BRB No. 01-0223 BLA

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

Appeal of the Decision and Order - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edward Waldman (Howard M. Radzely, Acting 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2000-BLA-0361) of Administrative Law Judge Joseph E. Kane granting modification and awarding 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).[1]

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[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 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal

before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001, order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 147 (D.D.C. 2001).

This case has been before the Board previously.[2] On remand, in a Decision and Order dated February 26, 1996, Administrative Law Judge Huddleston denied modification and benefits. Director's Exhibit 45. Claimant appealed the denial of benefits to the Board and in *Abshire v. Director, OWCP*, BRB No. 96-0767 BLA (Feb. 26, 1997)(unpub.), the Board vacated the decision and remanded the case for further consideration. Director's Exhibit 52. On remand, in a Decision and Order dated December 11, 1998, Administrative Law Judge Richard E. Huddleston denied modification and benefits. Director's Exhibit 57. Claimant appealed the denial of benefits to the Board, but also forwarded medical evidence to the Board while the appeal was pending. Claimant subsequently requested that the Board dismiss his appeal and stated that he wished to pursue modification. In *Abshire v. Director, OWCP*, BRB No. 99-0370 BLA (Sept. 2, 1999)(unpub. Order), the Board granted claimant's request, dismissed claimant's appeal and remanded the case to the district director so claimant could pursue modification. Director's Exhibits 58, 61-63. On September 21, 1999, claimant requested modification, which the district director denied, Director's Exhibits 64, 70, and the case was referred to the Office of Administrative Law Judges for a hearing, Director's Exhibit 72. On September 29, 2000, Administrative Law Judge Joseph E. Kane issued a Decision and Order granting modification and awarding benefits, which is the subject of the instant appeal.

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[2] Claimant, Billy R. Abshire, the miner, filed his first claim for black lung benefits with the Department of Labor on April 23, 1980. Director's Exhibit 20. This claim was denied by the district director on March 25, 1981. Director's Exhibit 20. Claimant filed the instant duplicate claim on March 5, 1986, Director's Exhibit 1, which was denied by the district director on August 26, 1986, Director's Exhibit 7, and February 6, 1987, Director's Exhibit 11, and by Administrative Law Judge Richard E. Huddleston on February 9, 1988, Director's Exhibit 15. Claimant requested modification of the denial, Director's Exhibit 16, which was eventually denied by Administrative Law Judge Charles W. Campbell on June 16, 1993. Director's Exhibit 31. Claimant appealed to the Board and in *Abshire v. Director, OWCP*, BRB No. 93-1981 BLA (May 19, 1995)(unpub.), the Board affirmed in part, vacated in part and remanded the case for further consideration. Director's Exhibit 41.

The administrative law judge credited claimant with fifteen years of coal mine employment and adjudicated this claim involving a request for modification of a duplicate claim pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found that the newly submitted pulmonary function study and medical opinion evidence were sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000), and therefore found a change in conditions established pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge then considered all the evidence of record and found that the existence of pneumoconiosis was established by the x-ray and medical opinion evidence pursuant to Section 718.202(a)(1), (4) (2000). Finally, the administrative law judge found that claimant's total disability due to pneumoconiosis was established by the medical opinion evidence of record pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge granted modification and awarded benefits. On appeal, the Director contends that the administrative law judge erred in his evaluation of the newly submitted pulmonary function study and medical opinion evidence in determining that claimant was totally disabled pursuant to Section 718.204(c)(1), (4) (2000). Claimant has not filed a response brief in this appeal.

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

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000),[3] a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held, however, that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly, *i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence." *See Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). In order to establish entitlement to benefits on the merits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as this, which were pending on January 19, 2001.

(2000). Failure of claimant to establish any one of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Pursuant to Section 718.204(c) (2000), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence. *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *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)(*en banc*).

Initially, the Director contends that the administrative law judge erred in finding that the newly submitted pulmonary function study evidence demonstrated total disability. The newly submitted pulmonary function studies included a nonqualifying pulmonary function study from Dr. Sundaram dated May 21, 1998, Director's Exhibit 64,[4] and a qualifying pulmonary function study from Dr. Sikder dated September 28, 1999, which Dr. Sikder found indicated restrictive lung disease much worse than in April 1997. Decision and Order at 6-7, 12; Director's Exhibits 64, 66, 67. Dr. Burki invalidated the qualifying September 1999 pulmonary function study on the basis that the paper speed was too slow. Decision and Order at 7 n.5, 12; Director's Exhibit 68.

The administrative law judge initially accorded greater weight to the September 1999 study than to the May 1998 study because he found that the more recently performed test more accurately reflected claimant's current condition.[5] The administrative law judge

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[4] For pulmonary function studies developed and/or conducted prior to January 19, 2001, *see* 20 C.F.R. §718.101(b), 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. Part 718 (2000), Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1) (2000).

[5] The administrative law judge may accord greater weight to the more recent evidence on the issue of total disability. *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988).

accorded little weight to Dr. Burki's invalidation of the September 1999 study as Dr. Burki failed to explain why he thought the paper speed was too slow and failed to explain how the paper speed affected the validity of the study. Decision and Order at 12. The Director specifically contends that the administrative law judge erred in discrediting Dr. Burki's invalidation of the September 1999 pulmonary function study as unexplained, because no explanation was necessary. Director's Brief at 5.

The quality standards at 20 C.F.R. §718.103 (2000), applicable to pulmonary function study evidence developed prior to January 19, 2001, *see* 20 C.F.R. §718.101 (2001), are not mandatory and pulmonary function studies which fail to conform to those standards may not be precluded from consideration by the administrative law judge under Section 718.204(c)(1) (2000) on this basis alone. *See Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring); *see also Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). It is for the administrative law judge, as the fact-finder, to determine whether an objective study that does not conform to the quality standards is nevertheless reliable. *See DeFore, supra; Orek, supra.* The party challenging an objective study because it does not conform to the quality standards must demonstrate how this defect or omission renders the study unreliable and the administrative law judge can then explain the basis for his determination. *See Orek, supra*. In addition, the administrative law judge is not limited to looking at only the four corners of the objective study report in determining its reliability, but may look at other supportive documents in the record in an attempt to cure any defects in the actual report. *Id*. In addition, the Board has held that while an administrative law judge may reject a qualifying pulmonary function study which is subsequently invalidated, he must provide a rationale for preferring the opinion of the consulting physician over the opinion of the administering physician. *Siegel v. Director, OWCP*, 8 BLR 1-156 (Brown, J., dissenting)(1985).

In the instant case, the administrative law judge determined Dr. Burki's invalidation report was neither well-documented nor well-reasoned and he acted within his discretion in according the report little weight. Decision and Order at 12. Consequently, as the administrative law judge offered a valid explanation for his weighing of the September 1999 pulmonary function study, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence, alone and in conjunction with all of the pulmonary function study evidence of record, supports a finding of total disability. *See Defore, supra; Siegel, supra.*

The Director also contends that the administrative law judge did not offer a valid explanation for favoring Dr. Sundaram's opinion of total disability where the May 1998 pulmonary function study he administered was nonqualifying and Dr. Sundaram's assessment of claimant's physical limitations do not, the Director asserts, indicate that

claimant is precluded from performing his usual coal mine employment. These arguments have merit. The administrative law judge acknowledged that the study administered by Dr. Sundaram yielded nonqualifying results. *Id.* The administrative law judge next acknowledged that Dr. Sundaram also noted that claimant is unable to do his usual coal mine employment because he "suffers from shortness of breath with limited activity" and cannot "bend, crawl, stoop or work at unprotected heights." Decision and Order at 13; Director's Exhibit 64. The administrative law judge then found that Dr. Sundaram's findings supported the physician's opinion that claimant was totally disabled. *Id.* The administrative law judge subsequently concluded that Dr. Sundaram's opinion was well-documented and well-reasoned and accorded the opinion greater weight because it was the most recent report of record. Decision and Order at 15.

A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). To make that determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Fuller*, *supra*.

In the instant case, the administrative law judge has failed to adequately explain his rationale for finding Dr. Sundaram's opinion well-documented and well-reasoned and for crediting Dr. Sundaram's opinion in light of the normal pulmonary function study[6] and claimant's usual coal mine employment as a rock truck driver. Moreover, as the Director correctly asserts, the administrative law judge should have compared the physician's assessment of claimant's physical limitations to the exertional requirements of claimant's usual work as a coal truck driver to determine whether claimant was totally disabled. While Dr. Sundaram explicitly indicated that claimant was precluded from performing his usual coal mine work, he did not specifically indicate the severity of claimant's impairment or render an explicit opinion with regard to whether claimant suffers from a totally disabling respiratory impairment. Furthermore, Dr. Sundaram did not specifically indicate that he was aware of the job duties of claimant's usual coal mine employment or the exertional

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[6] The computer generated interpretation of the May 21, 1998, pulmonary function study administered by Dr. Sundaram showed the "[t]esting indicate[d] normal spirometry," but Dr. Sundaram did not include any additional comments of his own. Decision and Order at 6; Director's Exhibit 64.

requirements that claimant's work entailed. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held, in *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. Although the administrative law judge discussed the exertional requirements of claimant's usual coal mine employment while considering Dr. Vogelsang's opinion, Decision and Order at 14, the administrative law judge did not compare Dr. Sundaram's assessment of physical limitations with the exertional requirements of claimant's usual coal mine employment.[7]

As it is unclear how the administrative law judge determined that Dr. Sundaram's opinion established total disability, this case must be remanded for reconsideration of Dr. Sundaram's opinion with respect to that issue. In assessing the relative credibility of Dr. Sundaram's opinion on the issue of total disability, the administrative law judge must consider the physician's familiarity with claimant's job duties and knowledge of the exertional requirements of claimant's usual coal mine employment. *See Cornett*, *supra*. Even if the doctor was unfamiliar with claimant's usual coal mine employment, the administrative law judge may make a total disability finding by comparing the exertional requirements of claimant's usual coal mine employment with the limitations set out in the doctor's report. *See Fields*, *supra*. After considering whether the physician's opinion is sufficient to establish a totally disabling respiratory impairment under Section 718.204(b)(iv) (2001) pursuant to the directives set forth in *Cornett*, *supra*, the administrative law judge

[7] The administrative law judge stated that claimant testified that his last coal mine job was as a rock truck driver at a strip mine, Decision and Order at 5, which involved fueling and greasing the truck and driving the truck to various dump sites, and required sitting for eight hours a day. Decision and Order at 14; Director's Exhibit 6. The administrative law judge found that claimant's job primarily involved sitting and that a mild pulmonary impairment would not prevent claimant from performing his usual coal mine employment. Decision and Order at 14.

must weigh all the evidence on total disability together at Section 718.204(b)(i)-(iv) (2001), to determine if a totally disabling respiratory impairment is established, *see Fields*, *supra*; *Shedlock*, *supra*, and, therefore, a change in conditions.[8] *See Worrell*, *supra.* If, on remand, the administrative law judge again finds that a change in conditions is established, he must consider all the evidence, both old and new, to determine if claimant has established the necessary elements of entitlement in accordance with the substantive changes in the relevant amended regulations.

[8] The provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge