BRB No. 00-0103 BLA

GEORGE F. BOWMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	Date Issued:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0379) of Administrative Law Judge Paul H. Teitler 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). This case involves a duplicate claim.[1] The administrative law judge found

[1]Claimant first filed an application for benefits on September 12, 1980, which was denied on July 31, 1981, for failure to establish any element of entitlement. Director's Exhibit 24. Claimant took no further action. Claimant filed his second claim on October 11, 1996. Director's Exhibit 25. On February 21, 1997, the Department of Labor informed claimant that his claim would be dismissed if he did

that while claimant established he suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and was totally disabled pursuant to 20 C.F.R. §718.204(c)(4), the evidence did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in accepting Dr. Green's opinion, in violation of the 20-day rule, and erred in his consideration of the evidence pursuant to Sections 718.204(b) and 718.204(c)(1), (4).[2] The Director, Office of Workers' Compensation Programs, has responded, in agreement with claimant that the administrative law judge erred in accepting the Director's untimely submission of Dr. Green's opinion, and requests the Board to remand the case to the administrative law judge to determine whether the Director established good cause. The Director further submits that the administrative law judge properly considered the pulmonary function study evidence.

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 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

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not submit further information on his claim. Claimant took no further action until he filed the instant claim on June 25, 1998. Director's Exhibit 1.

[2]The administrative law judge's determination that claimant established twelve and one-half years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b) are unchallenged on appeal and are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm the administrative law judge's determination that claimant did not establish total disability pursuant to Section 718.204(c)(2) and (c)(3) as these findings are also unchallenged on appeal. *Id.*

C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). As this claim constitutes a duplicate claim, claimant must first establish a material change in conditions pursuant to 20 C.F.R. §725.309 by establishing an element of entitlement previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If claimant establishes a material change in conditions, the record in its entirety will be considered by the administrative law judge to determine whether claimant has established his entitlement to benefits. *Id*.

Claimant first contends that the administrative law judge erred in accepting the April 27, 1999 opinion by Dr. Green, in violation of the 20-day rule. The record indicates that the Department of Labor scheduled an examination for claimant with Dr. Green on March 25, 1999. On April 26, 1999, the Director notified claimant's attorney that Dr. Green's opinion had not yet been submitted and that he intended to ask the administrative law judge to permit him to submit the evidence fewer than twenty days before the hearing. On April 28, 1999, twenty days before the hearing, the Director informed the administrative law judge of the outstanding evidence and requested an enlargement of time to submit it. Claimant's attorney filed an objection. On May 12, 1999, the Director submitted Dr. Green's opinion. The hearing was held on May 18, 1999, at which time the administrative law judge admitted Dr. Green's report, stating that he was required to fully develop records as far as practicable, and permitted claimant to submit rebuttal evidence. *See* Hearing Transcript at 42.

An administrative law judge has the discretion to admit documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing, if the parties waive the requirement or if a showing of good cause is made for the late exchange of evidence. *See* 20 C.F.R. §725.456(b)(2); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In the instant case, as Dr. Green's report was not submitted prior to twenty days before the hearing and the parties did not waive the 20-day requirement, the administrative law judge erred in failing to determine whether the Director established good cause in submitting the report in an untimely manner. 20 C.F.R. §725.456(b)(2). Thus, we remand the case to the administrative law judge to make this determination. Furthermore, as the administrative law judge relied upon Dr. Green's opinion at Section 718.204(b) and (c)(4), we vacate the administrative law judge's findings pursuant to those subsections.

At Section 718.204(c)(1), claimant contends that the administrative law judge erred in finding that Dr. Green's non-qualifying pulmonary function study was the only study of

record which had not been invalidated.[3] Contrary to claimant's assertion, the administrative law judge precluded rebuttal of Dr. Green's study at the hearing on May 18, 1999. Hearing Transcript at 61 - 63. Nevertheless, on August 5, 1999, claimant submitted additional medical reports, and the Director filed a Motion to Strike based upon the administrative law judge's prior ruling regarding the admission of rebuttal evidence. By Order dated August 27, 1999, the administrative law judge granted the Director's Motion to Strike. The record does not contain the evidence referred to by claimant, and the administrative law judge properly found that Dr. Green's study had not been invalidated by any physician. Moreover, although claimant contends that the administrative law judge erred in stating that Dr. Green actually performed the February 8, 1999 study the record indicates that the study was signed by Krystal Clemens, the administering technician, and Dr. Green and claimant has failed to demonstrate how this contention has prejudiced his claim. Director's Exhibit 27.

In considering the remainder of the studies, the administrative law judge rationally credited Dr. Michos' invalidations of the July 30, 1998 and April 7, 1999 studies finding him to be highly qualified and his reports to be well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the July 30, 1998 and April 7, 1999 studies are invalid. The administrative law judge then determined that Dr. Ranavaya's invalidation opinions were unreasoned, and therefore found that the November 7, 1996 study by Dr. R. Kraynak and the February 8, 1999 study by Dr. M. Kraynak are valid. Considering these two valid studies, along with Dr. Green's April 8, 1999 study, the administrative law judge acted within his discretion in finding that because Dr. Green's results had not been invalidated by any other physician, the non-qualifying[4] study by Dr. Green was entitled to the greatest weight.

[3]Dr. Green's pulmonary function study was submitted into the record on April 21, 1999, and claimant does not contend that the study was submitted in violation of the 20-day rule. Director's Exhibit 27.

[4]The administrative law judge's Decision and Order contains a typographical error stating that Dr. Green's opinion produced qualifying results, but it is clear from

Decision and Order at 14. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We therefore affirm the administrative law judge's determination that the pulmonary function study evidence does not establish that claimant is totally disabled pursuant to Section 718.204(c)(1).

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his conclusion at Section 718.204(c)(1) and his earlier notation on pace 13 of his decision regarding the results of the test that he intended to state that Dr. Green's test is non-qualifying.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part, and the case remanded for further consideration of the evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge