BRB No. 99-0201 BLA

FRANCIS BARKUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 10/20/99
	)	
Respondent	)	DECISION and ORDER

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

Debra A. Smith (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Jennifer U. Toth (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 BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-01841) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge found five years of qualifying coal mine employment and, based on the date of filing, adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge determined that the evidence of record was sufficient, in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 4-8. The administrative law judge concluded, however, that the evidence of record was insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, or to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Decision and Order at 8-12. Accordingly, benefits were denied. On appeal, claimant argues that the administrative law judge erred in failing to find Dr. Kraynak's opinion sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203 and to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, arguing that the administrative law judge properly weighed the evidence of record, but asserting that a remand is required for the development of additional evidence. Claimant has filed an objection to the Director's Motion to Remand.

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 law. 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 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 to establish any of these elements precludes entitlement. *Trent v.*

[1]Claimant filed his application for benefits on February 18, 1997. Director's Exhibit 1.

Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially contends that the administrative law judge erroneously determined that claimant's pneumoconiosis did not arise out of his coal mine employment by rejecting the medical report of Dr. Kraynak. The administrative law judge fully considered the medical opinions of record and properly found that Dr. Kraynak was the only physician to address the etiology of claimant's pneumoconiosis.[2] Decision and Order at 8. The administrative law judge rationally found that the opinion of Dr. Kraynak was unreasoned and entitled to no weight, and therefore did not establish the element of causation at Section 718.203, since this physician based his opinion on a coal mine employment history of ten years, twice that found by the administrative law judge, and the record contains evidence of exposure to other industrial irritants.[3] Director's Exhibits 2, 19, 20, 22; Hearing Transcript at 31. The discrepancy between the coal mine employment history found by the administrative law judge, and that relied upon by the physicians of record, and the possible effects of other industrial exposure, are factors affecting the weight given to a medical report, and the administrative law judge may rationally accord less weight to a medical report on this basis. *See Barnes v. Director, OWCP,* 18 BLR 1-71 (1995)(*en banc*); *Smith v. Director, OWCP,* 12 BLR 1-156 (1989); *Addison v. Director, OWCP,* 11 BLR 1-68 (1988); *Hall v. Director, OWCP,* 8 BLR 1-193 (1985); *Long v. Director, OWCP,* 7 BLR 1-254 (1988); *Shepherd v. Director, OWCP*, 6 BLR 1-485 (1983). The administrative law judge is empowered to weigh the medical evidence and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its inferences on appeal. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR

[2]There are two medical opinions in the record. Dr. Michos reviewed the evidence of record and opined that "from the limited medical evidence provided, it is my reasoned medical opinion that inconclusive evidence is documented at the present time to establish a diagnosis of coal workers' pneumoconiosis" and stated that he needed more information before he could diagnose pneumoconiosis. Director's Exhibit 24. Dr. Kraynak opined that claimant is totally and permanently disabled due to coal workers' pneumoconiosis contracted during his employment in the anthracite coal industry. Director's Exhibits 19, 20, 22.

[3]The record indicates that claimant was employed at Bethlehem Steel for approximately thirty-three years. Director's Exhibits 2, 19. Claimant stated that he was exposed to dust and fumes during this employment. Director's Exhibit 2; Hearing Transcript at 31.

1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's evaluation of the medical report of Dr. Kraynak pursuant to Section 718.203.

Nonetheless, we agree with the Director that a remand is required in this case. Notwithstanding claimant's burden of proving entitlement to benefits, the Department of Labor has a statutory duty to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). In the instant case, the administrative law judge discredited the only medical evidence of record which addresses the issue of the etiology of claimant's pneumoconiosis. Since the Department has adduced no credible evidence relevant to this issue of causation at Section 718.203, we vacate the administrative law judge's denial of benefits and remand this case to the district director to furnish claimant with a complete, credible pulmonary evaluation. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges, supra*; *Pettry, supra*; *Hall, supra*.

In remanding this case for a complete pulmonary evaluation, we emphasize for claimant's benefit that the evidence of record is presently insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment. In order for claimant to prove his case, additional evidence must be submitted to establish this essential element of entitlement. The Department of Labor will offer a complete pulmonary examination at no cost to claimant on remand. Claimant, of course, may choose not to undergo another pulmonary examination, in which case, without further medical evidence, claimant has not established his entitlement to benefits. *See Trent, supra*; *Perry, supra*.

In the interest of administrative efficiency, we will now review the administrative law judge's Section 718.204(c)(4) findings in the instant case, based solely on the record before him. Claimant contends that the administrative law judge erred in according little weight to Dr. Kraynak's opinion at Section 718.204(c)(4). We agree. The administrative law judge accorded little weight to Dr. Kraynak's opinion because the physician based his diagnosis, that claimant is totally and permanently disabled, on an invalid pulmonary function study, because Dr. Kraynak did not review the subsequent non-qualifying ventilatory study and because the physician relied on a blood gas study which contained non-qualifying values. Decision and Order at 11-12. As claimant contends, Dr. Kraynak's pulmonary function study has not been found to be invalid. Rather, two reviewing physicians found the study to be valid and, based upon this evidence, the administrative law judge determined that

this qualifying pulmonary function study was valid. Decision and Order at 10; Director's Exhibits 14-17. Thus, in weighing Dr. Kraynak's opinion at Section 718.204(c)(4), the administrative law judge mischaracterized his prior finding in concluding that "Dr. Kraynak appears to base his diagnosis in large part on a ventilatory study which I have found to be invalid." Decision and Order at 11-12. Additionally, an administrative law judge may not reject a medical opinion because the physician did not consider subsequent evidence. *See Shelosky v. Consolidation Coal Co.*, 8 BLR 1-303 (1985); *York v. Director, OWCP*, 7 BLR 1-641 (1985). Furthermore, an administrative law judge may not discredit a total disability opinion because the objective study evidence produced non-qualifying values. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge is empowered to weigh the medical evidence of record and to access its credibility, however the interpretation of the medical data is for the medical experts. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). As the administrative law judge has not articulated a rational basis to discredit Dr. Kraynak's opinion, we vacate his findings with respect to the medical opinion evidence of record pursuant to Section 718.204(c)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete credible pulmonary examination and for further consideration of the merits of this claim in light of the new evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge