BRB No. 01-0759 BLA

ROBERT BLEW	)	
	)	
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 (Upon Remand By The Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Michael J. Rutledge (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (Upon Remand By The Benefits Review Board)(99-BLA-0500) 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). This case is before the Board for a second time. Director's Exhibit 1. On November 9, 1999, the administrative law judge issued a Decision and Order denying benefits. The administrative law judge found that claimant established a coal mine employment history of nine years and the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge concluded, however, that the weight of the evidence failed to establish the presence of a totally disabling respiratory or pulmonary impairment. Accordingly, benefits were denied. Subsequent to an appeal by claimant, the Board issued a Decision and Order vacating the

denial of benefits. *Blew v. Director, OWCP*, BRB No. 00-0273 BLA (Jan. 31, 2001)(unpub.). The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment. *Blew*, slip op. at 2 n.2. The Board, however, vacated the administrative law judge's finding that claimant failed to demonstrate a totally disabling respiratory impairment by pulmonary function study evidence because the administrative law judge failed to provide any support for his finding that Dr. Michos's qualifications were superior to those of Dr. Kraynak when he credited Dr. Michos's invalidation of claimant's March 10, 1999 qualifying pulmonary function study and failed to explain why he found that the more recent January 14, 1998 non-qualifying pulmonary function study was the most credible of record. *Blew*, slip op. at 2-3. Accordingly, the Board remanded the case for the administrative law judge to provide a basis for his finding that Dr. Michos's qualifications were superior to those of Dr. Kraynak, and for further consideration of the pulmonary function study evidence. The Board further instructed the administrative law judge to again address the opinion of Dr. Kraynak, since he had relied on the invalidated March 10, 1999, qualifying pulmonary function study and rejected the non-qualifying January 14, 1998 study in opining that claimant was totally disabled, and to weigh, together, all of the relevant evidence on total disability, both like and unlike, in reaching a determination on the issue. *Blew*, slip op. at 4. On remand, the administrative law judge considered the evidence of record, including Dr. Michos's credentials, and concluded, again, that such evidence failed to establish total respiratory disability. Decision and Order on Remand at 2-4. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in reopening the record to accept a statement of Dr. Michos's credentials and then crediting Dr. Michos's invalidation of the March 10, 1999 qualifying pulmonary function study in light of those credentials.[1] Claimant further asserts that the administrative law judge erred in his analysis of the pulmonary function study evidence and medical opinion evidence and, therefore, erred in concluding that claimant failed to establish a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's

[1] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

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).

Claimant asserts that the administrative law judge erred in reopening the record to admit evidence of Dr. Michos's credentials. Claimant argues that the administrative law judge's decision to reopen the record on remand constitutes an abuse of discretion because it provided the Director with the opportunity to correct a deficiency in the record which was not provided claimant.

On May 31, 2001, the administrative law judge issued an Order Reopening the Record for Additional Medical Evidence to obtain evidence of Dr. Michos's credentials because those credentials were necessary to a proper weighing of the pulmonary function study evidence. The administrative law judge found, citing the American Board of Medical Specialties database internet listing, that Dr. Michos was Board-certified in Internal Medicine and Pulmonary Disease, and the administrative law judge provided both the Director and claimant ten days to either verify or dispute the accuracy, or use, of these qualifications.[2] In response, the Director submitted Dr. Michos's curriculum vitae confirming the administrative law judge's finding regarding Dr. Michos's qualifications. In a letter dated June 7, 2001, claimant stated that he did not dispute that Dr. Michos was Board-certified in Internal and Pulmonary Medicine, but objected to the administrative law judge's reopening of the record to allow the Director to submit Dr. Michos's curriculum vitae when the Director had not submitted the credentials the first time the case was before the administrative law judge.

[2] Although the administrative law judge refers to employer rather than the Director in the order, because the Director is the respondent in this case, we assume that the reference to employer was a clerical error. Order dated May 31, 2001.

The decision as to whether to reopen the record on remand is within the province of the administrative law judge, 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1985); *see Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49, 1-51 (1988); *see also Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169, 1-174 (1989)(*en banc*). Since the Board's remand order clearly instructed the administrative law judge to provide a basis for his finding that Dr. Michos possessed qualifications superior to those of Dr. Kraynak, the administrative law judge's decision to reopen the record was consistent with the Board's remand instructions, and did not constitute an abuse of discretion. *See* 20 C.F.R. §725.456(e); *Lynn*, *supra*; *White*, *supra*; *Toler*, *supra*; *see also Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd sub nom. Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992). Moreover, although claimant objects to the administrative law judge's reopening of the record because the Director has been allowed to submit evidence he could have submitted the first time the case was before the administrative law judge, the administrative law judge's finding regarding Dr. Michos's credentials does not rest on evidence provided by the Director, *i.e.*, Dr. Michos's curriculum vitae, but rather on the fact that he took judicial notice of Dr. Michos's credentials as shown on the American Board of Medical Specialties database internal listing, which is proper, and which he could have done in his first decision. *See Maddaleni*, *supra*. Because the administrative law judge could take judicial notice of Dr. Michos's credentials as long as he gave claimant an opportunity to respond, which he did, we reject claimant's contention that this in any way denied claimant due process. Accordingly, we reject claimant's assertion and hold that the administrative law judge permissibly reopened the record in order to obtain the credentials of Dr. Michos. Further, contrary to claimant's argument, based on these credentials, the administrative law judge properly accorded greater weight to the opinion of Dr. Michos regarding the validity of the March 10, 1999 pulmonary function study, *i.e.*, that it was invalid, than to the contrary opinion of Dr. Kraynak. Claimant's Exhibits 1, 3; Claimant's Exhibit 5 at 9; Director's Exhibits 47, 53; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting).[3]

[3] Dr. Michos stated that the study was invalid because claimant provided less than optimal effort, cooperation and comprehension. Director's Exhibit 47.

Claimant next contends that the administrative law judge erred in finding that the January 14, 1998, non-qualifying pulmonary function study was credible and, therefore, cast doubt on the credibility of the earlier, April 2, 1996 qualifying study. Director's Exhibits 12, 25. Specifically, claimant asserts that the January 14, 1998, non-qualifying test should not have been considered by the administrative law judge as a valid indicator of claimant's pulmonary status because Dr. Kraynak questioned the accuracy of the test results. Claimant also contends that the administrative law judge's analysis of the pulmonary function study evidence was flawed by his misapplication of the opinion of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994)(unpub.) to find that a test which produces higher results is automatically entitled to greater weight.

Because pneumoconiosis is a progressive disease, the administrative law judge found that the more recent, non-qualifying study of January 14, 1998, was a more reliable indicator of claimant's condition than the qualifying study of April 2, 1996. Specifically, relying on *Andruscavage*, *supra*, the administrative law judge discounted Dr. Kraynak's opinion, that the 1998 test showed inaccurate values that represented claimant's lung function as higher than it actually was, because the Third Circuit had held that it was reasonable to conclude that an improperly administered test will yield "spuriously low values, not spuriously high values." *Andruscavage*, *supra*. The administrative law judge therefore accorded Dr. Kraynak's invalidation of the January 14, 1998 study little, if any, weight. Decision and Order On Remand at 3. This was rational. *Andruscavage*, *supra*; *Cf. Thorn v. Itmann Coal Co.*, 3 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991).[4] Accordingly, the administrative law judge, properly concluded that the 1998 non-qualifying study was a valid pulmonary function study and that the weight of the pulmonary function evidence failed to demonstrate a totally disabling respiratory impairment. Decision and Order On Remand at 3; *see Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986); *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984); *Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983). The administrative law judge has, therefore, complied with the Board's remand instructions by providing a valid basis for concluding that the January 14, 1998 non-qualifying pulmonary study was valid, and we affirm the administrative law judge's determination that the pulmonary function study

[4] The Director, Office of Workers' Compensation Programs, contends that even if application of *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpub.) was improper, Dr. Kraynak's opinion invalidating the non-qualifying January 14, 1998 study is not credible because it was to speculative, *i.e.*, Dr. Kraynak states that some movement on claimant's part "may" have affected the test result. *See U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389-90, 21 BLR 2-639, 647-48 (4th Cir. 1999).

evidence is insufficient to support a finding of total disability. *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant also asserts that the medical opinion of Dr. Kraynak diagnosing total disability arising out of coal workers' pneumoconiosis, Claimant's Exhibit 5, is entitled to the greatest weight because Dr. Kraynak has a lengthy history as claimant's treating physician and because Dr. Kraynak's opinion is the best-reasoned opinion of record, notwithstanding his reliance on pulmonary function studies found to be invalid.[5] Claimant's Exhibit 5.

The administrative law judge concluded that the probative weight of Dr. Kraynak's opinion was "diminished" by his reliance on the questionable April 1996 and March 1999 qualifying pulmonary function studies. Decision and Order at 3. This was rational. *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, contrary to claimant's contention, the administrative law judge is not required to accord greater weight to the opinion of a treating physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Accordingly, the administrative law judge properly concluded that in weighing all the evidence together, blood gas studies, pulmonary function studies and medical opinions, the evidence did not establish a totally disabling respiratory impairment. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987). Inasmuch as claimant has failed to establish a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement pursuant to Part 718, *see Trent, supra*; *Perry, supra*, we must affirm the denial of benefits.

[5] The other medical opinion of record, by Dr. Corazza, did not find a totally disabling respiratory impairment. Dr. Corazza indicated that claimant was totally disabled due to "Post-CVA affects which include recent memory deficit, difficulty in concentration." Director's Exhibit 22. *See Beatty v. Danri Corp. & Triangle Enterprises*, 49 F.3d 993, 19 BLR 2-136 (3d Cir.1995), *aff'g* 16 BLR 1-11 (1991).

Accordingly, the Decision and Order (Upon Remand By The Benefits Review Board) of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge