BRB No. 04-0543 BLA

THOMAS McSURDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BELTRAMI ENTERPRISES, INCORPORATED	)	DATE ISSUED: 03/23/2005
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer/carrier.

Jeffrey S. Goldberg (Howard M. Radzely, 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:

Employer appeals the Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) (01-BLA-0678) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) on claimant's September 29, 2000 request for modification in connection with his March 21, 1991 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). This case is before the Board for the second time. In *McSurdy v. Beltrami Enterprises, Inc.*, BRB No. 02-0858 BLA (Sept. 26, 2003)(unpublished), the Board vacated the administrative law judge's finding that the newly submitted pulmonary function studies and medical opinions established total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i), (iv) and thereby established a change in conditions at 20 C.F.R. §725.310 (2000) since the prior denial of benefits. The Board affirmed, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §725.310 (2000) that there was no mistake in a determination of fact contained in the prior denial, and that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii). Accordingly, the case was remanded.

In his Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board), the administrative law judge found that claimant established a change in conditions at 20 C.F.R. §725.310 (2000) by establishing total respiratory or pulmonary disability at 20 C.F.R. §718.204(b), based on the weight of the newly submitted pulmonary function studies and medical opinions at 20 C.F.R. §§718.204(b)(2)(ii) and 718.204(b)(2)(iv), respectively. Specifically, the administrative law judge relied on the sole, newly submitted, qualifying, and valid pulmonary function study conducted by Dr. Dittman on July 20, 2001, and on the opinions of Drs. Kraynak, Kruk, Simelaro, and Ranganath. Accordingly, benefits were awarded. In his Addendum to Decision and Order Awarding Benefits dated March 26, 2004, the administrative law judge indicated that he had erred by failing to weigh the newly submitted evidence in conjunction with the previously submitted evidence. Based on his consideration of the record as a whole, the administrative law judge determined that it was sufficient to establish total disability at 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[1] The administrative law judge stated his preference for the more recent evidence of record, indicating that pneumoconiosis is an irreversible and progressive disease. The administrative law judge found that the newly

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

submitted evidence, including the opinions of Drs. Kraynak, Kruk, Simelaro, and Ranganath, outweighed the previously submitted evidence that showed that claimant was not then totally disabled. The administrative law judge thus awarded benefits, noting that employer had not challenged his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment.

On appeal, employer argues that the administrative law judge erred in determining that the July 20, 2001 pulmonary function study resulted in qualifying values, and thus erred in finding total disability established in this case. Employer asserts that the administrative law judge thus erroneously rejected Dr. Dittman's medical opinion that claimant is not totally disabled, based on the administrative law judge's mistaken characterization of the July 20, 2001 pulmonary function study as qualifying. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief. The Director argues that the pertinent inquiry is "whether the ALJ acted within his discretion in finding that the values measured in the July 20, 2002 [sic], ventilatory study support the opinions of Drs. Kraynak, Kruk, Simelaro and Ranganath that [claimant] lacks the pulmonary capacity to perform his last coal mine employment." Director's Brief at 2. Employer has filed a reply to the Director's response brief. Employer argues that the administrative law judge should have determined the qualifying or non-qualifying nature of the pulmonary function studies and then compared them to any contrary probative evidence to determine whether total disability was established in this case. Claimant has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer notes that the July 20, 2001 pulmonary function study was conducted when claimant was seventy-four years old, *see* Employer's Exhibit 1, and that the tables published at Appendix B of 20 C.F.R. Part 718 cover miners aged seventy-one years old or younger, *see* 20 C.F.R. Part 718 Appendix B. Employer thus asserts that "[s]ince the tables do not provide disability standards for miner's [sic] over the age of 71, the values must be calculated consistently with the table. Specifically, the miner's pulmonary function test must result in an FEV1 at or below 60% of predicted with either the MVV or FVC also being at or below 60% of predicted in order to be considered qualifying." Employer's Brief at 4-5. Employer thereby argues that the values for a seventy-one year old miner are not applicable because pulmonary function declines with age. Based on its own calculations, employer asserts that the pulmonary function study dated July 20, 2001 resulted in non-qualifying values. Employer contends that the administrative law judge thus erred in stating:

> As I have now found that the only new valid [pulmonary function test] is the July 20, 2001 study, and this study qualifies to establish total disability and supports the opinions of the physicians who found Claimant to be totally disabled, I again find that the opinions of Drs. Kraynak, Kruk, Simelaro and Ranganath that Claimant is totally disabled outweigh Dr. Dittman's contrary opinion.

Decision and Order on Remand at 5. Employer argues that the administrative law judge thereby rejected Dr. Dittman's opinion based on the administrative law judge's mistaken ruling that the July 20, 2000 pulmonary function study resulted in qualifying values.[2]

Employer's challenge to the administrative law judge's characterization of the July 20, 2001 pulmonary function study as qualifying was not raised earlier, and cannot be raised for the first time on appeal to the Board. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(Stage, J., dissenting). The record shows that the Board, in its 2003 Decision and Order, specifically noted that the administrative law judge found that the July 20, 2001 pulmonary function study, among others, yielded qualifying values. *McSurdy*, slip op at 4; *see also* Decision and Order on Remand at 2. The Board then noted that while the table in Appendix B lists values for miners aged seventy-one and younger, claimant was tested at ages seventy-three, seventy-four, and seventy-five. *Id.* at 4 n.5. The Board stated, "The administrative law judge did not set forth his methodology for determining the qualifying or non-qualifying nature of studies in this case, but employer does not challenge the administrative law judge's characterization of the studies on appeal." *Id.* We thus decline to address employer's assertion of error in the administrative law judge's characterization of the July 20, 2001 pulmonary function study as qualifying. Consequently, we affirm the administrative law judge's determination that the July 20, 2001 pulmonary function study supported the opinions of those physicians who found claimant to be totally disabled. The administrative law judge permissibly determined that those opinions outweighed the contrary opinion of Dr. Dittman. 20 C.F.R. §718.204(b)(2)(iv); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

Because employer alleges no further error in the administrative law judge's Decision

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[2] Employer adds, "Similarly, the arterial blood gas study of July 20, 2001 was non-qualifying." Employer's Brief at 5-6. The Board, however, previously affirmed, as unchallenged on appeal, the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii). *McSurdy v. Beltrami Enterprises, Inc.*, BRB No. 02-0858 BLA (Sept. 26, 2003)(unpublished), at 3 n.4.

and Order on Remand or Addendum, we affirm the administrative law judge's award of benefits in the instant case.

Accordingly, the Decision and Order Awarding Benefits (Upon Remand by the Benefits Review Board) and Addendum to Decision and Order Awarding Benefits of the administrative law judge are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge