BRB No. 02-0314 BLA

CHARLES L. CONSAGRA	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Barry H. Joyner (Eugene Scalia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0420) of Administrative Law Judge Robert D. Kaplan rendered 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).[1] After crediting claimant with eight and one-half years of coal mine employment, the administrative law judge found a material change in conditions established based on the stipulation by the Director, Office of Workers' Compensation

[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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Programs (the Director), that the presence of pneumoconiosis arising out of coal mine employment was established (the element of entitlement previously adjudicated against claimant).[2] Considering the evidence of record, the administrative law judge found that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding total disability established based on the pulmonary function studies of record and the medical opinion of Dr. Sander Levinson. Claimant also contends that Dr. Levinson's opinion establishes disability causation. The Director responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[3]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[2] The Director, Office of Workers' Compensation Programs (the Director), contends that because the prior claim appears to have been denied on procedural grounds, not on the merits, this claim was not subject to the duplicate claims provision at 20 C.F.R. §725.309 (2000). *See Crowe v. Director, OWCP*, 226 F.3d 609, 22 BLR 2-80 (7th Cir. 2000); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97 (2000). This error, if any, is harmless however, inasmuch as the administrative law judge's finding that total disability is not established on the evidence of record, is affirmable. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] We affirm the findings of the administrative law judge on length of coal mine employment and at 20 C.F.R. §718.204(b)(2)(ii)-(iii) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 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*).

Claimant first argues that the administrative law judge erred in his analysis of the pulmonary function study evidence. Specifically, claimant contends that the qualifying, post-bronchodilator pulmonary function study dated May 10, 2001, submitted by Dr. Levinson, establishes total disability and that the administrative law judge erred in finding the test invalid based upon the statement of the technician who conducted the test, opining that claimant exhibited poor effort. Claimant contends that Dr. Levinson, while conceding that the study exhibited less than optimal effort, never opined that the study was invalid.

In considering the pulmonary function studies of record, the administrative law judge concluded that only the post-bronchodilator portion of the May 10, 2001 study was qualifying. Decision and Order at 7-8; Director's Exhibits 7, 10; Claimant's Exhibits 3, 4. The administrative law judge found, however, that because claimant's effort on the study was noted to be poor by the technician conducting the study, the study did not conform to the quality requirements of the regulation and was not a valid study. The Director responds, contending that the administrative law judge erred in finding that the study did not satisfy the applicable quality standards because those standards require only that claimant's effort be recorded, not that it be at a certain level, 20 C.F.R. §718.103(b)(5). Nonetheless, the Director contends that the administrative law judge's error is harmless since the administrative law judge properly found the study invalid and unreliable due to claimant's poor effort. We agree.

The regulation requires only that claimant's effort be recorded, not that it be at a certain level, 20 C.F.R. §718.103(b)(5). Nevertheless, the administrative law judge could properly accord little weight to the qualifying test, especially in light of the other non-qualifying pulmonary function studies, because he found it unreliable, *Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-106 n.3 (1994)(fact-finder can discount pulmonary function study as unreliable where effort is poor and results are disparately low). Hence, we affirm the administrative law judge's finding that the pulmonary function studies of record do not establish total disability. Accordingly, we affirm the administrative law judge's finding that the pulmonary function studies fail to establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(i).

Claimant next contends that the administrative law judge erred in finding Dr.

Levinson biased and in finding that his opinion failed to establish a totally disabling respiratory impairment. We agree with claimant and the Director that the administrative law judge erred in finding Dr. Levinson biased, because the administrative law judge did not substantiate his assertion that Dr. Levinson "was not acting as an impartial and objective expert in rendering his opinion." Decision and Order Denying Benefits at 9. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104-106 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991). Contrary to claimant's contention, however, the administrative law judge properly found that Dr. Levinson's opinion did not establish a totally disabling respiratory impairment because it was based principally on an invalid pulmonary function study. This was rational. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Tedesco, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1986)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126, 1-128 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Thus, we affirm the administrative law judge's finding that the medical opinion evidence failed to establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(iv). Because we affirm the administrative law judge's finding that claimant has failed to establish total respiratory disability, we will not address claimant's argument on disability causation. *See Trent, supra*; *Perry, supra*.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge