BRB No. 97-0895 BLA

JOHN J. MALEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	Date Issued:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1558) of Administrative Law Judge Robert D. Kaplan 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). Initially, in this case involving a petition for modification filed by claimant, the administrative law judge found no mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310.[1] Next, the administrative law judge considered the new evidence

[1]Claimant originally filed a claim on August 15, 1988, which was denied by the administrative law judge in a Decision and Order issued on January 29, 1990, Director's Exhibit 18. The administrative law judge found eight years and eight months of coal mine

submitted in conjunction with claimant's petition for modification to determine whether it established whether claimant's respiratory or pulmonary condition had become worse and established that he was totally disabled pursuant to Section 718.204(c). The administrative

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employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203, but further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, therefore, denied benefits. Claimant took no further action on this claim.

Claimant filed a second, duplicate claim on February 5, 1992, Director's Exhibit 1. In a Decision and Order issued on July 21, 1993, the administrative law judge considered the relevant, newly submitted evidence of record and found that it was insufficient to establish that claimant was totally disabled from a respiratory or pulmonary standpoint pursuant to Section 718.204(c)(1)-(4). Accordingly, benefits were denied, *see* 20 C.F.R. §725.309. Claimant appealed and the Board affirmed the administrative law judge's Decision and Order denying benefits. *Maley v. Director, OWCP*, BRB No. 93-2265 BLA (Jul. 25, 1995)(unpub.).

Claimant subsequently filed a petition for modification on April 12, 1996, along with new evidence, asserting that it was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310, Director's Exhibit 36, at issue herein.

law judge found the newly submitted pulmonary function study and blood gas study evidence insufficient to demonstrate total disability pursuant to Section 718.204(c)(1)-(2) and that there was no evidence in the record of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(c)(3). Finally, the administrative law judge found the newly submitted medical opinion evidence insufficient to demonstrate that claimant was totally disabled pursuant to Section 718.204(c)(4) and, therefore, found that claimant failed to establish that he was totally disabled pursuant to Section 718.204(c) based on the current evidence as well as the prior record. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted pulmonary function study and medical opinion evidence insufficient to demonstrate total disability pursuant to Section 718.204(c)(1) and (4). The Director, Office of Workers' Compensation Programs, [the Director] responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact, *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986).

[2]Inasmuch as the administrative law judge's findings pursuant to Section 718.204(c)(2)-(3) have not been challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to Section 718.204(c)(1), the administrative law judge considered the five newly submitted pulmonary function studies of record, which include three non-qualifying[3] pulmonary function studies, Director's Exhibits 40, 42, 48, and two qualifying pulmonary function studies. Dr. Kraynak, claimant's treating physician who is board-eligible in family medicine, administerred the two qualifying pulmonary function studies, Director's Exhibits 43, 48; Claimant's Exhibit 3. The qualifying pulmonary function study dated February 8, 1996, was found to be invalid by Dr. Sahillioglu, who is board-eligible in internal medicine and pulmonary diseases, because of inconsistent effort on the FVC and MVV results and because no demonstration of inspiratory effort was provided, Director's Exhibit 43. The qualifying pulmonary function study dated October 17, 1996, was also found to be invalid by Dr. Sahillioglu because claimant's weight was not recorded, there was no demonstration of inspiratory effort, the MVV result was variable and the restrictive defect it indicated needed to be verified by a volume determination, Director's Exhibit 48; Claimant's Exhibit 3.

The administrative law judge, within his discretion, gave greater weight to Dr. Sahillioglu's opinion that Dr. Kraynak's February 8, 1996, qualifying pulmonary function study was invalid, in part, because of inconsistent effort on the FVC and MVV results and in light of his superior qualifications, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Decision and Order at 4. However, the administrative law judge discredited the reasons Dr. Sahillioglu's gave for invalidating the October 17, 1996, pulmonary function study inasmuch as all but one of the reasons were irrational and/or not required under the regulations, Decision and Order at 5. Nevertheless, inasmuch as the results of contemporaneous pulmonary function studies dated October 3, 1996, Director's Exhibit 49, and February 22, 1996, Director's Exhibit 40, were higher, the administrative law judge found them more reliable and therefore found the October 17, 1996, pulmonary function study result was not valid.

[3]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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Regarding the February 8, 1996, pulmonary function study, claimant properly contends that, contrary to Dr. Sahillioglu's opinion, it is not required that a patient's inspiration be recorded on a pulmonary function study's tracings where the initial inspiration is taken from the open atmosphere, *see* 20 C.F.R. Part 718, Appendix B (1)(vii), (2)(ii)(A).[4] Claimant also contends that Dr. Sahillioglu provided no rationale to support his opinion that the FVC and MVV results of the qualifying February 8, 1996, pulmonary function study were inconsistent. However, Dr. Sahillioglu did review the tracings. Moreover, merely checking a box on a Department of Labor form without further explanation is not necessarily unreliable, even when a physician finds a pulmonary function study to be invalid, *see Gambino v. Director, OWCP*, 6 BLR 1-134 (1983); *see also Hall v. Director, OWCP*, 12 BLR 1-133 (1989)(where the Board held that a physician's checking of a "no"

[4]The quality standards at Appendix B do not require that a patient's inspiration be recorded on the tracings. Part 718, Appendix B (2)(ii) specifically states that the "patient shall be instructed to make a full inspiration, either from the spirometer or the open atmosphere, using a normal breathing pattern, and then blow into the apparatus," and that "the patient shall be observed for compliance," that the "expirations shall be checked visually" from the tracings, and that the "effort shall be judged unacceptable when" the patient has "not reached full inspiration preceding the forced expiration," *see* 20 C.F.R. Part 718, Appendix B (2)(ii)(A). Thus, the quality standards specifically provide that inspiration may be taken prior to even blowing into the apparatus or spirometer, which could measure the level of inspiration, and that a patient's inspiration effort will be judged based on the observations of the administrator of the pulmonary function study. In addition, Appendix B (1)(vii) states that "the instrument used shall provide a tracing... during the entire forced expiration," *see* 20 C.F.R. Part 718, Appendix B (1)(vii), but does not state that a tracing shall be provided during the inspiration. In this regard, Dr. Kraynak indicated that claimant's initial inspiration was taken from the open atmosphere and found the February 8, 1996, pulmonary function study valid, *see* Claimant's Exhibit 2.

box on a Department of Labor form could support rebuttal at 20 C.F.R. §727.203(b)(3)); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(where the Board held that a physician's checking of a "no" box as to etiology on a standardized form is sufficiently reasoned under 20 C.F.R. §718.202(a)(4)). Inasmuch as the administrative law judge, within his discretion, credited the other valid, alternative reason for discrediting the qualifying February 8, 1996, pulmonary function study provided by Dr. Sahillioglu, *i.e.*, that the FVC and MVV results were inconsistent, *see Hall, supra; Perry, supra; Gambino, supra,* and in light of his superior qualifications, *see Wetzel, supra*, any potential error by the administrative law judge in failing to consider Dr. Sahillioglu's other erroneous reason that claimant's inspiration was not recorded when considering the February 8, 1996, pulmonary function study is harmless, *see Searls v. Southern Ohio Coal Co*., 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co*., 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Turning to the qualifying October 17, 1996, pulmonary function study from Dr. Kraynak, claimant also contends that the administrative law judge erred in finding that it was not valid because the results of contemporaneous pulmonary function studies were higher and, therefore, more reliable, noting that the United States Court of Appeals for the Fourth Circuit has held that, "on any given day, it is possible to do better [on a pulmonary function study], and indeed to exert more effort, than one's typical condition would permit," *see Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991). However, inasmuch as claimant's most recent coal mine employment was performed in Pennsylvania, the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). Moreover, it is within the administrative law judge's discretion to find a pulmonary function study's values disparately low in comparison with contemporaneous studies and discredit the pulmonary function study on that basis, *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). Consequently, we affirm the administrative law judge's discrediting of the qualifying February 8, 1996, and October 17, 1996, pulmonary function studies and, therefore, affirm his finding that total disability was not demonstrated by the newly submitted pulmonary function study evidence under Section 718.204(c)(1).

Next, pursuant to Section 718.204(c)(4), the administrative law judge considered the three newly submitted opinions of record, including the opinion of Dr. Kraynak, a board-eligible physician in family medicine and claimant's treating physician, who found that claimant's condition had gotten progressively worse since April, 1993, and that claimant was totally disabled due to pneumoconiosis, Claimant's Exhibit 2. In addition, Dr. Simelaro, a board-certified physician in internal medicine and diseases of the chest, found claimant's pulmonary function study results were "normal," that his "pulmonary functions have not deteriorated," and recommended that claimant "never return to work," Director's Exhibit 40. Finally, Dr. Rashid, a board-certified physician in internal medicine, noted that claimant's pulmonary function study and blood gas study results were normal, but provided no opinion as to the degree, if any, of claimant's impairment or disability, Director's Exhibit 48.

Contrary to claimant's contention, the administrative law judge properly found that Dr. Simelaro's opinion that claimant should never return to work does not constitute an opinion that claimant is totally disabled, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Decision and Order at 6. The administrative law judge also inferred from Dr. Simelaro's statements that the physician believed claimant was not totally disabled. In addition, the administrative law judge inferred from Dr. Rashid's omission of any opinion as to the degree, if any, of claimant's impairment or disability and his findings that claimant's pulmonary function study and blood gas study results were normal that he believed claimant was not totally disabled. Ultimately, the administrative law judge gave greater weight to the opinions of Drs. Simelaro and Rashid in light of their superior qualifications and because they were supported by underlying objective studies, *see Wetzel, supra*.

Regarding claimant's contentions under Section 718.204(c)(4), although claimant notes that Dr. Kraynak is claimant's treating physician, an administrative law judge may, but is not required to give greater weight to a treating physician's opinion than a non-treating physician's opinion, *see Wetzel, supra*. Moreover, although, as claimant contends, Dr. Rashid examined claimant only once, that fact does not *per se* render his opinion unreasoned or undocumented, *see Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). Finally, claimant contends the fact that Dr. Rashid failed to diagnose pneumoconiosis compromises his opinion. Dr. Rashid, however, noted that claimant's x-ray result was classified as 1/1, which is sufficient to affirmatively establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.102. Moreover, as the administrative law judge noted, Decision and Order at 6, n. 4, the fact that Dr. Rashid may have failed to diagnose pneumoconiosis does not detract from his opinion as to disability as x-rays are not diagnostic of the extent of respiratory disability, but only of the presence or absence of disease, *see Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129, n. 4 (1987), and a diagnosis of pneumoconiosis does not go to the issue of impairment or disability, *see Jarrel v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting).

Nevertheless, inasmuch as non-qualifying objective study results, alone, do not establish the absence of a respiratory or pulmonary impairment or disability, *see Estep v. Director, OWCP*, 7 BLR 1-904 (1985), the administrative law judge erred in inferring from the normal objective test results provided by Drs. Simelaro and Rashid that they believed that claimant was not totally disabled, without reference to any corroborating medical statement provided by Drs. Simelaro and Rashid suggesting that these results necessarily establish that claimant is not totally disabled, *see e.g. McMath v. Director,* OWCP, 12 BLR 1-6 (1989); *Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). Interpretation of pulmonary function study or blood gas study results is a determination for medical experts, such that it is error for an administrative law judge to interpret such evidence and substitute his own conclusions or inference for those of a physician, *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993*); Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); *Casella v. Kaiser Steel Corp*, 9 BLR 1-131

(1986); *see also Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). Consequently, inasmuch as the administrative law judge improperly exceeded his expertise by speculating that the results of the pulmonary function studies and blood gas studies administered by Drs. Simelaro and Rashid indicated that they believed claimant was not totally disabled, we vacate the administrative law judge's finding pursuant to Section 718.204(c)(4)[5] and remand the case for reconsideration.[6]

[5]Although the Director contends that Dr. Kraynak's opinion is not documented and reasoned, the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

[6] The administrative law judge may wish to reopen the record if he finds that the record is incomplete and that further development of the relevant evidence is warranted, *see Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

Accordingly, the Decision and Order of the administrative law judge's denying benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge