BRB No. 03-0394 BLA

JAMES P. REILLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SKYTOP CONTRACTING COMPANY	)	DATE ISSUED: 11/25/2003
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0797) of Administrative Law Judge Robert D. Kaplan denying benefits on a duplicate 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 noted that employer stipulated that claimant has established sixteen 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, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

employment,[2] but found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement previously adjudicated against him, and thus failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Accordingly, benefits were denied.

On appeal, claimant contends that the pulmonary function study and medical opinion evidence establish a totally disabling respiratory impairment. Employer did not file a response brief and the Director, Office of Workers= Compensation Programs, is not participating 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).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in rejecting the preponderance of qualifying pulmonary function studies and in failing to provide an adequate rationale for his findings under Section 718.204(b)(2)(i), in violation of the Administrative Procedure Act (APA), 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). Claimant specifically argues that the administrative law judge imposed an improper burden of proof on claimant by rejecting the validation reports of Drs. Simelaro and Venditto, who are highly qualified pulmonary experts, because they used the Department of Labor's standard form to determine that the September 12, 2001 and October 4, 2001 pulmonary function studies are "acceptable" without providing a "response to the specific reasons given by Dr. Levinson for finding the studies invalid." Claimant's Brief at 5. Claimant's arguments are without merit. The administrative law judge reviewed Dr. Levinson's opinion that the tracings of the September 12, 2001 pulmonary function study show that the "flow volumes indicate a marked discontinuation between the inhalation and the

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[2] This finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

beginning of exhalation and the MVV tracings indicate less than maximal effort." Decision and Order at 7; Employer's Exhibit 4. Regarding the October 4, 2001 pulmonary function study, the administrative law judge determined that Dr. Levinson deemed claimant's effort to be unacceptable due to the "marked hesitation in exhalation of the FVC attempts, suggesting either [claimant] closed his glottis or was breathing through an obstructed mouthpiece." *Id.* The administrative law judge did not reject the validation reports of Drs. Simelaro and Venditto; rather, he reasonably gave greater weight to Dr. Levinson's reports because, unlike Drs. Simelaro and Venditto, who merely checked off a box to indicate that the "vents are acceptable," Dr. Levinson fully explained why he found that these studies were invalid. *Trent*, 11 BLR 1-26; Decision and Order at 7; Claimant's Exhibits 7, 8, 10, 12. The administrative law judge further considered Dr. Raymond Kraynak's testimony that he observed that claimant's effort was good and that the pulmonary function studies were valid, but permissibly gave greater weight to Dr. Levinson's invalidations based on his superior qualifications as a Board-certified pulmonologist.[3] *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc)*; Decision and Order at 7; Claimant's Exhibit 7-9.

Similarly, contrary to claimant's assertion, the administrative law judge permissibly credited Dr. Levinson's invalidations of the pulmonary function studies dated November 29, 2000 and April 17, 2002 over the contrary opinions of Drs. Raymond and Matthew Kraynak and Dr. Kruk because Dr. Levinson possessed superior qualifications.[4] *Scott*; 14 BLR 1-37; Decision and Order at 6, 8; Director's Exhibit 3; Claimant's Exhibits 1, 5, 9, 17; Employer's Exhibits 1, 4. Further, the administrative law judge rationally found that the qualifying pulmonary function study of October 10, 2000 and the non-qualifying pulmonary function study of May 3, 2002 were non-conforming, based on the expert opinions of Drs. Levinson and Simelaro. Decision and Order at 6, 7; Claimant's Exhibit 24; Employer's Exhibit 5. The administrative law judge correctly found that Dr. Levinson stated that claimant's effort was unacceptable and that Dr. Simelaro agreed with Dr. Levinson in finding both pulmonary function studies to be invalid.[5] Decision and Order at 6, 7; Claimant's Exhibits 23, 24; Employer's Exhibits 5, 6.

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[3] The administrative law judge found that Dr. Raymond Kraynak is Board-eligible in family medicine. Decision and Order at 6.

[4] The administrative law judge found that Dr. Matthew Kraynak is Board-certified in family medicine and Dr. Kruk is Board-certified in internal medicine. Decision and Order at 6, 8.

[5] The administrative law judge noted that Dr. Simelaro agreed that the pulmonary function studies were not valid for "legal purposes under legal standards [that] must be adhered to," but could be used for "clinical purposes." Decision and Order at 6.

Claimant further argues that the administrative law judge applied an inconsistent standard of review by placing unquestioning reliance on all of Dr. Levinson's invalidation reports, including his "conflicting opinion" regarding the August 2, 2001 pulmonary function study. Claimant's Brief at 7. Claimant's arguments lack merit. The administrative law judge noted that although Dr. Levinson, who administered the study, characterized claimant's effort as "fair," he also opined:

> The results of the pulmonary function according to my direct visualization and my review of the spirometric tracings do not indicate [Claimant's] true and complete pulmonary function capacities.…The tracings will clearly indicate (sic) that the patient has held back in the course of his exhalation indicating artificial obstruction or purposeful closure of the glottis.

Decision and Order at 7; Employer's Exhibit 3. Contrary to claimant's assertion, Dr. Levinson's characterization of claimant's effort as "fair" is not necessarily in conflict with his subsequent statement that the study was invalid based on expert review of the tracings, and no other physician validated this study. *See Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). As substantial evidence supports the administrative law judge's finding that all of the qualifying pulmonary function studies were invalid, we affirm his finding that the evidence was insufficient to establish a totally disabling respiratory impairment under Section 718.204(b)(2)(i).

Claimant next contends that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Kruk, Simelaro, Raymond and Matthew Kraynak, that claimant is totally disabled, and for according determinative weight to the contrary opinion of Dr. Levinson under Section 718.204(b)(2)(iv). We disagree. The administrative law judge permissibly accorded little weight to the opinions of Drs. Kruk, Raymond and Matthew Kraynak because the pulmonary function studies they relied on in making their determinations were subsequently invalidated by a pulmonary specialist. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). With regard to the opinion of Dr. Simelaro, the administrative law judge determined that the physician's conclusions were based upon two pulmonary function studies which he conceded were invalid, *i.e.*, the non-qualifying pulmonary function study of May 3, 2001 and the qualifying study dated October 10, 2000, and upon the pulmonary function study dated August 2, 2001, which the administrative law judge found was invalid based upon Dr. Levinson's opinion. Decision and Order at 9. The administrative law judge acted within his discretion in finding that Dr. Simelaro's opinion was unreasoned because he failed to provide any rational explanation for concluding that the invalid pulmonary function studies were acceptable for clinical purposes. *Id.* Further, contrary to claimant's arguments, the administrative law judge was not required to accord enhanced weight to the opinions of Drs. Raymond and

Matthew Kraynak and Dr. Simelaro based on their status as treating physicians, as he found that their opinions were not as credible as the opinion of Dr. Levinson. *See* 20 C.F.R. ' 718.104(d)(5); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3rd Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See* Trent, 11 BLR 1-26. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge's finding that the medical opinion evidence was insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv) is supported by substantial evidence and thus is affirmed. Consequently, we affirm his denial of benefits.

Accordingly, the Decision and Order of the administrative law judge 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