains no medical testimony questioning this study's reliability.

Claimant's treating physician, Dr. Tavaria, who is Board-certified in internal medicine, administered a pulmonary function study on September 19, 1996. The physician found claimant's comprehension and cooperation "good" and interpreted the test as diagnostic of "severe restrictive lung disease." Claimant's Exhibit 3. This study yielded non-qualifying values before the administration of a bronchodilator, and qualifying values post-bronchodilator. *Id*. Dr. Sahillioglu reviewed the study and found it unacceptable, however, because fewer than the required number of FVC and MVV tracings were submitted without explanation for this deficiency and because claimant's effort on the FVC's was inconsistent.[3] Director's Exhibit 18. Dr. Sahillioglu also advised that a TLC test be done to verify the presence of a restrictive defect.

Dr. Tavaria was deposed and responded to some of Dr. Sahillioglu's comments. Dr. Tavaria stated that he reviewed the tracings after the technician conducted the study and "did not find any inconsistent effort . . . ." Claimant's Exhibit 7 at 18. The physician disagreed with Dr. Sahillioglu's comment that another TLC test was needed, noting that a TLC test was done as part of the study. Claimant's Exhibit 7 at 19. Dr. Tavaria did not comment on Dr. Sahillioglu's notation that fewer that the required number of tracings had been submitted.

The administrative law judge summarized the results of both pulmonary function studies and the medical testimony regarding the September 19, 1996 study. The administrative law judge weighed both studies and concluded that, "considering that Dr. Tavaria's study is not in substantial compliance as he did not submit the requisite number of tracings; [and] there was inconsistent effort on the FVC's; and . .

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] Claimant's Exhibit 3 contains three graphs, each bearing one pre-bronchodilator line and one post-bronchodilator line.

. the values of both studies were non-qualifying pre-bronchodilator, I find that the weight of the PFS does not establish total disability." Decision and Order at 8.

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge provided no rationale for crediting Dr. Sahillioglu's opinion that claimant's effort was inconsistent on the study dated September 19, 1996 over Dr. Tavaria's opinion that claimant's effort was good. Claimant's Brief at 5-6. The Director responds that the administrative law judge permissibly questioned the reliability of this study based on the reviewer's notation that fewer than the required number of tracings were submitted with the study and that claimant's effort on the FVC portion of the test was inconsistent. Director's Brief at 6.

The applicable regulation provides in part that all pulmonary function studies "shall be accompanied by three tracings of each test performed, unless the results of two tracings of the MVV are within 5% of each other, in which case two tracings for that test shall be sufficient." 20 C.F.R. §718.103(b). A pulmonary function study must substantially comply with the quality standards of Section 718.103. 20 C.F.R. §718.103(c); *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 (3d Cir. 1987)(a medical test administered incorrectly may be completely unreliable). Dr. Sahillioglu indicated that some of the FVC and MVV tracings were not included with the September 19, 1996 test results. Director's Exhibit 18. On appeal, claimant does not challenge the administrative law judge's reliance on Dr. Sahillioglu's uncontradicted notation of this deviation from the Section 718.103 quality standards. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984). Therefore, we affirm the administrative law judge's finding that the September 19, 1996 pulmonary function study was not in substantial compliance with the applicable quality standards.[4] *See Siwiec, supra*; *Mangifest, supra*. Since the administrative law judge offered two, independent reasons for rejecting the September 19, 1996 study, one of which we hold valid, we need not address the other reason which claimant questions on appeal, since any error would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant further asserts that the administrative law judge should have accorded no weight to the non-qualifying April 30, 1996 pulmonary function study because claimant's variable effort on that test rendered it unreliable. Claimant's Brief

[4] Claimant's argument that Dr. Sahillioglu mistakenly believed that a TLC test was not done is not relevant to this issue. The administrative law judge did not rely on this aspect of Dr. Sahillioglu's report in weighing the pulmonary function studies. Decision and Order at 8.

at 4. As previously discussed, the administering physician deemed this study sufficiently reliable to be interpreted as normal. Director's Exhibit 7 at 2. Claimant submitted no evidence relevant to the validity of this study. Therefore, we reject claimant's contention that the administrative law judge was bound to discredit its non-qualifying values merely because claimant's effort was variable. *See Anderson v. Youghiogeny & Ohio Coal Co*., 7 BLR 1-152, 1-154 (1984)(because pulmonary function studies are effort-dependent, a non-qualifying study revealing sub-optimal cooperation may still be a valid measure of the lack of respiratory disability). Because the administrative law judge properly weighed the pulmonary function studies, we affirm his finding that the weight of the pulmonary function studies did not establish total respiratory disability pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in crediting Dr. Ahluwalia's opinion over that of Dr. Tavaria. Claimant's Brief at 12-17. Dr. Ahluwalia examined and tested claimant and diagnosed severe hypertension, minimal hypoxemia at rest, and no significant respiratory impairment by pulmonary function tests. Director's Exhibit 8. Dr. Tavaria examined and tested claimant, concluded that his pulmonary function study was "severely abnormal," and opined that he is totally disabled due to pneumoconiosis. Claimant's Exhibit 1 at 2; Claimant's Exhibit 7.

Claimant contends that Dr. Ahluwalia's opinion was unreasoned. Claimant's Brief at 12. Contrary to claimant's contention, the administrative law judge permissibly found Dr. Ahluwalia's opinion, which was based on an examination, medical and coal mine employment histories, and non-qualifying pulmonary function and blood gas tests, to be "well-reasoned, documented, and supported by the objective evidence of record." Decision and Order at 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant further asserts that Dr. Tavaria's opinion should have been credited in recognition of his status as claimant's treating physician. Claimant's Brief at 13. An administrative law judge may, but is not required to credit the opinion of a treating physician. *See Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992). In finding that total respiratory disability was not established, the administrative law judge considered Dr. Tavaria's treating status, Decision and Order at 7, but properly found that his opinion was unreliable because the pulmonary function study upon which it was based was not in substantial compliance with the quality standards. Decision and Order at 10; see *Siwiec* 894 F.2d at 639, 13 BLR at 2-267 (a doctor's opinion based entirely on non-conforming pulmonary function evidence does not constitute substantial evidence). Claimant argues that this was a selective analysis of Dr. Tavaria's opinion, and claims that Dr. Tavaria relied on several other factors.

Claimant's Brief at 16-17. However, when deposed, Dr. Tavaria was asked what he relied upon, beyond the pulmonary function study, to diagnose total respiratory disability. Claimant's Exhibit 7 at 18. In response, the physician cited a 1/1 chest x-ray and claimant's coal mine employment history. Claimant's Exhibit 7 at 19. On further questioning, Dr. Tavaria conceded that an x-ray is not diagnostic for the extent of disability. *Id*. Mere exposure to coal dust is not sufficient evidence of total respiratory disability. Given Dr. Tavaria's own testimony, it was reasonable for the administrative law judge to conclude that the physician's diagnosis of total respiratory disability was based in large part on the September 19, 1996 pulmonary function study, which the administrative law judge found was not in substantial compliance with the quality standards. The administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences. *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Because the administrative law judge properly weighed the medical opinions and permissibly found that Dr. Ahluwalia's opinion outweighed Dr. Tavaria's opinion, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4), and therefore, we also affirm his finding that a material change in conditions was not established pursuant to Section 725.309(d). *See Swarrow*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge