BRB No. 98-0374 BLA

RUDOLPH MLYNEK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 5/4/99
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi, Pottsville, Pennsylvania, for claimant.

Cathryn Celeste Helm (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, the United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (94-BLA-1659) of

[1] Claimant is the miner, Rudolph Mlynek, who filed his initial application for benefits on June 7, 1983, which was denied on November 30, 1987. Director's Exhibits 1, 30. Claimant filed the present petition for modification on October 26, 1993. Director's Exhibit 68.

Administrative Law Judge Paul H. Teitler 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). In the most recent Decision and Order, the administrative law judge noted that claimant had previously established the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that a review of the record did not indicate that a mistake in fact had been demonstrated.[2] Based on a review of the newly

[2]On November 30, 1987, Administrative Law Judge Robert J. Feldman credited claimant with eleven years of coal mine employment, but denied benefits after finding that the evidence of record was insufficient to establish the presence of pneumoconiosis, or total disability due to pneumoconiosis. Claimant filed a petition for modification on September 23, 1988, which was denied by Administrative Law Judge Paul H. Teitler on July 18, 1990, since claimant had not established that he was totally disabled due to pneumoconiosis, although he had established a change in condition pursuant to 20 C.F.R. §725.310 by demonstrating the existence of pneumoconiosis arising out of coal mine employment. On appeal, the Board affirmed the administrative law judge's findings regarding the number of years of coal mine employment, and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but remanded for reconsideration of the pulmonary function studies and medical reports of record pursuant to 20 C.F.R. §718.204(c)(1) and (4), as well as instructing the administrative law judge to consider all the evidence, both old and new when considering whether entitlement had been established on remand. *Mlynek v. Director, OWCP,* BRB No. 90-1993 BLA (Sept. 25, 1992)(unpub.). In his Decision and Order Upon Remand issued June 1, 1993, Judge Teitler again found that claimant had not established total disability due to pneumoconiosis and denied benefits.

Claimant filed the present petition for modification on October 26, 1993, which was denied on October 18, 1995, by Judge Teitler who again determined that claimant had not established total disability due to pneumoconiosis, or a change in condition. Claimant appealed the denial to the Board which affirmed the findings regarding claimant's height, but remanded the case for the administrative law judge to reconsider the pulmonary function studies of record pursuant to Section 718.204(c)(1), and to consider Dr. Kraynak's response to Dr. Sahillioglu's invalidation of Dr. Kraynak's pulmonary function study. The Board further vacated the Section 718.204(c)(4) findings which had been based on the flawed Section 718.204(c)(1) findings, and directed the administrative law judge to provide an adequate basis for rejecting Dr. Kraynak's report, to consider claimant's testimony that he had never been treated for a heart condition, and to determine whether a

submitted evidence, the administrative law judge found however, that claimant had established a change in conditions as he is now totally disabled pursuant to 20 C.F.R. §718.204(c)(4). 20 C.F.R. §725.310. After reviewing the entire record, the administrative law judge determined that total disability had not been established. Accordingly, benefits were denied. On appeal, claimant argues that the administrative law judge erred in his consideration of the medical reports of record relevant to Section 718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the denial of benefits be vacated, and the case remanded to allow the administrative law judge to review the evidence relevant to the issues of change in condition and total disability pursuant to the applicable standard.[3]

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, and is 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent*, *supra*; *Perry*, *supra*.

Initially, we reject claimant's argument that the administrative law judge erred by finding the results of the newly submitted arterial blood gas study to be equivocal. The administrative law judge rationally found that the results of this study were equivocal since the study produced qualifying values at rest, but non-qualifying values after exercise.[4] Accordingly, the administrative law judge determined that

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mistake in fact had been demonstrated based on a review of the whole record. *Mlynek v. Director, OWCP*, BRB No. 96-0319 BLA (Mar. 26, 1997)(unpub.).

[3] The administrative law judge's finding that there was no mistake in fact in the prior decision is unchallenged on appeal, therefore it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

claimant had not established total disability at Section 718.204(c)(2), Decision and Order at 4, and this finding is affirmed. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

We agree, however, that the administrative law judge erred in his consideration of the medical evidence relevant to Section 725.310, since the administrative law judge first considered only the newly submitted evidence and determined that a change in condition had been established since claimant had established that he was now totally disabled, and then considered the new evidence with the previously submitted evidence, and reached the opposite conclusion. Accordingly, remand is required to allow the administrative law judge to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). On remand, the administrative law judge must provide a thorough discussion of his findings of fact and conclusions of law sufficient to satisfy the provisions of the Administrative Procedure Act, specifically evaluating each medical report in light of its underlying documentation.[5] *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The Director argues that the administrative law judge erred in his consideration of Dr. Krol's opinion, stating that the administrative law judge mechanically found Dr. Krol's assessment of a mild impairment consistent with the objective studies and failed to consider and compare claimant's description of his usual coal mine employment with Dr. Krol's enumeration of specific physical limitations. In considering the medical opinion evidence under Section 718.204(c)(4), the administrative law judge initially noted that Dr. Krol stated that claimant's mild impairment would allow claimant to perform some mine functions. Decision and Order at 8. The administrative law judge construed Dr. Krol's opinion as evidence that supported the absence of a totally disabling respiratory or pulmonary impairment, and accorded this opinion determinative weight on the ground that it was well supported by its underlying documentation, and because Dr. Krol is Board-certified in internal medicine. Decision and Order at 9 The record

[5] The Administrative Procedure Act, 5 U.S.C. §557)c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

indicates that Dr. Krol stated that claimant had a mild impairment, but that claimant could do some "mine" work and the doctor provided specific limitations regarding claimant's abilities. Director's Exhibit 28. We agree that the administrative law judge must reconsider Dr. Krol's opinion and determine if these limitations are the claimant's assessment of his condition, or if they are the physician's professional assessment. If the limitations are those of Dr. Krol, they must be compared with the exertional requirements of claimant's usual coal mine work prior to finding whether this opinion supports a finding of total disability. *See Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

Both claimant and the Director argue that the administrative law judge erred in his consideration of Dr. Kraynak's opinion. We agree that the administrative law judge provided inconsistent findings with regard to Dr. Kraynak's opinion and that the case should be remanded for the administrative law judge to reconsider and clarify his findings regarding Dr. Kraynak's report. As both claimant and the Director contend, the administrative law judge initially found that Dr. Kraynak's report was documented and reasoned and established that claimant was now totally disabled. The administrative law judge then rejected Dr. Kraynak's opinion during his evaluation of all the evidence of record on the merits of the claim. Specifically, the administrative law judge initially determined that Dr. Kraynak's qualifying pulmonary function study dated September 28, 1997 was valid due to Dr. Kraynak's status as the administering physician, and rejected Dr. Sahillioglu's invalidation of this study. Decision and Order at 5; Director's Exhibits 68, 69. The administrative law judge found that the pulmonary function study administered by Dr. Kraynak supported the physician's diagnosis of totally disabling pneumoconiosis, which was the basis of the administrative law judge's finding that a change in condition had been established. *Id.* Subsequently, after reviewing all the evidence on the merits, the administrative law judge rejected Dr. Kraynak's diagnosis of total disability because the underlying pulmonary function study was invalidated by Dr. Sahillioglu, a physician with superior expertise.[6] Decision and Order at 9. On remand, the administrative law judge must resolve the apparent inconsistency in his weighing of Dr. Kraynak's medical report.[7] Decision and Order at 3-5; *Piccin, supra.*

[6]The administrative law judge also stated that Dr. Kraynak's opinion was entitled to little weight because his testimony regarding the pulmonary function study that he conducted was directly contradicted by claimant. Decision and Order at 9. As claimant contends, the administrative law judge did not identify the evidence showing that claimant contradicted Dr. Kraynak.

[7]As noted by the Director, Office of Workers' Compensation Programs, the

administrative law judge in this instance also treated inconsistently the report in which Dr. Sahillioglu invalidated the September 28, 1993 pulmonary function study administered by Dr. Kraynak. Director's Exhibit 69. The administrative law judge initially declined to credit Dr. Sahillioglu's report on the ground that Dr. Kraynak was the administering physician but subsequently preferred the report of Dr. Sahillioglu based on his expertise. Decision and Order at 3, 9.

Similarly, the administrative law judge must also clarify his findings regarding the opinion in which Dr. Corazza found no evidence of a totally disabling respiratory or pulmonary impairment, as the administrative law judge erred in rejecting this report based on his finding that Dr. Corazza incorrectly concluded that the arterial blood gas studies were normal since the administrative law judge may not independently assess the medical evidence.[8] *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Decision and Order at 5; Director's Exhibit 83. There is no merit, however, in claimant's argument that the administrative law judge treated Dr. Corazza's opinion inconsistently by initially finding that it was outweighed by Dr. Kraynak's opinion and, after consideration of all the record evidence, subsequently finding that Dr. Corazza's opinion was entitled to greater weight than Dr. Kraynak's opinion. The administrative law judge accorded little weight to Dr. Corazza's opinion in his consideration of the issue of whether a change in condition had been established and in his review of the merits at Section 718.204(c).

We also reject claimant's contention that the administrative law judge erred in crediting Dr. Ahlawalia's opinion. Claimant argues that because the administrative law judge found the pulmonary function study relied upon by Dr. Ahlawalia to be invalid, the administrative law judge erred in crediting Dr. Ahlawalia's opinion under Section 718.204(c)(4). Contrary to claimant's contention the administrative law judge did not find the pulmonary function study administered by Dr. Ahlawalia on December 22, 1988 invalid. Director's Exhibit 37. The administrative law judge considered that pulmonary function study under Section 718.204(c)(1) and properly found that it did not establish total disability as it produced non-qualifying values. 20 C.F.R. §718.204(c)(1); Decision and Order at 7; Director's Exhibit 37. Furthermore, we reject claimant's contention that the administrative law judge gave no reason for giving less weight to Dr. Kruk's opinion. The administrative law judge specifically gave less weight to Dr. Kruk's opinion on the ground that Dr. Kruk's conclusion of total disability conflicted with the physician's findings on physical examination, the

[8]In the Board's prior decision, the Board held that the administrative law judge failed to consider claimant's testimony that he has never been treated or taken medication for a heart condition, 1995 Hearing Transcript at 17-18, and Dr. Kraynak's testimony that he was not aware that claimant has any coronary artery disease, Claimant's Exhibit 5 at 12, in conjunction with Dr. Corazza's finding that claimant's age and cardiac condition would prevent him from performing his last coal mine employment. *Mlynek v. Director, OWCP,* BRB No. 96-0319 BLA (Mar. 26, 1997)(unpub.).

pulmonary function study administered by Dr. Kruk and upon which Dr. Kruk relied was subsequently invalidated by Drs. Cander and Spagzolo, and the report was not supported by all of the objective evidence of record. Decision and Order at 9; Director's Exhibits 35, 37.

In light of the administrative law judge's errors discussed above, we vacated the administrative law judge's finding under Section 718.204(c)(4) and remand the case to the administrative law judge for reconsideration of the relevant evidence. If the administrative law judge on remand finds total respiratory disability established pursuant to Section 718.204(c), *see Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.,* 9 BLR 1-231 (1987), he must then determine whether claimant's pneumoconiosis is a contributing cause of his totally disabling respiratory pursuant to Section 718.204(b). *See Bonessa v. U.S. Steel Corp.,* 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge