BRB No. 97-1106 BLA

JOSEPH KORZENASKIE	)	
	)	
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 - Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-BLA-0787) of Administrative Law Judge Ainsworth H. Brown 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). A summary of the procedural history is as follows: On June 30, 1973, claimant filed his first claim for black lung benefits which was denied by the Social Security Administration, and was finally denied by the Department of Labor on April 9, 1980. Director's Exhibit 19. Claimant did not pursue that claim but filed a second claim for benefits on September 13, 1984. Administrative Law Judge Joel R. Williams denied benefits on March 29, 1988 because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. *Id.* Claimant did not appeal that denial of benefits but filed the instant claim for benefits on September 11, 1995. It was denied on January 24, 1996 by the district director. Director's Exhibit 20. The claim was transferred to the Office of Administrative Law Judges on February 23, 1996 for a

formal hearing. *Id.*

Administrative Law Judge Ainsworth H. Brown (the administrative law judge) credited claimant with twelve years of coal mine employment. He found the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d) and weighed the new evidence pursuant to the governing standard in *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), to determine if there had been a material change in conditions. He reviewed all the evidence of record on the merits and found that claimant established a material change in conditions and the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1), based on the x-ray evidence. He then found the evidence of record insufficient to establish total respiratory disability at 20 C.F.R. §718.204(c). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in evaluating the pulmonary function studies at Section 718.204(c)(1) and the medical reports at Section 718.204(c)(4). He urges reversal of the administrative law judge's denial of benefits and, in the alternative, urges remand.[1] The Director, Office of Workers' Compensation Programs (the Director), had submitted a Motion to Remand. Claimant has filed Claimant's Response to Director's Motion to Remand.[2]

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,

[1]Claimant has submitted with his brief on appeal a portion of cross-examination deposition testimony provided by Dr. Green in another case. The deposition testimony was not admitted into evidence below. Inasmuch as the Board is not authorized to consider new evidence submitted for the first time on appeal, we decline to consider it. *See* 20 C.F.R. §802.301(b); *Berka v. North American Coal Co.*, 8 BLR 1-183 (1985). The deposition testimony is hereby returned to claimant with this Decision and Order.

[2]We affirm, as unchallenged, the administrative law judge's findings at Sections 718.202(a)(1), 718.204(c)(2) and (c)(3), his finding that a material change in conditions was established at Section 725.309(d), as well as his length of coal mine employment finding. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-70 (1983).

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).

With respect to Section 718.204(c)(1), claimant contends that the administrative law judge erred in mischaracterizing the October 9, 1995 pulmonary function study as non-qualifying, erred in crediting the invalidations of Dr. Michos and erred in failing to provide a rationale for his findings. Initially, we affirm the administrative law judge's reliance on invalidations by Dr. Michos of the October 9, 1995, May 15, 1996 and September 19, 1996 pulmonary function studies. *Clark v. Karst Robbins Coal Co.,* 12 BLR 1-149 (1988)(*en banc*); *Siegel v. Director, OWCP,* 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting). However brief Dr. Michos' invalidation reports may have been, they did not merely declare the studies invalid, but gave specific reasons why each study was invalid. Moreover, the administrative law judge was fully cognizant of Dr. Kraynak's disagreement with Dr. Michos' invalidations of Dr. Kraynak's May 15, 1995 and September 19, 1996 studies, Decision and Order at 7, but within his discretion to make credibility determinations, *see Kertesz v. Crescent Hills Coal Co.,* 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986), credited Dr. Michos' invalidations based on Dr. Michos' superior qualifications. Claimant and the Director correctly contend that the administrative law judge erred in not finding the October 9, 1995 pre-bronchodilator values to be qualifying. However, contrary to claimant's contention, as the Director correctly asserts, the administrative law judge properly relied on Dr. Michos' invalidation of that study based on Dr. Michos' superior qualifications. *See Clark, supra; Siegel, supra.* Similarly, the administrative law judge could find the October 9, 1995 pulmonary function studies unreliable based on Dr. Green's opinion that the miner did not exert optimal effort. *See generally Revnack v. Director,OWCP,* 7 BLR 1-771 (1985). Thus, the administrative law judge's error in failing to recognize the qualifying status of the October 9, 1995 study is harmless. *See Larioni v. Director, OWCO,* 6 BLR 1-1276 (1984). However, as claimant and the Director correctly contend, the administrative law judge's mischaracterization of the October 9, 1995 study as non-qualifying does affect his weighing of the September 9, 1996 qualifying study.[3] When the record contains both a pre-bronchodilator and a post-bronchodilator study and one qualifies and one does not, as with the October 9, 1995 study, the administrative law judge must weigh the values and explain which results he considers more productive. *See generally Keen v. Jewell Ridge Coal Corp*., 6 BLR 1-454 (1983). We therefore vacate the administrative law judge's Section 718.204(c)(1) finding and remand the case to the administrative law judge. We note that contrary to claimant's contention, an administrative law judge may discredit a pulmonary function study which is

[3]Specifically, the administrative law judge used the October 9, 1995 study to find the September 9, 1996 study insufficient to establish total disability "given the fact that the study conducted by Dr. Green less than a year earlier, [the October 9, 1995 study] and found to be invalid for suboptimal effort, produced values exceeding those set forth in the regulations as evidence of total disability." Decision and Order at 8.

disparately low in comparison with other studies. *See Baker v. North American Coal Co.,* 7 BLR 1-79 (1984); *Burich v. Jones & Laughlin Steel Corp.,* 6 BLR 1-1189 (1984).

We next address claimant's challenges to the administrative law judge's findings at Section 718.204(c)(4). Claimant argues that the administrative law judge erred in rejecting the opinion of his treating physician, Dr. Kraynak. Claimant alleges that Dr. Kraynak's opinion is based on more than the pulmonary function studies which the administrative law judge found invalidated. The administrative law judge may not selectively analyze constituent parts of a medical opinion, as claimant contends. The administrative law judge must resolve inconsistencies in the medical opinions and draw inferences. *See Lafferty v. Cannelton Industries, Inc.,*12 BLR 1-190 (1989). Because we are remanding this case for the administrative law judge to reconsider his findings regarding the pulmonary function evidence at Section 718.204(c)(1), he must consider the impact of his pulmonary function study findings on his evaluation of the medical reports at Section 718.204(c)(4). We, therefore, vacate the administrative law judge's discrediting of Dr. Kraynak's opinion and remand for reconsideration. Although the administrative law judge was cognizant of Dr. Kraynak's treating physician status, he is not required to credit the treating physician, as claimant contends.[4] The status of the physician is only one factor to be considered by the administrative law judge in according weight to a medical opinion. *See Schaaf v. Matthews,* 574 F.2d 157 (3d Cir. 1978); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994).

Claimant also contends that the administrative law judge erred in relying on earlier opinions in the record that are no longer relevant. The administrative law judge did consider evidence submitted with the earlier claims. Contrary to claimant's contention, however, the administrative law judge was conscious of the age of the medical evidence. In a duplicate claim, as here, the administrative law judge is required to consider the entirety of the evidentiary record in adjudicating the claim on the merits. With respect to Section 718.204(c)(4), the administrative law judge relied on the opinion of Dr. Green over that of Dr. Kraynak and specifically noted that Dr. Green had examined claimant "fairly recently."[5] Thus, the administrative law judge's approach to weighing the evidence at Section 718.204(c)(4) is consistent with the principle that medical evidence developed closer in time to the hearing may be more probative. *See generally Swarrow, supra; Cooley v. Island Creek Coal Co.,* 845 F.2d 622, 11 BLR 1-147 (6th Cir. 1988)(the crucial inquiry is claimant's condition at the time of the hearing); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Faulk v.Peabody Coal Co.,* 14 BLR 1-18(1990).

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[4]The administrative law judge noted that Dr. Kraynak testified in deposition on September 26, 1996 that claimant had been under his care since May 15, 1996. Decision and Order at 9; Claimant's Exhibit 29, Deposition at 6.

[5]Dr. Green examined claimant on October 9, 1995. He opined that claimant had no pulmonary impairment and could return to his coal mine employment. Director's Exhibit 12. Dr. Kraynak opined that claimant was totally disabled from pneumoconiosis acquired in the anthracite coal industry. Claimant's Exhibits 21, 29.

Claimant additionally argues that the administrative law judge erred in relying on Dr. Green's opinion. On remand, the administrative law judge should reassess his evaluation of Dr. Green's report to determine the impact, if any, of the pre-bronchodilator qualifying pulmonary function study results on Dr. Green's report at Section 718.204(c)(4). Hence, on remand, the administrative law judge should reweigh the evidence at Section 718.204(c) under the standard in *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986).

If on remand the administrative law judge finds total respiratory disability established at Section 718.204(c), he must consider the issue of causation at Section 718.204(b) under the governing standard in *Bonessa v. U.S. Steel Corp.,* 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge