

BRB No. 06-0620 BLA

DONALD G. HENTZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	DATE ISSUED: 05/24/2007
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (03-BLA-6305) of Administrative Law Judge Janice K. Bullard denying benefits on a subsequent claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

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<sup>1</sup> Claimant filed his first application for benefits on September 16, 1996. That claim was denied on December 22, 1998 by Administrative Law Judge Robert D. Kaplan because total respiratory disability was not established pursuant to 20 C.F.R. §718.204(c)(2000). Judge Kaplan noted that the existence of pneumoconiosis arising out of coal mine employment had been conceded by the Director, Office of Workers’ Compensation Programs. Claimant’s second application, the subsequent claim for benefits, was filed on August 15, 2002. Director’s Exhibit 3.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, credited claimant with ten years of qualifying coal mine employment, and found that the Director, Office of Workers' Compensation Programs (the Director), conceded the presence of pneumoconiosis in the prior claim and that, therefore, this issue was uncontested. Next, the administrative law judge found that because the newly developed medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), claimant failed to establish that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

Claimant appealed the denial and the Board affirmed the administrative law judge's determinations that claimant failed to establish total disability at Section 718.204(b)(2)(i)-(iii) and her weighing of Dr. Rao's opinion, as unchallenged on appeal. However, the Board vacated the administrative law judge's determinations under Sections 718.204(b)(2)(iv) and 725.309 because the administrative law judge erred in according no weight to Dr. Kraynak's opinion, erred in failing to determine whether Dr. Prince rendered a reasoned medical report requiring consideration, and erred in failing to determine who authored the medical report contained in Director's Exhibit 13, as well as the appropriate weight it should be accorded. Hence, the Board remanded the case to the administrative law judge for further consideration of the medical opinion evidence under Section 718.204(b). *Hentz v. Director, OWCP*, BRB No. 05-0102 BLA (Sept. 20, 2005) (unpub.).

On remand, the administrative law judge again found the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Specifically, the administrative law judge found that Dr. Kraynak's opinion was undocumented and unsubstantiated, that Dr. Prince's opinion was unreasoned, and that Director's Exhibit 13, which contained Dr. Massin's report, failed to support a finding of total disability. Because claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge also found that claimant failed to establish that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to Section 725.309, and accordingly, denied benefits.

On appeal, claimant asserts that the administrative law judge erred in her analysis of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), and argues that the administrative law judge's weighing of the medical opinions of Drs. Kraynak, Prince, and Massin is irrational and not supported by substantial evidence. In response, the Director, while disagreeing with claimant's contention that the administrative law judge erred in discrediting the opinions of Drs. Kraynak and Prince, agrees with claimant that the administrative law judge erred in discounting the opinion of Dr. Massin. More specifically, the Director, reiterating the argument he made in the prior appeal in this

case, states that Dr. Massin, the physician who conducted claimant's pulmonary evaluation on behalf of the Department of Labor, failed to provide claimant with a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b). The Director, therefore, requests that the case be remanded to the district director to remedy the flaws contained in Dr. Massin's report.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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, under Section 718.204(b)(2)(iv), the administrative law judge erred again by discrediting Dr. Kraynak's total disability assessment on the ground that Dr. Kraynak's opinion was based on non-qualifying pulmonary function studies. Claimant also argues that the administrative law judge's finding that Dr. Kraynak's opinion was not adequately supported by facts, observations, and test results is not supported by substantial evidence inasmuch as Dr. Kraynak reviewed the evidence of record, provided detailed deposition testimony, and had treated claimant since November 1997. Claimant also avers that the administrative law judge's finding that Dr. Kraynak's opinion was conclusory is irrational because Dr. Kraynak not only explained the evidence he reviewed and his conclusions, but also relied upon diagnostic studies, including the valid January 7, 2003, pulmonary function study, which resulted in reduced values, and his own examinations of claimant.

Claimant is correct that an opinion concerning total respiratory disability, such as Dr. Kraynak's,<sup>2</sup> is reasonable even if based, in part, on a non-qualifying test result, *see Hentz, slip op.* at 5, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In weighing medical opinion evidence at Section 718.204(b)(2)(iv), however, the administrative law judge is required to determine the reliability of a physician's opinion with reference to the underlying documentation of that opinion, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985) (documentation underlying physician's report could not logically lead to assessment that claimant was totally disabled by respiratory or pulmonary impairment).

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<sup>2</sup> Dr. Kraynak, who was claimant's treating physician and Board-eligible in Family Practice, stated that, based on his examinations of claimant and his review of claimant's coal mine employment history, pulmonary function study and blood gas study results, he believed that claimant was totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibits 2, 4.

In this case, contrary to claimant's contention, the administrative law judge did not commit the same error on remand, as she did in her prior decision, by according no weight to Dr. Kraynak's opinion because it was based, in part, on non-qualifying objective studies. Instead, the administrative law judge provided a rational analysis for her determination that the probative value of Dr. Kraynak's opinion was undermined.

While acknowledging that Dr. Kraynak's opinion may be entitled to controlling weight because he had treated claimant, the administrative law judge, nonetheless, permissibly found that Dr. Kraynak's opinion was flawed and unsubstantiated due to its lack of documentation of clinical testing, observations, and findings to support the doctor's opinion of total disability. Decision and Order on Remand at 4. The administrative law judge further determined that Dr. Kraynak's April 2, 2004 deposition testimony failed to rehabilitate the reliability his opinion because, even though claimant's medical, social, and complaint histories were documented, none of the other bases of Dr. Kraynak's testimony were, *i.e.*, the findings on physical examinations of claimant and the results of claimant's diagnostic studies. Decision and Order on Remand at 5. The administrative law judge noted that Dr. Kraynak's six pages of "barely legible" office notes lacked any observations regarding physical examinations, diagnostic studies performed on claimant, or discussion concerning his findings. Decision and Order on Remand at 5. The administrative law judge further observed that although Dr. Kraynak testified that claimant had a severe restrictive defect based on a pulmonary function study that he administered to claimant on October 28, 2003, the study was not contained in the record. Decision and Order on Remand at 5. Thus, because the administrative law judge's determination, that Dr. Kraynak's opinion was entitled to "little or no weight" on the bases that it was "largely unsubstantiated," inadequately explained, and conclusory, is rational and supported by substantial evidence, we affirm the administrative law judge's discounting of Dr. Kraynak's total disability opinion. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order on Remand at 5.

Claimant also contends that the administrative law judge erred in rejecting Dr. Prince's opinion<sup>3</sup> on total disability. Dr. Prince opined that claimant's restrictive impairment is sufficiently severe to prevent him from returning to his last coal mine employment, based on the non-qualifying results of a January 7, 2003 pulmonary function study.

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<sup>3</sup> On June 14, 2004, Dr. Prince reviewed a pulmonary function study that was administered on January 7, 2003, found that it revealed a mild to moderate restrictive ventilatory defect which is sufficient to prevent claimant from returning to his last coal mine employment, and then listed the exertional requirements of claimant's job as an underground laborer. Claimant's Exhibit 5.

In assessing the probative value of Dr. Prince's opinion, the administrative law judge determined that it was worthy of diminished weight because, in his one-page report, Dr. Prince failed to explain how the pulmonary function study taken by claimant on January 7, 2003, which yielded non-qualifying results and was performed with less than optimal effort, demonstrated that claimant was totally disabled. Consequently, the administrative law judge determined that, absent such an explanation, Dr. Prince's opinion was no more than an unsupported conclusory statement. Decision and Order on Remand at 6.

We affirm the administrative law judge's determination to reject Dr. Prince's report in light of the recognition by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,<sup>4</sup> that an administrative law judge has broad discretion in determining the reliability, documentation, and reasoning of medical opinions, *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1328-29, 10 BLR 2-220, 2-238 (3d Cir. 1987), and that she has no authority to credit a report which is based exclusively upon unreliable evidence. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259, 2-267 (3d Cir. 1990). Hence, we reject claimant's contention.

Claimant finally contends that the administrative law judge erred in discounting Dr. Massin's opinion, Director's Exhibit 13, because a finding of moderate restrictive lung disease is sufficient to establish claimant's inability to return to his last coal mine employment. Claimant avers that the administrative law judge engaged in medical speculation by concluding "that Dr. Massin 'was not of the opinion that Claimant was totally disabled within the [meaning of the] Act' because 'Dr. Massin had two opportunities to render an opinion regarding whether Claimant suffered from a respiratory impairment that restricted him from coal mine work, yet declined to do so both times'." Claimant's Brief in Support of Petition for Review at 14, citing Decision and Order on Remand at 7. In response, the Director argues that the administrative law judge clearly erred in inferring from Dr. Massin's silence that he believed claimant was not disabled. In light of deficiencies contained in Dr. Massin's opinion,<sup>5</sup> however, the Director requests that the Board to remand the case to the district director so that the

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<sup>4</sup> Because the miner last worked in Pennsylvania, this 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) (*en banc*); Director's Exhibit 3.

<sup>5</sup> The Director acknowledges that Dr. Massin did not address: whether claimant's disability was entirely pulmonary in nature; whether claimant's pulmonary impairment was disabling, and, if so, whether that disability was related to coal mine employment. Director's Brief at 10.

Director can remedy the flaws in Dr. Massin's pulmonary evaluation in accordance with Section 413(b) of the Act, 30 U.S.C. §923(b).<sup>6</sup>

It is well established that the Department of Labor has a statutory duty to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. 30 U.S.C. §923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990). Accordingly, we grant the Director's request that the case be remanded to the district director for the purpose of remedying the flaws contained in the report of Dr. Massin. *See Petry*, 14 BLR at 1-100; *Hall*, 14 BLR at 1-54.

Consequently, we vacate the administrative law judge's finding of total respiratory disability at Section 718.204(b)(2)(iv), based on the newly submitted evidence, and remand the case to the administrative law judge for further consideration thereunder, and for a determination pursuant to Section 725.309. If the administrative law judge finds that total respiratory disability, and therefore a change in an applicable condition of entitlement has been established, she must then consider all of the evidence of record to determine if claimant has established entitlement.

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<sup>6</sup> In the prior appeal in this case, it was unclear who actually completed the CM-988 physician's report form because it was illegible. Director's Exhibit 13. As a result, the Board had instructed the administrative law judge to determine who authored this report and determine what weight, if any, it should be accorded. Moreover, the Board noted, "The Director may renew his request for remand of this case for compliance with 30 U.S.C. §923(b) while the case is before the administrative law judge, if he considers it appropriate." *Hentz, slip op.* at 6-7 n.7.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge