BRB No. 99-0818 BLA

ISAAC O. MILLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; 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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Modification (99-BLA-150) 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). This is the fourth appeal in this claim.[1] The administrative

[1] Claimant initially filed this claim on September 10, 1990, which the district director denied in January 1991 and again after a conference in April 1991. Director's Exhibits 1, 23, 31. Following a hearing, Administrative Law Judge Ainsworth H. Brown (the administrative

law judge considered the newly submitted evidence in conjunction with the previous

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law judge) issued a Decision and Order on May 4, 1992. The administrative law judge credited claimant with ten years of coal mine employment, found the x-ray evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and found claimant entitled to the presumption at 20 C.F.R. §718.203(b) as rebuttal had not been established. The administrative law judge, however, found the evidence insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) and denied benefits. *See* Director's Exhibit 57. In the first appeal, the Board affirmed the findings of the administrative law judge at Sections 718.202, 718.203, and 718.204(c)(2)-(3), (d)(2) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Board, however, vacated the findings of the administrative law judge at Section 718.204(c)(1) and (4) and remanded this case for further consideration. *See Miller v. Director, OWCP*, BRB No. 92-1709 (Nov. 24, 1993) (unpub.); Director's Exhibit 66.

On remand, the administrative law judge again found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(1) and (4) and denied benefits. *See* Director's Exhibit 71. In the second appeal, the Board affirmed the administrative law judge's findings at Section 718.204(c)(1) and (4) and the denial of benefits. *See Miller v. Director, OWCP*, BRB No. 94-3811 (Feb. 27, 1995)(unpub.); Director's Exhibit 79.

Claimant timely requested modification on June 5, 1995, which the district director denied on September 21, 1995 and on February 15, 1996, after a conference, on the grounds that claimant did not establish a change in conditions or a mistake in a determination of fact. Following a hearing, the administrative law judge issued a Decision and Order on April 9, 1997 denying modification. The administrative law judge found that no mistake in a determination of fact had been made, concluded that the newly submitted evidence failed to demonstrate the presence of a totally disabling respiratory impairment, and therefore, no change in conditions was established, and denied modification pursuant to 20 C.F.R. §725.310. In the third appeal, the Board affirmed the findings of the administrative law judge at Section 718.204(c)(1) and (4) and his denial of modification. *See Miller v. Director, OWCP*, BRB No. 97-1008 BLA (Mar. 23, 1998)(unpub.); Director's Exhibit 121.

Claimant filed the present request for modification on June 9, 1998 which the district director denied on August 31, 1998. *See* Director's Exhibit 122, 124. Although claimant initially requested a hearing, the parties ultimately agreed to a decision on the record. *See* Letter dated December 14, 1998 from claimant's counsel; Director's Exhibit 125.

evidence of record at 20 C.F.R. §718.204(c), and found it insufficient to establish a change in condition. *See* 20 C.F.R. §725.310. The administrative law judge also reviewed the evidence of record and concluded that a mistake in a determination of fact had not been made. *Id*. Accordingly, he denied modification. In the instant appeal, claimant challenges the findings of the administrative law judge at Section 718.204(c)(1) and (4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[2] We affirm, as unchallenged on appeal, the finding of the administrative law judge that a mistake in a determination of fact was not established at 20 C.F.R. §725.310 and the finding at 20 C.F.R. §718.204(c)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Since the miner's last coal mine employment took place in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit, the jurisdiction where the miner last worked. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error. In considering the weight to be accorded the June 8, 1998 qualifying pulmonary function study performed by Dr. Kraynak at Section 718.204(c)(1), the administrative law judge acted within his discretion when he accorded greater weight to Dr. Ranavaya's invalidation report of this test on the basis of his superior credentials. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 5; Director's Exhibit 123. Furthermore, contrary to claimant's assertion, the invalidation report of Dr. Ranavaya is legible, *see* Director's Exhibit 123, and Dr. Ranavaya provided a proper rationale for invalidating this test as he stated that the test reflected less than optimal effort by claimant during its performance and that the test was improperly performed as it did not meet the reproductive/variability criteria of the regulations.[4] *See* 20 C.F.R. §718.204(c)(1); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); Director's Exhibit 123.

[4] Claimant's argument concerning Dr. Ranavaya's statement that the June 8, 1998 pulmonary function study does not meet the NIOSH standards is without merit as the regulatory validation criteria is based on NIOSH standards. *See* 20 C.F.R. §718.204(c)(1), Appendix B.

Next, contrary to claimant's assertion, the administrative law judge did not err in crediting Dr. Rashid's December 17, 1998 non-qualifying pulmonary function study. Contrary to claimant's assertion, Dr. Rashid did not perform six trials in an effort to obtain the highest possible results when he conducted his pulmonary function study on December 17, 1998. Instead, in compliance with the regulatory criteria for administering pulmonary function tests, Dr. Rashid performed three pre-bronchodilator and three post-bronchodilator pulmonary function studies and selected the highest values in each set as the basis for making his determination on the issue of the presence of a totally disabling respiratory impairment.[5] *See* 20 C.F.R. §718.204(c)(1), Appendix B; Director's Exhibit 131. Further, in according greater weight to Dr. Rashid's non-qualifying pulmonary function study over the February 15, 1999 qualifying pulmonary function study performed by Dr. Kraynak, the administrative law judge permissibly determined that since pulmonary function studies are effort dependent, the validity of a test depends on the effort expended by the test subject and that spurious high values are not possible although spurious low values can result when less than full effort is expended by the test subject. Thus, the administrative law judge acted within his discretion when he accorded greater weight to Dr. Rashid's non-qualifying pulmonary function study. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). We, therefore, affirm the administrative law judge's treatment of the pulmonary function studies and his finding that the newly submitted pulmonary function study evidence was insufficient to establish a totally disabling respiratory impairment at Section 718.204(c)(1) as it is supported by substantial evidence.

[5] All of the trials performed by Dr. Rashid yielded values in excess of the regulatory values for disability. *See* 20 C.F.R. §718.204(c)(1), Appendix B; Director's Exhibit 131.

At Section 718.204(c)(4), claimant must demonstrate the presence of a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). In the instant case, the administrative law judge properly found that Dr. May's characterization of claimant's function capacity as "quite limited...from a disability standpoint due to a significant pulmonary component" was insufficient to demonstrate the presence of a totally disabling respiratory impairment because the opinion of Dr. May, who is Board-certified in internal medicine and cardiology and claimant's treating cardiologist,[6] was not based on any objective testing of claimant's pulmonary system.[7] Decision and Order at 6; Director's Exhibit 123; *Beatty, supra*; *see Church, supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Tedesco, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Likewise, the administrative law judge did not err when he declined to accord determinative weight to the opinion of Dr. Sackman, a Board-certified cardiologist who, contrary to claimant's assertion that he is also a treating physician, saw claimant one time. *See* Director's Exhibit 122. The administrative law judge noted that Dr. Sackman's opinion, that claimant had a "limited functional capacity", was based on his understanding that claimant suffered from pulmonary disease, presumably black lung, but was made without the benefit of any pulmonary testing. *See* Decision and Order at 6; Director's Exhibit 122. Thus, the administrative law judge permissibly inferred, because of the lack of pulmonary testing contained in this report, that the physician's conclusion regarding the source of claimant's limited functional capacity was unreasoned.[8] *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Church, supra*; *Carson, supra*; *Fields, supra*.

Finally, because Dr. Rashid did not find a totally disabling respiratory impairment and because the administrative law judge found the opinions of Drs. May and Sackman to be unreasoned, we need not address claimant's argument that the administrative law judge erred in according greater weight to Dr. Rashid's opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we affirm the findings of the administrative law judge at Section 718.204(c)(4) as they are supported by substantial evidence. We also affirm the administrative law judge's finding that the newly submitted medical evidence was

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[6] Dr. May stated that he examined claimant once a year to determine his cardiac status. *See* Director's Exhibit 122. After his most recent examination, Dr. May opined that claimant's cardiac status was stable. *Id*.

[7] In his most recent examination of claimant, Dr. May conducted a physical examination and a stress echo cardiogram. *Id*. The stress echo cardiogram was limited due to shortness of breath. *Id*.

[8] Like Dr. May, Dr. Sackman conducted a physical examination of claimant and performed an echo cardiographic test and holter monitor test. *Id*.

insufficient to establish a change in condition at Section 725.310. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). The administrative law judge's denial of benefits is therefore supported by substantial evidence and must be affirmed.

Accordingly, the Decision and Order Denying Benefits Upon Modification of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge