BRB No. 01-0106 BLA

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

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

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

Sarah M. Hurley (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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (98-BLA-1350) of Administrative Law Judge Ralph A. Romano 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 is before the

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be

Board for the second time. The administrative law judge issued his Decision and Order - Denying Benefits on March 18, 1999, where he noted the stipulation of "thirteen plus" years of coal mine employment, and found the evidence sufficient to establish a material change in conditions. The administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, but found the evidence insufficient to establish total respiratory disability. Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that the evidence established a material change in conditions, and his findings that the existence of pneumoconiosis was established by the x-ray evidence, that claimant's pneumoconiosis arose out of his coal mine employment, as well as his finding that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000), as these findings were not challenged on appeal. The Board, however, held that the administrative law judge erred in his consideration of the pulmonary function study evidence and the medical opinion evidence regarding disability, and vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000). *Hoysock v. Director, OWCP,* BRB No. 99-0738 BLA (Apr. 13, 2000)(unpub.).

On remand, the administrative law judge found the pulmonary function study

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codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed an application for benefits on September 6, 1988 which was denied by the claims examiner on November 21, 1988. Director's Exhibit 12. No further action was taken on that claim. On February 20, 1998, claimant filed a subsequent application for benefits. Director's Exhibit 1.

evidence and the medical opinions insufficient to establish total respiratory disability. Accordingly, the administrative law judge denied benefits. 2000 Decision and Order

On appeal, claimant asserts that the administrative law judge erred in his consideration of the pulmonary function study and the medical opinion evidence. Claimant also requests the Board to either reverse the denial of benefits, or affirm the denial, and requests that the Board not remand the case, so that, due to claimant's advanced age, he may appeal the case at this time. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's findings and his denial of benefits.

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).

Initially, we consider claimant's assertions regarding the administrative law judge's evaluation of the pulmonary function study evidence. Claimant asserts that the administrative law judge erred in his consideration of the pulmonary function study evidence. Specifically, claimant contends that by inferring that Dr. Rashid found the July 6, 1998 pulmonary function study to be valid, the administrative law judge impermissibly substituted his opinion for that of the physician. In addition, claimant asserts that this finding is not supported by the record and it therefore violates 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). The Director maintains that the administrative law judge's inference was reasonable.

The administrative law judge noted the two recent pulmonary function studies of record. The administrative law judge found that the July 6, 1998 pulmonary function study, administered by Dr. Rashid, yielded non-qualifying values, and the November 11, 1998 pulmonary function study, administered by Dr. M. Kraynak, yielded qualifying values. The administrative law judge noted Dr. R. Kraynak's validation of the November 11, 1998 pulmonary function study. The administrative law judge also considered Dr. R. Kraynak's invalidation of the July 6, 1998 pulmonary function study and stated "I infer

[3] 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).

[4] The administrative law judge accorded less weight to the September 21, 1988 pulmonary function study because it is over ten years old and is not as probative of claimant's current respiratory ability. 2000 Decision and Order at 2.

from Dr. Abdul Rashid's reliance on the July 6, 1998 pulmonary function study in rendering his opinion that he found the study to be valid." 2000 Decision and Order at 2. The administrative law judge then stated:

> Dr. Rashid is Board certified in internal medicine while Dr. R. Kraynak is only Board Eligible in family medicine. Because Dr. Rashid's qualifications are superior to those of Dr. R. Kraynak, I find that the non-qualifying pulmonary function study of July 6, 1998 is valid.

2000 Decision and Order at 2. The administrative law judge also found that the November 11, 1998 pulmonary function study is valid. The administrative law judge stated:

> Because the non-qualifying pulmonary function study of July 6, 1998 and the qualifying pulmonary function study of November 11, 1998 were performed only four months apart, I find that these studies are contemporaneous and equally probative in determining Claimant's present disability. Because there is one qualifying and one non-qualifying pulmonary function study in the record, I find that Claimant failed to establish total disability by a preponderance of the evidence under 20 C.F.R. §718.204(c)(1).

2000 Decision and Order at 3.

We reject claimant's assertion that the administrative law judge erred by inferring that Dr. Rashid found the July 6, 1998 pulmonary function study to be valid. The administrative law judge is charged with evaluating the evidence and drawing inferences therefrom. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). 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 inference drawn by the administrative law judge regarding the validity of the July 6, 1998 pulmonary function study is not patently unreasonable or inherently incredible, *see Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1335 (9th Cir. 1978), and we hold that the administrative law judge's finding in this regard is permissible. *See Lafferty, supra*; *Fagg, supra*; *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Consequently, we affirm the administrative law judge's finding that claimant has not satisfied his burden of demonstrating, by a preponderance of the evidence, total disability by means of the pulmonary function study evidence, since, as the administrative law judge found, the record contains the results of one qualifying pulmonary function study and one non-qualifying pulmonary function study. *See* 20 C.F.R. §§718.204(b)(1)(i), 718.204(c)(1) (2000); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR

2-64 (3d Cir. 1993).

We now consider claimant's challenges to the administrative law judge's finding that the medical opinion evidence is insufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). The administrative law judge considered the medical opinions of Drs. Rashid, M. Kraynak and R. Kraynak and found the opinion of Dr. Rashid to be the most persuasive. The administrative law judge stated:

> Dr. Rashid's opinion that Claimant is not totally disabled is reasoned and supported by the objective testing of record, which includes the non-qualifying pulmonary function study of July 6, 1998 and the non-qualifying blood gas studies. On the other hand, I give less weight to the opinions of Drs. R. Kraynak and M. Kraynak that Claimant is totally disabled because they failed to adequately reconcile the arterial blood gas studies which produced non-qualifying values with their opinion of total disability. Furthermore, the qualifications of Dr. Rashid are superior to those of Drs. R. Kraynak and M. Kraynak.

2000 Decision and Order at 4.

Claimant asserts that administrative law judge erred by failing to provide a rational basis for crediting Dr. Rashid's opinion over the opinions of Drs. R. Kraynak and M. Kraynak. Specifically, claimant asserts that Dr. Rashid's opinion is not supported by his pulmonary function study which was invalidated by Dr. R. Kraynak. Further, claimant maintains that "Dr. Rashid's Board Certification in Internal Medicine, as compared to Dr. Matthew J. Kraynak's qualifications as Board Certified in Family Medicine, is a distinction without a difference." Claimant's Brief at 17. Claimant also contends that the administrative law judge erred by rejecting the opinions of Drs. R. Kraynak and M. Kraynak because they failed to reconcile the non-qualifying blood gas studies with their opinions of total disability.

We disagree with claimant's assertion that the administrative law judge

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[5] Dr. Rashid stated "(b)ased on history and physical and pulmonary tests, EKG, and blood gases it appears that this claimant has no significant pulmonary disease." Director's Exhibit 5. Dr. M. Kraynak opined that claimant is totally and permanently disabled due to his coal workers' pneumoconiosis. Claimant's Exhibit 2. Dr. R. Kraynak opined that claimant is totally and permanently disabled due to coal workers' pneumoconiosis. The record also contains the 1988 opinion of Dr. Cable. Director's Exhibit 12. However, this opinion is not considered by the administrative law judge, as he based his opinion on the medical evidence which is more indicative of claimant's current condition. Claimant's Exhibit 4.

mischaracterized the evidence of record when he found that Drs. Kraynak failed to adequately reconcile their opinions of total disability with the non-qualifying blood gas study they considered in formulating their opinions. While Dr. R. Kraynak was asked to address the significance of claimant's normal July 15, 1998 blood gas study, his response was general and did not specifically address claimant's situation. Claimant's Exhibit 4 at 10. Dr. M. Kraynak did not address the significance of the normal blood gas study results. Accordingly, it was appropriate for the administrative law judge to find that these physicians did not "adequately reconcile" their opinions of total disability with the non-qualifying blood gas study results. *See Lafferty, supra*; *Fagg, supra*.

In addition, the administrative law judge as trier-of-fact permissibly found these opinions entitled to little weight as not well reasoned as the physicians failed to adequately reconcile their conclusions of total disability with the non-qualifying blood gas studies they considered in formulating their opinions. *See* Claimant's Exhibits 2, 4; *Clark, supra*; *Lafferty, supra*. We, therefore, affirm the administrative law judge's finding that claimant failed to carry his burden of demonstrating total disability by the medical opinion evidence of record. *See* 20 C.F.R. §718.204(b)(1)(iv); 20 C.F.R. §718.204(c)(4) (2000); *Ondecko, supra; see generally Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Inasmuch as we affirm the administrative law judge's discrediting of the medical opinion evidence supportive of claimant's burden, we need not consider claimant's other assertions regarding the administrative law judge's weighing of the medical opinion evidence. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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[6] As the Director points out, Dr. R. Kraynak's response addresses the situation of a miner with a normal pulmonary function study. Dr. R. Kraynak specifically stated:

> [B]lood gases are done to find a small subset of miners that may have normal pulmonary function yet have an inability to oxygenate their blood with exercise. So this – the fact that one has normal blood gas doesn't affect disability.

Claimant's Exhibit 4 at 10. In the instant case, Dr. Kraynak found claimant's pulmonary function study to be qualifying, or "abnormal."

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge