BRB No. 03-0201 BLA

JACK L. GOTSHALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/17/2003
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Jennifer U. Toth (Howard 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (01-BLA-0096) of Administrative Law Judge Ralph A. Romano 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] In the initial decision, the administrative law judge credited claimant

[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

with eleven and one-half years of coal mine employment and found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Although the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), he found the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R §718.204(c)(4) (2000).[2] The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated July 11, 2002, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a), and 718.203(b) (2000) as unchallenged on appeal. *Gottshall v. Director, OWCP*, BRB No. 01-0877 BLA and 01-0877 BLA-A (July 11, 2002) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(4) (2000). *Id.* The Board also instructed the administrative law judge, on remand, to consider the "treating physician rule" set out at revised 20 C.F.R. §718.104(d) in weighing Dr. Kraynak's opinion. *Id.*

On remand, the administrative law judge initially found that the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Although the administrative law judge subsequently found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv), he awarded benefits. On appeal, the Director contends that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R §718.204(b)(2)(i) and (iv). Claimant has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

The Director contends that the administrative law judge erred in finding the pulmonary function study evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains the results of three pulmonary function studies conducted on May 10, 2000, December 15, 2000 and February 15, 2001. Director's Exhibits 9, 30; Claimant's Exhibit 3. Claimant's December 15, 2000 pulmonary function study produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 30. However, claimant's May 10, 2000 and February 15, 2001 pulmonary function studies each produced qualifying values both before and after the administration of bronchodilators.[3] Director's Exhibit 9; Claimant's Exhibit 3.

On remand, in his consideration of whether the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge stated that:

> At deposition, Dr. Kraynak explained that Dr. Kucera invalidated the May 2000 PFT by making contradictory statements that the tracings were illegible but at the same time they show excessive variability. (CX 9 at 9-

[3] Numerous physicians have addressed the validity of claimant's pulmonary function studies. Dr. Kucera invalidated claimant's May 10, 2000 pulmonary function study. Director's Exhibit 10. In a letter dated August 11, 2000, Dr. Michos characterized claimant's May 10, 2000 pulmonary function study as "suboptimal." Director's Exhibit 20. However, Dr. Kraynak disagreed with the assessments of Drs. Kucera and Michos and opined that claimant's May 10, 2000 pulmonary function study was valid. Claimant's Exhibits 2, 9 at 9-11.

Dr. Green, the physician who administered claimant's December 15, 2000 pulmonary function study, stated that "the results could be influenced by a suboptimal effort on the part of the patient." Director's Exhibit 30. Drs. Simelaro and Venditto invalidated claimant's December 15, 2000 pulmonary function study. Claimant's Exhibit 3. Dr. Kraynak also opined that claimant's December 15, 2000 pulmonary function study was invalid. Claimant's Exhibit 9 at 12.

Dr. Michos invalidated claimant's February 15, 2001 pulmonary function study. Director's Exhibit 34. During an April 27, 2001 deposition, Dr. Kraynak testified that:

> The 2/15/2001 study was found to be invalid by Dr. Michos. He states there was greater than 100 cc and 5 percent variation. From my review the tracings vary by less than 85 milliliters, corresponding to the regulations.

Claimant's Exhibit 9 at 11.

> 10). If they were illegible, Dr. Kucera could not determine they showed excessive variability. Without more explanation from Dr. Kucera, which was not forthcoming. I must adopt Dr. Kraynak's evaluation of the May 2000 PFT as being valid. Moreover, other than Dr. Kucera's refuted invalidation of the May 2000 PFT, the Director only invalidated the February 15, 2001 PFT. Because Claimant invalidated the December 2000 PFT with Drs. Simelaro and Venditto's invalidation reports, the only non-invalidated PFT was that of May 10, 2000. Based on Dr. Kraynak's explanation for the validity of that report, I find Claimant has established total disability by a preponderance of the evidence.

Decision and Order on Remand at 5.

The Director contends that the administrative law judge committed numerous errors in his consideration of claimant's qualifying May 10, 2000 pulmonary function study. The Director initially contends that the administrative law judge ignored Dr. Michos's August 11, 2000 report in which he indicated that claimant's May 10, 2000 pulmonary function study was "suboptimal." Although Dr. Michos characterized claimant's May 10, 2000 pulmonary function study as "suboptimal," he provided no explanation or reason for his assessment.[4] Consequently, Dr. Michos's invalidation of claimant's May 10, 2000 pulmonary function study is not sufficiently reasoned. *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). Because Dr. Michos's invalidation is not sufficiently reasoned, the administrative law judge's error in not addressing it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The Director next contends that the administrative law judge erred in rejecting Dr. Kucera's report invalidating claimant's May 10, 2000 pulmonary function study. On a DOL form entitled "Validation of Pulmonary Function and Arterial Blood Gas Studies," Dr. Kucera indicated that claimant's May 10, 2000 pulmonary function study was not acceptable because the tracings were not legible. Director's Exhibit 10. In the space provided for an explanation, Dr. Kucera stated "excessive variability." *Id.* Despite the Director's contention that "Dr. Kucera *likely* meant that the tracings were merely difficult, but not impossible, to distinguish," Dr. Kucera clearly indicated that he invalidated claimant's May 10, 2000 pulmonary function study because he found that the tracings were not legible. Director's Exhibit 10. Given this determination, the administrative law judge reasonably questioned how Dr. Kucera was able to determine

[4] Dr. Kraynak disagreed with Dr. Michos's finding that claimant's May 10, 2000 pulmonary function study was "suboptimal." Based upon his review of the study, Dr. Kraynak found that there was "good effort throughout." Claimant's Exhibit 2.

that the study revealed "excessive variability."[5] The administrative law judge's assessment is supported by Dr. Kraynak's testimony that if the tracings were not legible, one could not determine whether there was excessive variability. Claimant's Exhibit 9 at 9-10. Consequently, the administrative law judge acted within his discretion in discrediting Dr. Kucera's invalidation of claimant's May 10, 2000 pulmonary function study. We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The Director next argues that the administrative law judge erred in his consideration of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that three physicians, Drs. Kraynak, Michos and Green, offered opinions regarding whether claimant was totally disabled. Decision and Order on Remand at 9. Because the administrative law judge found that none of these opinions was sufficiently reasoned, he found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

The Director contends that the administrative law judge erred in his consideration of Dr. Michos's opinion. In an August 11, 2000 letter, Dr. Michos opined that claimant "does not have evidence of simple CWP nor a total disability secondary to simple CWP." Director's Exhibit 20. In a subsequent letter dated February 19, 2001, Dr. Michos opined that claimant had the respiratory capacity to perform his last coal mine employment. Director's Exhibit 32.

In his consideration of Dr. Michos's opinion, the administrative law judge stated that:

> Dr. Michos opined that Claimant was not totally disabled based on objective data including Claimant's work history, the May 19, 2000 ABG, and a "suboptimal" PFT of May 10, 2000. (DX 20). Later Dr. Michos indicated that he relied on the December 15, 2000 ABG. (DX 32). Dr. Michos' opinion was adequately documented, because he set forth the data upon which he relied. However, his opinion was not adequately reasoned, because he relied on an imprecise work history. Dr. Michos relied on a 1.674 year work history (DX 20), but Claimant's work history I later

[5] Dr. Kucera did not indicate which values (FEV1, FVC or MVV) demonstrated excessive variability.

> determined to be eleven and a half years. Because Dr. Michos' opinion was not adequately reasoned, I accord it little weight.

Decision and Order on Remand at 9.

We agree with the Director that the length of a miner's coal mine employment may be relevant to the issue of the etiology of a miner's pulmonary impairment pursuant to 20 C.F.R. §718.204(c), but it is not relevant to the issue of whether a miner is totally disabled pursuant to 20 C.F.R. §718.204(b). *See generally See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Consequently, the administrative law judge's basis for discrediting Dr. Michos's opinion at 20 C.F.R. §718.204(b)(2)(iv) cannot stand.

However, Dr. Michos's opinion that claimant was not totally disabled supports the administrative law judge's ultimate determination that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Even if the administrative law judge credited Dr. Michos's opinion that claimant was not totally disabled, it would only serve to reinforce his ultimate determination that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Having found the medical opinion evidence insufficient to establish total disability, we hold that the administrative law judge's error in discrediting Dr. Michos's opinion is harmless. *See Larioni*, 6 BLR at 1-1278.

Inasmuch as the Director does not raise any other contentions of error, we affirm the administrative law judge's award of benefits under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

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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PETER A. GABAUER, JR.
Administrative Appeals Judge