BRB No. 00-0530 BLA

HOMER BLACKBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOW BRANCH COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	
	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Gregory Herrell (Arrington Schelin & Herrell, P.C.), Bristol, Virginia, for claimant.

Joanna Han (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0635) of Administrative Law Judge Thomas F. Phalen, Jr. 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] The administrative law judge found the instant case to be a request

[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

for modification of the Decision and Order of Administrative Law Judge Stuart A. Levin issued on September 12, 1996, denying claimant's prior request for modification, which was affirmed by the Board in a Decision and Order dated September 25, 1997.

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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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

In the original Decision and Order in this case, Administrative Law Judge Giles J. McCarthy determined that the case was a duplicate claim of the miner's original Social Security Administration claim which was denied by the Department of Labor (DOL) in 1979.[2] Addressing the merits of the claim, Judge McCarthy credited claimant with fourteen years of coal mine employment, accepting the stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000), based on claimant's June 6, 1983 filing date. In weighing the medical evidence, Judge McCarthy found that the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). In addition, he found the evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge McCarthy denied benefits. In a Decision and Order dated January 29, 1993, the Board affirmed Judge McCarthy's denial of benefits, holding that he reasonably found that the medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000) and, therefore, an award of benefits was precluded.[3] *Blackburn v. Sow Branch Coal Co.*, BRB No. 91-1054 BLA (Jan. 29, 1993)(unpub.); Director's Exhibit 72. On February 17, 1993, claimant filed a request for reconsideration of the Board's Decision and Order, accompanied by new medical evidence. Director's Exhibit 73. Considering claimant's submission of new evidence to be a request for modification, the Board denied claimant's request for reconsideration and remanded the case to the district director for modification proceedings pursuant to 20 C.F.R. §725.310 (1999). *Blackburn v. Sow Branch Coal Co.*, BRB No. 91-1054 BLA (April 9, 1993)(Order); Director's Exhibit 75.

Following the district director's denial of claimant's modification, the case was transferred to the Office of Administrative Law Judges, wherein it was assigned to Judge Levin for a formal hearing. By Decision and Order issued on September 12, 1996, Judge Levin denied benefits finding that the newly submitted evidence failed to establish the

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[2] Claimant filed his first claim with the Social Security Administration (SSA) on January 11, 1973. Director's Exhibit 110-1. This case was denied by the Social Security Administration Appeals Council on June 30, 1977. Director's Exhibit 110-35. Claimant filed an Election Card on April 7, 1978 requesting review by the Department of Labor. Director's Exhibit 110-37. This claim was denied by the claims examiner on August 17, 1979. Director's Exhibit 110-39.

[3] The Board also held that in light of its affirmance of Judge McCarthy's finding that total respiratory disability was not established, any error in the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) (2000) was harmless. *Blackburn v. Sow Branch Coal Co.*, BRB No. 91-1054 BLA (Jan. 29, 1993)(unpub.).

existence of pneumoconiosis under Section 718.202(a) (2000) as well as total respiratory disability under Section 718.204(c) (2000) and, therefore, that claimant failed to establish a change in conditions pursuant to Section 725.310 (1999). Judge Levin also noted that claimant had not alleged a "mistake in a determination of fact, except in those matters affirmed by the Board." 1996 Decision and Order at 3; Director's Exhibit 95. Consequently, Judge Levin found that the evidence was not sufficient to support modification and, accordingly, denied benefits. In a Decision and Order dated September 25, 1997, the Board affirmed Judge Levin's denial of benefits. Specifically, the Board affirmed his determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) as well as insufficient to establish total respiratory disability pursuant to Section 718.204(c) (2000). The Board, therefore, affirmed Judge Levin's denial of claimant's request for modification. *Blackburn v. Sow Branch Coal Co.*, BRB No. 97-0135 BLA (Sep. 25, 1997)(unpub.); Director's Exhibit 100.

On September 22, 1998, claimant filed his second and current request for modification of the denial of benefits, enclosing additional medical evidence. Director's Exhibit 101. Following denial by the district director, Director's Exhibit 105, the case was transferred to the Office of Administrative Law Judges wherein it was assigned to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge). Initially, the administrative law judge credited claimant with fourteen years of coal mine employment and found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) (2000) and, thus, sufficient to support a change in conditions pursuant to Section 725.310 (1999). The administrative law judge further found that the evidence was sufficient to establish that claimant's pneumoconiosis arose out his coal mine employment pursuant to Section 718.203(b) (2000). However, the administrative law judge found the medical evidence as a whole, old and new, insufficient to establish a totally disabling respiratory or pulmonary condition pursuant to Section 718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence was insufficient to establish total respiratory disability. In addition, claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence in finding that this evidence was insufficient to establish total respiratory disability. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that she will not file a response brief in this appeal.[4]

[4] The parties do not challenge the administrative law judge's decision to credit claimant with fourteen years of coal mine employment or his findings that the new

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court 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 Association 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 February 21, 2001, to which both employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to this Order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits 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,

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evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000) and, therefore, that the new evidence established a change in conditions sufficient to support modification under 20 C.F.R. §725.310 (1999). In addition, the parties do not challenge the administrative law judge's findings under 20 C.F.R. §§718.203(b) (2000), 718.204(c)(2) and (c)(3) (2000). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 (1965).

On appeal, claimant contends that the administrative law judge erred in finding the April 19, 1999 pulmonary function study was invalid, arguing that the administrative law judge failed to adequately explain his rationale for according greater weight to the invalidation report of Dr. Fino, who reviewed the study, over the opinion of Dr. Robinette, the physician for whom the test was administered and who interpreted the test results. Claimant's argument has merit.

The administrative law judge found that the record contains the results of thirteen pulmonary function studies, of which three studies and the pre-bronchodilator portion of the August 1995 study produced qualifying values. Decision and Order at 10; Director's Exhibits 12, 26, 33, 58, 60, 92, 93, 101, 103; Claimant's Exhibit 1; Employer's Exhibit 1. However, the administrative law judge further determined that the most recent qualifying study [April 19, 1999] was invalidated by Dr. Fino due to suboptimal effort, Claimant's Exhibit 1; Employer's Exhibit 10, and, that based on this invalidation and the preponderance of the evidence, found that claimant failed to establish total respiratory disability by the pulmonary function study evidence. Decision and Order at 10.

As claimant correctly contends, the administrative law judge has not adequately explained his weighing of the pulmonary function study evidence, particularly the most recent study dated April 19, 1999. In relying on the invalidation report of this study by Dr. Fino, the administrative law judge failed to discuss the contradictory evidence of record. Specifically, the administrative law judge did not discuss the pulmonary function study itself, which accompanied the medical opinion of Dr. Robinette and which included a statement of good patient effort and cooperation. *See* Claimant's Exhibit 1. We, therefore, vacate the administrative law judge's determination that the pulmonary function evidence is insufficient to demonstrate total respiratory disability and remand the case for the administrative law judge to more fully discuss the relevant evidence and provide a more detailed rationale for his conclusions. *See* the Administrative Procedure Act, 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); *see generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Moreover, inasmuch as the administrative law judge found that Drs. Fino and Robinette share superior qualifications in the area of pulmonary diseases, *see* Decision and Order at 11, on remand, the administrative law judge must provide an adequate basis for accepting the invalidation report of Dr. Fino over the opinion of Dr. Robinette. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *see generally Wojtowicz*, *supra*.

Furthermore, we vacate the administrative law judge's finding that the medical opinion evidence was insufficient to demonstrate total respiratory disability and remand the case to the administrative law judge for further consideration of the relevant evidence. The administrative law judge, in finding the medical opinion evidence insufficient to establish total respiratory disability, accorded little weight to the medical opinion of Dr. Robinette finding that his opinion was based, at least in part, on a qualifying pulmonary function study which the administrative law judge found was invalidated by Dr Fino. Decision and Order at 11. In light of our holding vacating the administrative law judge's finding that the April 19, 1999 pulmonary function study was invalid, *see* discussion, *supra*, we further vacate his finding that the medical opinion evidence was insufficient to establish total respiratory disability and remand the case to the administrative law judge to more adequately explain the bases for his conclusion in light of his weighing of the pulmonary function study evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge