BRB No. 04-0251 BLA

NORMAN SHOFFLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/21/2004
	)	
Respondent	)	DECISION and ORDER

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

Jordan H. Pecile, Hazleton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5402) of Administrative Law Judge Robert D. Kaplan rendered on a claim[1] 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). Initially, the administrative law judge found that claimant worked for seven years and three months in qualifying coal mine employment and that the record supported the concession of the Director, Office of Workers' Compensation Programs (the Director) that the existence of pneumoconiosis was established. Next, the administrative law judge found that claimant failed to establish that his pneumoconiosis arose out of coal

[1] Claimant is Norman Shoffler, the miner, who filed his application for benefits on August 29, 2001. Director's Exhibit 2.

mine employment pursuant to 20 C.F.R. §718.203(c) or that he suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in calculating the length of coal mine employment and in finding that he failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and that he suffered from a totally disabling respiratory disease pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The Director responds, and urges affirmance of the denial of benefits.[2]

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 challenging the administrative law judge's length of coal mine employment determination, claimant contends that the administrative law judge erred in relying exclusively on the Social Security Administration (SSA) employment records rather than on his formal hearing testimony alleging that he worked for eleven years in qualifying coal mine employment. Claimant contends that the administrative law judge's reliance on the SSA employment records was improper because the SSA records are not only unreliable since they do not include the periods of employment when claimant was paid in cash, but they are also frequently inaccurate and incomplete.

Contrary to claimant's contention, however, the administrative law judge was not persuaded by claimant's testimony concerning his coal mine employment because it directly conflicted with the periods of employment recorded in the SSA records and because claimant failed to proffer an explanation for the discrepancies between his testimony and the SSA records. The administrative law judge found that while claimant testified that he worked in coal mine employment for complete years, the SSA records indicated that he was employed with multiple employers in any given year. The administrative law judge noted claimant's testimony that he worked for Palmer Coal Company in 1953, although the SSA records indicated that he worked there in 1963, and his testimony that he worked exclusively for Minker Coal Company in 1957, although the SSA records reported that he worked for Metex Company from 1956 through 1958. Decision and Order at 4; *see* Hearing Transcript at 9-18,

[2] We affirm the administrative law judge's determination that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii) as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 7-8.

23-25; Director's Exhibit 8. Because claimant did not provide an explanation for these inconsistencies between his testimony and the SSA records, the administrative law judge, within a permissible exercise of his discretion, concluded that the SSA records were a more reliable indication of claimant's actual coal mine employment history. *See Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003) (crediting of SSA records over claimant's testimony where claimant's memory was unreliable is permissible); *accord Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984).

Additionally, we reject claimant's assertion that the SSA records do not reflect additional periods of coal mine employment when he was paid in cash, because the administrative law judge reasonably found that because the SSA records reported earnings with all the coal mine companies for which claimant had worked; the administrative law judge reasoned that it would be "inconsistent that an employer would report to the Social Security Administration some, but not all, of Claimant's earnings from that particular employment." *See Brewster v. Director,* OWCP, 7 BLR 1-120, 1-121-122 (1984) (claimant bears burden of proof in establishing length of coal mine employment); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983) (administrative law judge's computation of time will be upheld provided that it is based on reasonable method and supported by substantial evidence); Decision and Order at 4. Because the administrative law judge permissibly found that claimant's testimony concerning the periods of coal mine employment was unreliable, contradicted by the SSA records, and uncorroborated by any other evidence of record, we affirm the administrative law judge's determination that claimant worked for seven years and three months in qualifying coal mine employment.

Claimant contests the administrative law judge's failure to find that his pneumoconiosis arose out of coal mine employment because, claimant asserts, the record contains credible medical evidence establishing the causal nexus between his pneumoconiosis and coal mine employment, namely, the opinion of Dr. Kraynak. Claimant argues that the administrative law judge erred in rejecting Dr. Kraynak's opinion because, contrary to the administrative law judge's finding, Dr. Kraynak's reliance on an eleven-year coal mine employment history was an accurate understanding of his work history. We agree.

The administrative law judge found that Dr. Kraynak's opinion was not reasoned and thus, entitled to no weight because Dr. Kraynak relied on an inflated coal mine employment history of fourteen years, which was "almost double[]" the approximate seven-year coal mine employment history he found. Decision and Order at 6. Contrary to the administrative law judge's finding, however, a review of both of Dr. Kraynak's reports dated October 20, 2000 and November 7, 2001 reveal that Dr. Kraynak relied on a history of eleven, not fourteen, years of coal mine employment. Director's Exhibits 14, 15. Consequently, the administrative law judge mischaracterized Dr. Kraynak's understanding of the duration of

claimant's coal mine employment and therefore, impermissibly found that Dr. Kraynak's opinion was undermined based on this flaw. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984). Because the administrative law judge improperly relied on this factor as a basis for finding that Dr. Kraynak's opinion was less probative, we vacate the administrative law judge's finding pursuant to Section 718.203(c).[3]

In challenging the administrative law judge's determination that he failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i), claimant contends that the administrative law judge erred in rejecting the October 4, 2000 pulmonary function study, which yielded qualifying values. Claimant argues that the administrative law judge impermissibly substituted his opinion for that of the administering physician, who noted that claimant's effort and cooperation were "good," when he discounted this test because there is no evidence of record, nor any evidence cited by the administrative law judge, to indicate that claimant did not cooperate while performing the test.

A review of the record reveals that, of the three pulmonary function studies, two tests dated November 7, 2001 and March 5, 2002 yielded non-qualifying values while the earliest test dated October 4, 2000 was qualifying. Director's Exhibits 14, 17, 27. Finding that because pulmonary function studies are effort dependent, "spuriously low values are possible but spuriously high values are not," the administrative law judge determined that the non-qualifying, March 5, 2002 pulmonary function study was the most reliable indicator of claimant's true pulmonary capacity because this test "produced even higher values than both the November 7, 2001 and the October 4, 2000 pulmonary function studies." Decision and Order at 7. In concluding that the pulmonary function study evidence did not establish total respiratory disability, the administrative law judge determined that the March 5, 2002

[3] We note that the discrepancy between Dr. Kraynak's understanding that claimant worked in coal mine employment for eleven years, compared to the administrative law judge's finding of seven years and three months is a difference of three years and nine months. Although we have consistently held that an administrative law judge must note the existence of a discrepancy between his finding regarding a claimant's history of coal mine employment and that relied upon by a physician and explain how the discrepancy affects the credibility of that physician's opinion, the discrepancy must be "significant" to find a physician's opinion undermined on this basis. *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986) (10-11 year difference is significant); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985) (16-19 year disparity is significant); *Long v. Director, OWCP*, 7 BLR 1-254 (1984) (7 and one-half year discrepancy is significant); *compare Gouge v. Director, OWCP*, 8 BLR 1-307 (1985) (2 year discrepancy is not significant).

pulmonary function study, which is the most recent test, was the most reliable indicator of claimant's actual pulmonary capacity. The administrative law judge concluded his analysis of the pulmonary function study evidence by stating, "Based on the forgoing [sic], I find the October 4, 2000 and November 7, 2001 pulmonary function studies to be invalid." Decision and Order at 7. A review of the record reveals, however, that the record contains no evidence demonstrating that the pulmonary function studies dated October 4, 2000 and November 7, 2001 were "invalid." Director's Exhibits 14, 17. Moreover, the record demonstrates that these tests are conforming and in substantial compliance with the regulatory standards set forth in Section 718.103. *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). Hence, consistent with claimant's argument, the record lacks any medical evidence invalidating the qualifying, October 4, 2000 pulmonary function study. Because the administrative law judge is not permitted to substitute his opinion for that of a physician, *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986), and the interpretation of objective data is a medical determination, *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000, 1-1002 (1984), we vacate the administrative law judge's findings regarding the pulmonary function study evidence pursuant to Section 718.204(b)(2)(i).

With respect to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in crediting the opinion of Dr. Green and discrediting the opinion of Dr. Kraynak. Specifically, claimant argues that the administrative law judge erred in assigning dispositive weight to the opinion of Dr. Green, who did not diagnose the existence of pneumoconiosis, given that the Director conceded the existence of pneumoconiosis in this case. Claimant contends that Dr. Green's failure to acknowledge that pneumoconiosis is present renders his opinion unreasoned, and therefore, the credibility of his opinion is undermined due to this flaw. On the contrary, claimant contends that because Dr. Kraynak was his treating physician, Dr. Kraynak's opinion was entitled to greater weight.

With respect to Dr. Kraynak's opinion, the administrative law judge determined that, because the record contained no other evidence suggesting that he was claimant's treating physician, Dr. Kraynak's statement that claimant "has been under my care since October 4, 2000" found in his October 20, 2000 report was insufficient to entitle Dr. Kraynak's opinion to greater deference as a treating physician pursuant to Section 718.104(d). Further review of the record reveals that when Dr. Green examined claimant and completed his report on March 27, 2002, his report indicated that claimant's treating physician was Bruce Romantic, a physician located in Kulpmont, Pennsylvania. Director's Exhibit 25. Therefore, substantial evidence supports the administrative law judge's determination that the evidence of record, including Dr. Kraynak's statement that claimant has been under his care since October 4, 2000, was insufficient to warrant consideration as a treating physician's opinion under Section 718.104(d). *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 9 n.4.

Nevertheless, we must vacate the administrative law judge's finding at Section 718.204(b)(2)(iv) based on the remaining portion of his discrediting of Dr. Kraynak's opinion. Although the administrative law judge correctly noted that a medical opinion based on non-conforming pulmonary function tests may be accorded less weight, the administrative law judge erred in discounting Dr. Kraynak's opinion on the basis that Dr. Kraynak relied on "invalid" and non-conforming pulmonary function studies. Decision and Order at 9. As discussed *supra*, the record contains no medical evidence, nor has the administrative law judge cited any, demonstrating that these pulmonary function studies were either invalid or non-conforming. Accordingly, we vacate the administrative law judge's determination that the medical opinion evidence is insufficient to demonstrate total respiratory or pulmonary disability at Section 718.204(b)(2)(iv). On remand, the administrative law judge must consider the medical opinions of record, specifically, the opinions of Drs. Kraynak and Green, and that both physicians' diagnoses of the existence of a totally disabling respiratory impairment were based on physical examinations, diagnostic tests, claimant's symptomatology, and medical and employment histories.

Accordingly, on remand, the administrative law judge must determine whether claimant established that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c) and total respiratory disability pursuant to Section 718.204(b). Because the administrative law judge accepted the presence of pneumoconiosis in this case, he must also examine the relevant medical opinions of record to determine whether claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c) in accordance with *Soubik v. Director, OWCP*, 366 F.3d 226, 234, BLR (3d Cir. 2004),[4] if reached.

[4] Subsequent to the issuance of the administrative law judge's decision, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that "an [administrative law judge] may not credit a medical opinion stating that a claimant did not suffer from pneumoconiosis causing respiratory disability after the [administrative law judge] ha[s] already accepted the presence of pneumoconiosis unless the [administrative law judge] state[s] 'specific and persuasive reasons' why he or she relied upon such an opinion." *Soubik v. Director, OWCP*, 366 F.3d 226, 234, BLR (3d Cir. 2004), *citing Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge