BRB No. 02-0745 BLA

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

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

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

Jeffrey S. Goldberg (Howard M. Radzely, Acting 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-0939) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) 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).[1] The administrative law judge found that claimant established ten years of coal mine

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

employment. Considering the merits of the case under 20 C.F.R. Part 718, the administrative law judge found that the evidence of record established the existence of pneumoconiosis which arose out of claimant's coal mine employment under 20 C.F.R. §718.202 and 20 C.F.R §718.203(b), respectively. The administrative law judge also found, however, that the evidence of record fails to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in rejecting the pulmonary function studies that produced qualifying results. Claimant also contends that the administrative law judge improperly rejected the medical opinions of Drs. Kraynak and Tavaria, who are claimant's treating physicians. The Director, Office of Workers' Compensation Programs (the Director), responds, and seeks affirmance of the decision below. Specifically, the Director argues that the administrative law judge properly found that the evidence fails to establish total disability under 20 C.F.R. §718.204(b). The Director further indicates that he does not contest the administrative law judge's findings that claimant established ten years of coal mine employment and the presence of coal workers' pneumoconiosis.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge committed error "in rejecting the qualifying pulmonary function study evidence of record." Claimant's Brief at 2. Claimant relies on Dr. Kraynak's pulmonary function study dated April 7, 1997 and Dr. Tavaria's pulmonary function study dated April 1, 1999. Director's Exhibit 8; Claimant's Exhibit 3. Both physicians noted that claimant's effort, comprehension and cooperation were "good" at the time of the administration of their respective pulmonary function studies. *Id*. Dr. Levinson reviewed the April 7, 1997 pulmonary function study and found it to be unacceptable due to poor effort. Dr. Levinson noted that the test had not been performed properly because it showed "gross and excessive variability of the FEV^1s – Entire FVC curve not displayed. Poor effort on MVV's. (sic)" Director's Exhibit 8. Dr. Michos reviewed the April 1, 1999 pulmonary function study and found that it was unacceptable due to less than optimal effort. Director's Exhibit 48. Dr. Michos stated, "Suboptimal flow volume loops suggestive of poor effort/comprehension." *Id*. Dr. Michos also noted that the test lacked a sufficient number of FVC, FEV^1, and/or MVV tracings and included no explanation for this deficiency. *Id*. However, Dr. Kraynak also reviewed the April 1, 1999 pulmonary

function study and found that it was acceptable. Claimant's Exhibit 8. The administrative law judge considered the pulmonary function study evidence under 20 C.F.R. §718.204(b)(2)(i) and credited the invalidation reports of Drs. Levinson and Michos because their qualifications were superior to those of the administering physicians. Claimant argues that the invalidation reports of Drs. Levinson and Michos are not well reasoned and are not sufficient to overcome the reports of the administering physicians, Drs. Kraynak and Tavaria. We disagree.

Claimant's assertion that the invalidation reports of Drs. Levinson and Michos are not well reasoned and are not sufficient to overcome the reports of the administering physicians of the April 7, 1997 and April 1, 1999 pulmonary function studies, does not meet his burden to specify error in the decision below. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Moreover, the administrative law judge, within his discretion, credited Dr. Levinson's invalidation of Dr. Kraynak's April 7, 1997 pulmonary function study because Dr. Levinson, Board-certified in internal medicine and pulmonary diseases, has superior credentials to those of Dr. Kraynak, who is Board-eligible in family medicine. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990), *rev'd on other grounds*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). The administrative law judge likewise credited Dr. Michos' invalidation of Dr. Tavaria's April 1, 1999 pulmonary function study, which was validated by Dr. Kraynak, because Dr. Michos, Board-certified in internal medicine and pulmonary medicine, has superior credentials to those of Dr. Tavaria, who is Board-certified in internal medicine, and Dr. Kraynak, who is Board-eligible in family medicine. *Id*.

Claimant next contends that the administrative law judge improperly rejected the medical opinions of Drs. Kraynak and Tavaria, claimant's treating physicians, which reports are entitled to additional weight based on the physicians' status as treating physicians. Dr. Kraynak, based on an examination he performed on January 30, 2002, opined that claimant is totally and permanently disabled due to coal workers' pneumoconiosis that arose out of claimant's coal mine employment. Claimant's Exhibits 7, 8. Dr. Tavaria, based on an examination he performed on March 24, 1999, diagnosed pneumoconiosis with severe obstructive lung disease and opined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2. Dr. Rashid, based on an examination he performed on July 17, 1997, diagnosed hypertension, and found no respiratory impairment due to claimant's coal mine employment. Director's Exhibit 10. Dr. Rashid subsequently examined claimant on January 2, 2002, and diagnosed heart disease and hypertension, diabetes mellitus, obesity, and nicotine addiction. Director's Exhibit 39. Dr. Rashid opined that claimant was not

disabled due to his coal mine employment and noted that claimant was "still smoking 35 years." *Id*.

Considering the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge accorded less weight to Dr. Tavaria's opinion because he relied on a non-conforming pulmonary function study and did not review any other pulmonary function study or blood gas study. The administrative law judge found that while Dr. Kraynak's opinion was reasoned, he credited the contrary opinion of Dr. Rashid, who is Board-certified in internal medicine, based on his superior credentials. Citing to the newly promulgated regulation at 20 C.F.R. §718.104(d) regarding an administrative law judge's consideration of the medical opinion(s) rendered by a claimant's treating physician(s), and to *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994), the administrative law judge indicated that he declined to accord controlling weight, on the issue of claimant's total disability, to the opinions rendered by claimant's treating physicians, Drs. Kraynak and Tavaria. The administrative law judge explained that most of the evidence of record supports the conclusion that claimant is not totally disabled. Decision and Order at 12.

Claimant asserts that Drs. Kraynak and Tavaria treated claimant for an extended period of time and had the opportunity to review claimant's social, occupational, and medical history, as well other medical reports. The Director responds that claimant fails to specify any error in the administrative law judge's findings regarding the weight and the credibility of the medical opinion evidence relevant to the issue of claimant's disability. Alternatively, the Director argues that the administrative law judge properly weighed the medical opinion evidence.

Contrary to claimant's contention, the administrative law judge did not "improperly reject[]" the opinions rendered by claimant's treating physicians. Claimant's Brief at 3. Rather, the administrative law judge provided several reasons in support of his decision not to accord controlling weight to the opinions rendered by claimant's treating physicians, Drs. Raymond Kraynak and Soli Tavaria, that claimant is totally disabled. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Specifically, the administrative law judge properly found that most of the evidence of record supports the conclusion that claimant is not totally disabled. 20 C.F.R. §718.204(b); *see Director, OWCP v. Greenwich*

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[2] Contrary to the argument of the Director, Office of Workers' Compensation Programs, claimant adequately puts at issue the administrative law judge's weighing of the opinions rendered by claimant's treating physicians. *See* Claimant's Brief at 2-3.

Collieries [Ondecko], 512 U.S. 267, 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).

Based on the foregoing, we affirm the administrative law judge's findings that the evidence fails to establish total disability under 20 C.F.R. §718.204(b)(2)(i) and 20 C.F.R. §718.204(b)(2)(iv). We further affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence fails to establish total disability under 20 C.F.R §718.204(b)(ii) and 20 C.F.R. §718.204(b)(2)(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We thus affirm the administrative law judge's finding that claimant failed to prove, by a preponderance of the evidence, that he is totally disabled, and the administrative law judge's denial of benefits in the instant case. 20 C.F.R. §718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge