BRB No. 01-0122 BLA

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

Appeal of the Decision and Order Denying Benefits (Upon Second Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Howard M. Radzely, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (Upon Second Remand by the Benefits Review Board)(96-BLA-0534) of Administrative Law Judge Robert D. Kaplan on a duplicate claim filed pursuant to the provisions of Title IV of the Federal

[1] Claimant is Donald R. Smeltzer, the miner, who filed his first application for benefits on February 7, 1984, which was denied on June 1, 1984. Director's Exhibit 15. A review of the record does not reveal that claimant pursued this claim further. Claimant

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time. In the initial Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 (2000), credited claimant with six and one-quarter years of qualifying coal mine employment, found that claimant failed to establish that his pneumoconiosis arose out of coal mine employment, and accordingly, denied benefits. Claimant subsequently appealed the denial. The Board reversed the administrative law judge's determination that claimant failed to establish that his pneumoconiosis arose out of coal mine employment based on the concession of that element by the Director, Office of Workers' Compensation Programs (the Director). The Board additionally vacated the administrative law judge's finding on the length of coal mine employment and remanded the case for the administrative law judge to determine claimant's length of coal mine employment and whether claimant was totally disabled due to pneumoconiosis. *Smeltzer v. Director, OWCP*, BRB No. 97-1087 BLA (Mar. 6, 1998)(unpub.).

On remand, the administrative law judge credited claimant with nine and one-half years of qualifying coal mine employment and found that claimant failed to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(2000). Benefits were, accordingly, denied. Pursuant to claimant's appeal, the Board vacated the administrative law judge's determination that the pulmonary function study evidence was insufficient to demonstrate

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subsequently filed a duplicate application for benefits on February 13, 1995. Director's Exhibit 1.

[2] 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 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). 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).

total disability and remanded the case for the administrative law judge to better explain his analysis of the pulmonary function studies dated January 10, 1996 and January 16, 1997 and the post-bronchodilator portion of the June 17, 1996 study and to explicitly apply the law found in *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994)(unpub.), to the facts of this case. In addition, the Board vacated the administrative law judge's determination that the medical opinion evidence was insufficient to demonstrate total disability. Finally, the Board vacated the administrative law judge's determination that claimant failed to establish total disability due to pneumoconiosis based on the Director's representation he would concede the issue if on remand, the administrative law judge finds that total disability is established. *Smeltzer v. Director, OWCP*, BRB No. 99-0187 BLA (Mar. 31, 2000)(unpub.). Subsequently, claimant requested reconsideration of the Board's decision, however, the Board summarily denied claimant's motion. *Smeltzer v. Director, OWCP*, BRB No. 99-0187 BLA (Jun. 21, 2000)(unpub. Order). On remand, the administrative law judge again found that the pulmonary function study and medical opinion evidence were insufficient to demonstrate total respiratory disability, and accordingly, denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find that the pulmonary function study and medical opinion evidence demonstrated total respiratory disability. The Director responds, urging affirmance of the denial.

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 the 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 and 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, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his 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*).

[3] In the interest of preserving this argument for appeal purposes, claimant contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to fully explain the bases for his determinations, the weight assigned to the evidence, and his legal and factual conclusions. Claimant's Brief at 9-10.

Claimant argues that the administrative law judge imposed an unduly restrictive burden upon him by according dispositive weight to the non-qualifying, pre-bronchodilator results of the June 17, 1996 pulmonary function study over the qualifying, post-bronchodilator results of this same study and the qualifying January 10, 1996 and January 16, 1997 pulmonary function studies. Specifically, claimant avers that the administrative law judge erroneously found that the holding of *Andruscavage* is that pulmonary function studies that yield "disparately higher values" tend to be more reliable. Furthermore, claimant asserts that the June 17, 1996 pulmonary function study, taken as a whole, is sufficient to establish total disability because the post-bronchodilator portion of this test yielded qualifying values.

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this cases arises, stated in *Andruscavage,* "Moreover, the medical literature supports the [administrative law judge's] conclusion that [pulmonary function studies] which return disparately higher values tend to be more reliable indicators of an individual's respiratory capacity than those with lower values." *Andruscavage, slip op*. at 10. Consequently, the court held that it was within the discretion of the administrative law judge in that case to find that the fifth, most recent non-qualifying pulmonary function study was more indicative of Andruscavage's pulmonary condition instead of the first four qualifying pulmonary function studies. *Andruscavage, slip op*. at 9. Applying the law in *Andruscavage* to the facts of the case at bar, the administrative law judge, within a permissible exercise of his discretion, found that because the non-qualifying pre-

[4] A "qualifying" pulmonary function study or blood gas 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] A review of the record reveals seven pulmonary function studies. In his previous Decision and Order, the administrative law judge found that the non-qualifying pulmonary function studies conducted on March 2, 1984 and March 16, 1995 were entitled to less weight because these tests were neither recent nor contemporaneous with the other pulmonary function studies of record. Decision and Order Upon Remand at 8. In addition, the Board held, in its prior decision, that the administrative law judge properly discredited the qualifying pulmonary function studies conducted on April 17, 1996 and May 14, 1996 inasmuch as these studies were invalidated. *See Smeltzer v. Director, OWCP*, BRB No. 99-0187 BLA, *slip op*. at 3-4 (Mar. 31, 2000)(unpub.). Consequently, the remaining pulmonary function tests at issue were performed on January 10, 1996, June 17, 1996, and January 16, 1997. Director's Exhibit 21; Claimant's Exhibits 11, 21.

bronchodilator values obtained on the June 17, 1996 pulmonary function study were higher than the values obtained on the three qualifying tests, they were more indicative of claimant's true pulmonary condition and entitled to greater weight. *See Andruscavage, supra*; *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984); *Keen v. Jewell Ridge Coal Co.*, 6 BLR 1-454, 1-459 (1983)(when evaluating pre-bronchodilator and post-bronchodilator test results, where one qualifies and the other does not, administrative law judge must weigh values and explain which are more probative); Decision and Order Upon Second Remand at 4-5. Inasmuch as the administrative law judge's weighing of the pulmonary function study evidence comports with *Andruscavage,* we reject claimant's contentions. *See Andruscavage, slip op*. at 12.

Claimant similarly argues that the administrative law judge's reliance on *Andruscavage* is misplaced because the facts in that case are not analogous to the facts of the case *sub judice*. Claimant contends that in *Andruscavage*, each of the qualifying pulmonary function studies was invalidated by one or more physicians, forming a basis for their rejection, whereas in the instant case, the qualifying studies were validated. In *Andruscavage*, the Third Circuit court stated that the administrative law judge, "carefully analyzed the five ventilatory studies, each of which was 'invalidated' by one or more physicians, *and found that none should be rejected as probative evidence.*" *Andruscavage, slip op*. at 13 [emphasis added]. Therefore, notwithstanding that the qualifying pulmonary function tests in *Andruscavage* were invalidated, the court noted that the administrative law judge declined to credit the invalidation reports. In the case at bar, the administrative law judge found that the qualifying tests were valid and consequently, were probative evidence of total disability, but nevertheless, permissibly accorded the qualifying tests less weight because their values were disparately lower. *See Andruscavage, slip op*. at 10; Decision and Order Upon Second Remand at 4.

Next, claimant contends that the non-qualifying study in *Andruscavage* was normal whereas, in the instant case, the values of the pre-bronchodilator portion of the June 17, 1996 pulmonary function study were "reduced from normal." Claimant's contention lacks merit. Notwithstanding that the June 17, 1996 pre-bronchodilator test values were found to be abnormal, this portion of the test yielded non-qualifying values. *See* 20 C.F.R. Part 718, Appendix B. Accordingly, because the pre-bronchodilator portion of the June 17, 1996 pulmonary function test is insufficient to demonstrate total disability as a matter of law, it is not legally distinguishable from the non-qualifying study found in *Andruscavage*. *See* 20 C.F.R. Part 718, Appendix B.

Claimant additionally argues that the administrative law judge "overlooked" the preponderance of the valid, qualifying pulmonary function studies by relying solely on a non-qualifying test whose values were qualifying after the administration of bronchodilators. Contrary to claimant's argument, the administrative law judge

considered the valid, qualifying pulmonary function studies of record, but instead, within a rational exercise of his discretion, relied upon the non-qualifying pre-bronchodilator values of the June 17, 1996 pulmonary function study because these values were more indicative of claimant's true pulmonary condition. *See Andruscavage, supra*; *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); Decision and Order Upon Second Remand at 4. Moreover, the administrative law judge properly noted that Dr. Green, the administering physician of the June 17, 1996 test, opined that claimant's effort during the test was "suboptimal," and that therefore, "the results are most likely an underestimate of [claimant's] true parameters." *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985); *Clayton v. Pyro Mining Co.*, 7 BLR 1-551, 1-556 (1984); Decision and Order Upon Second Remand at 5; Director's Exhibit 21. Hence, we affirm the administrative law judge's determination that the pulmonary function study is insufficient to demonstrate total respiratory disability inasmuch as the administrative law judge weighed all non-qualifying and qualifying pulmonary function studies, including the pre-bronchodilator and post-bronchodilator results, and adequately explained which values were the most probative. *See Keen, supra*.

We next address claimant's contentions regarding the administrative law judge's finding that the medical opinion evidence is insufficient to demonstrate total respiratory disability. Claimant contends that the administrative law judge erroneously rejected the opinion of Dr. Kraynak, claimant's treating physician, on the basis that Dr. Kraynak was unaware of the exertional requirements of claimant's usual coal mine work. Dr. Kraynak opined that claimant is totally disabled and not able to engage in coal mine employment and stated that claimant worked in underground coal mine employment for seven years and above ground for four years. Claimant's Exhibit 14. During his deposition on May 17, 1996, Dr. Kraynak testified that claimant's "last coal mine employment was driving raw coal from the mines to the breakers" and prior to that, claimant "worked as a slate picker in a cleaning operation." Claimant's Exhibit 17 at 18. Consistent with the administrative law judge's determination, however, Dr. Kraynak failed to exhibit knowledge of the specific exertional requirements or required duties of claimant's coal mine employment. *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991)(physician's opinion was critically flawed because physician did not relate his findings to miner's duties or exertional requirements in mines); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). Inasmuch as the administrative law judge's determination is rational and supported by substantial evidence, we reject claimant's argument.

Claimant further argues that the administrative law judge improperly required Dr. Kraynak to explain whether the non-qualifying pre-bronchodilator values rendered on the June 17, 1996 pulmonary function study factored into his opinion that claimant is totally disabled. It has consistently been held that a physician may render a reasoned opinion

that a miner is totally disabled even where pulmonary function studies and/or blood gas studies are medically contraindicated. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, a physician's failure to provide an adequate explanation for evidence in his report which appears to conflict with the physician's conclusions is a factor which the administrative law judge may consider in determining the weight to be accorded that report. *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). Inasmuch as the administrative law judge permissibly found Dr. Kraynak's opinion undermined because of Dr. Kraynak's failure to explain the impact, if any, of the non-qualifying pre-bronchodilator values on his opinion, we reject claimant's argument. Decision and Order Upon Second Remand at 6.

Claimant argues that the administrative law judge irrationally found that "it is unclear whether or to what extent Dr. Kraynak's diagnosis is based on pulmonary function studies which [the administrative law judge] found to be invalid" because Dr. Kraynak reviewed the pulmonary function studies of record and, administered several of the studies which the administrative law judge found were valid. The administrative law judge rationally found that Dr. Kraynak's opinion was "problematic" because Dr. Kraynak did not indicate whether or to what extent he relied upon the pulmonary function studies performed on April 17, 1996 and May 14, 1996 that were found to be invalid by the administrative law judge. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Smeltzer, Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); BRB No. 99-0187 BLA, *slip op*. at 3-4; Decision and Order Upon Second Remand at 3. Hence, we reject claimant's contention.

Finally, claimant avers that the administrative law judge erroneously relied on Dr. Green's opinion to reject that of Dr. Kraynak's because the administrative law judge found that Dr. Green's opinion was not well reasoned. The administrative law judge discounted Dr. Green's opinion because Dr. Green was unaware of the exertional requirements of claimant's coal mine employment. Decision and Order Upon Second Remand at 5. Under his analysis of Dr. Kraynak's opinion, the administrative law judge found that the opinion of Dr. Kraynak was based in part upon abnormal findings on physical examination, contrary to those revealed from Dr. Green's physical examination of claimant. Albeit the administrative law judge improperly relied on this determination as a basis for finding Dr. Kraynak's opinion entitled to less weight, he nevertheless provided alternate, valid bases upon which to discount Dr. Kraynak's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 n.4 (1983); Decision and Order Upon Second Remand at 6.

[6] Claimant also asserts that the administrative law judge impermissibly substituted his opinion for that of Dr. Green by determining that Dr. Green relied upon the non-qualifying

Consequently, because we affirm the administrative law judge's finding that claimant has failed to establish total respiratory disability, a requisite element of entitlement in this Part 718 case, we must affirm the denial of benefits. *See Trent*, *supra*; *Perry*, *supra*.

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pre-bronchodilator values of the June 17, 1996 pulmonary function study. This argument is moot in light of the administrative law judge's discounting of Dr. Green's opinion as not sufficiently reasoned.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Second Remand by the Benefits Review Board) is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge