BRB No. 98-0192 BLA

JIMMY ADAMS	)	
	)	
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 of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Rodney E. Buttermore, Jr. (Buttermore, Turner, Lawson & Boggs), Harlan, Kentucky, for claimant.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-828) of Administrative Law Judge Alfred Lindeman denying benefits 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 request for modification.[1] After noting that the parties had

[1] Claimant filed his initial claim for benefits on April 5, 1993. Director's Exhibit 1. The claim was denied on September 28, 1993, for failure to establish any of the elements of entitlement. Director's Exhibit 22. Claimant requested an appeal of the denial on January 13, 1994, which was considered a request for modification. Director's Exhibit 27.

stipulated to twenty-five years of coal mine employment and that the Director, Office of Workers' Compensation Programs (the Director), had conceded the existence of simple pneumoconiosis arising out of coal mine employment, the administrative law judge determined that a basis for modification had been established pursuant to 20 C.F.R. §725.310. The administrative law judge then considered all of the relevant evidence to determine whether claimant established total disability pursuant to 20 C.F.R. §718.204(c) and found that the evidence was insufficient to establish this element of entitlement. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1) and (4) are erroneous. The Director has responded by a Motion to Remand, urging the Board to affirm the administrative law judge's weighing of the pulmonary function study evidence pursuant to Section 718.204(c)(1), but vacate the findings pursuant to Section 718.204(c)(4), and remand the case for further consideration of the medical opinion evidence relevant to the issue of total disability.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance 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 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (3) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially contends that the administrative law judge erred in discrediting Dr. Wicker's April 1993 pulmonary function study results by relying on the physician's statement that claimant's effort was fair, and by applying the quality standards at Part 718, Appendix B. *See* Petition for Review at 3-4; Director's Exhibit 11. Furthermore, claimant contends that the administrative law judge should have accorded determinative weight to the Department of Labor's (DOL) consulting physician, Dr. Kraman, who validated Dr. Wicker's qualifying results.[3] Director's Exhibit 11. Dr. Wicker submitted a letter in which he opined that the cause of the low values obtained on claimant's pulmonary function study was that claimant did not exert himself fully. *Id*. Contrary to claimant's contentions, the administrative law judge did not apply the quality standards at Part 718. The administrative law judge rationally accorded the greatest weight to Dr. Wicker's opinion that the test results were not valid as he was the physician who actually administered the test. *See* Decision and Order at 5; *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Lastly, the administrative law judge is not required to accord greater weight to the opinion offered by a DOL physician. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Claimant also contends that the administrative law judge erred in rejecting Dr. Collins' August 1996 qualifying pulmonary function study results because he relied on the quality standards at Part 718. The record indicates that during the MVV maneuver of the pulmonary function study, claimant collapsed and was eased to the floor. Dr. Collins stated that it was "difficult to discern whether it was a reaction to bronchodilators or if it was hyperventilation." Director's Exhibit 60. The test was invalidated by Dr. Burki because the equipment used to perform the test was not approved by NIOSH and the paper speed was too slow. *Id*. Relying on Dr. Burki's invalidation, the administrative law judge permissibly found that the August 1996 test was invalid as it was not performed in substantial compliance of the regulations. *See* 20 C.F.R. §718.103; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). Thus, as the administrative law judge permissibly found that the two qualifying studies were invalid, and the remaining valid studies in the record were non-qualifying, Director's Exhibits 9, 51, 52, 55, we affirm the finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1).

[3] A "qualifying" pulmonary function 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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

At Section 718.204(c)(4), claimant contends that the administrative law judge erred in determining that Dr. Baker's opinion failed to establish total disability. Claimant contends that Dr. Baker's reports are well-reasoned and documented and are sufficient to establish that claimant cannot perform his usual coal mine employment. In his discussion of the medical opinion evidence, the administrative law judge noted that Dr. Baker's opinion is documented, but was unreasoned nevertheless because of the physician's failure to explain his determination that claimant is totally disabled, when the objective studies, on their face, did not establish total disability. *See* Decision and Order at 7. The administrative law judge further found that Dr. Baker did not make a finding that claimant's industrial bronchitis is disabling. Therefore, the administrative law judge accorded diminished weight to Dr. Baker's opinions. Director's Exhibits 12, 13, 51, 52. The administrative law judge found Dr. Vuskovich's opinion, that claimant is not totally disabled, to be well-reasoned and documented, and accorded the opinion determinative weight pursuant to Section 718.204(c)(4). In his Motion to Remand, the Director agrees with claimant that the reasons provided by the administrative law judge for discrediting Dr. Baker's opinions are erroneous. First, the Director argues that while the pulmonary function studies performed by Dr. Baker were not qualifying, they were not normal either.[4] Second, the Director argues that the administrative law judge mischaracterized Dr. Baker's opinion because the physician did not state that all of claimant's symptoms could resolve with medication, but rather, that medication could relieve some of claimant's symptoms, but not his lung functioning. *See*

[4] Dr. Baker performed two pulmonary function studies on claimant. The first test, on March 5, 1992, yielded non-qualifying results. The accompanying comment stated that "although tracings are reproducible, technician questioned maximum effort on part of the patient." Director's Exhibit 9. The second test, performed on October 21, 1992, also yielded non-qualifying results. Director's Exhibits 51, 52. Again, the technician felt that maximum effort may not have been expended due to hyperventilating, nervousness and anxiety. Dr. Baker diagnosed a moderate obstructive ventilatory defect based on this pulmonary function study. Dr. Baker testified in his deposition that claimant's tracings were all reproducible, but that claimant has difficulty sustaining a forced expiratory effort, which may be seen in someone who has a moderate degree of airway disease. Director's Exhibit 57.

Director's Exhibit 57 at 11-13. Thus, the Director urges the Board to vacate the administrative law judge's weighing of Dr. Baker's opinion, and remand for further consideration of the evidence. We agree with the Director and claimant. In light of the administrative law judge's mischaracterization of Dr. Baker's opinions, which impacted his weighing of the evidence, we vacate the findings pursuant to Section 718.204(c)(4) and remand the case for further discussion of the evidence. *See Peyton v. Brown Badgett Coal Co.*, 10 BLR 1-122 (1987). On remand, the administrative law judge must reconsider whether Dr. Baker's opinions are reasoned and documented, and if they are, the relative weight to accord the opinions. If on remand, the administrative law judge determines that claimant has established total disability, he must then consider the issue of causation at Section 718.204(b) in accordance with the standard set forth in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Accordingly, the administrative law judge Decision and Order denying benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge