BRB No. 02-0840 BLA

RONALD C. DONTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/30/2003
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Timothy S. Williams (Howard Radzely, Acting 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (00-BLA-1000) of Administrative Law Judge Paul H. Teitler 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).[1] In the initial decision, the administrative law judge

[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, 722, 725, and 726

credited claimant with twenty-five years of coal mine employment and found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a) (2000). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. ' 718.203(b) (2000). However, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(c)(1)-(4) (2000).[2] Accordingly, the administrative law judge denied benefits.

By Decision and Order dated April 24, 2002, the Board affirmed the administrative law judge=s length of coal mine employment finding and his findings pursuant to 20 C.F.R. ' ' 718.202(a), 718.203(b) and 718.204(c)(2) and (c)(3) (2000) as unchallenged on appeal. *Donton v. Director, OWCP*, BRB No. 01-0758 BLA (Apr. 24, 2002) (unpublished). The Board also rejected claimant=s allegation of error in regard to the administrative law judge=s admission of Dr. Michos=s report into the record. *Id.* The Board further held that the administrative law judge permissibly found that claimant=s qualifying November 16, 2000 pulmonary function study was invalid. *Id.* However, because the administrative law judge mischaracterized the remaining pulmonary function study evidence as non-qualifying, the Board vacated the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.204(c)(1) (2000) and remanded the case for further consideration. *Id.* Moreover, because the administrative law judge=s analysis of the medical opinion evidence was affected by his erroneous conclusion that the underlying pulmonary function studies were non-qualifying,

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. ' 718.204(c), is now found at 20 C.F.R. ' 718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. ' 718.204(b), is now found at 20 C.F.R. ' 718.204(c). We note that the administrative law judge, on remand, failed to apply the amended regulations. However, the administrative law judge=s error is harmless inasmuch as the amended disability regulation set out at 20 C.F.R. ' 718.204(b) mirrors the previously applicable disability regulation set out at 20 C.F.R. ' 718.204(c) (2000). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

the Board also vacated the administrative law judge=s finding pursuant to 20 C.F.R. ' 718.204(c)(4) (2000). *Id.*

On remand, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(c)(1) and (c)(4) (2000).[3] The Director, Office of Workers=

[3] Claimant also contends that the administrative law judge erred in failing to make a finding as to whether Agood cause@ existed before admitting Dr. Michos=s report into the record. Claimant=s Brief at 4. In its Decision and Order dated April 24, 2002, the Board affirmed the administrative law judge=s admission of Dr. Michos=s report into the record. *Donton v. Director, OWCP*, BRB No. 01-0758 BLA (Apr. 24, 2002) (unpublished). The Board=s previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address claimant=s contentions of error in regard to the administrative law judge=s admission of Dr. Michos=s report into the record.

Compensation Programs, responds in support of the administrative law judge=s denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant contends that the administrative law judge committed numerous errors in finding the pulmonary function study evidence insufficient to establish total disability. Claimant initially argues that the administrative law judge erred in holding that claimant=s qualifying November 16, 2000 pulmonary function study is invalid. In its Decision and Order dated April 24, 2002, the Board affirmed the administrative law judge=s finding that claimant=s November 16, 2000 pulmonary function study is invalid. *Donton v. Director, OWCP*, BRB No. 01-0758 BLA (Apr. 24, 2002) (unpublished). The Board=s previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address claimant=s contentions of error in regard to the administrative law judge=s finding that the claimant=s November 16, 2000 pulmonary function study is invalid.

Claimant also argues that the administrative law judge erred in finding that Dr. Matthew Kraynak=s diagnosis of pneumoconiosis was not well reasoned. Claimant=s Brief at 7. However, claimant concedes that, given the Board=s affirmance of the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a), the administrative law judge=s error in regard to Dr. Matthew Kraynak=s opinion constitutes Aharmless error.@ *Id.* at 8. Claimant raises this issue Asolely for any further appeal purposes.@ *Id.* at 8-9. Consequently, we need not address this contention of error.

Claimant next contends that the administrative law judge erred in finding the remaining three pulmonary function studies, conducted on December 8, 1999, April 10, 2000 and October 26, 2000, insufficient to establish total disability.[4] In his consideration of

[4] While claimant=s pulmonary function study conducted on December 8, 1999 produced qualifying values before the administration of a bronchodilator, it produced non-qualifying post-bronchodilator values. Director=s Exhibit 10. Claimant=s pulmonary function study conducted on April 10, 2000 produced qualifying values. Claimant=s Exhibit 7. Finally, while claimant=s pulmonary function study conducted on October 26, 2000 produced non-qualifying values before the administration of a bronchodilator, it produced qualifying post-bronchodilator values. Director=s Exhibit 27.

whether the pulmonary function study evidence was sufficient to establish total disability,[5] the administrative law judge recognized that in *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpublished),[6] the United States Court of Appeals for the Third

[5] The administrative law judge, in his consideration of the pulmonary function study evidence, mistakenly referred to claimant=s April, 2000 pulmonary function study as a December, 1999 pulmonary function study, and, conversely, mistakenly referred to claimant=s December, 1999 pulmonary function study as an April, 2000 pulmonary function study. *See* Decision and Order on Remand at 3. However, because only one of these two studies, the December, 1999 study, contains both pre-bronchodilator and post-bronchodilator results, it is apparent that the administrative law judge was considering this study when he referred to a pulmonary function study that Aproduced both qualifying and non-qualifying results.@ *Id*. Claimant=s April, 2000 pulmonary function study produced only qualifying results. Thus, under these circumstances, we hold that the administrative law judge=s clerical error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] In its Internal Operating Procedures, the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has provided:

Circuit held that pulmonary function studies which return disparately higher values tend to be more reliable indicators of an individual=s capacity than those with lower values. Decision and Order on Remand at 3. The Third Circuit has recognized that spuriously low values are unreliable because pulmonary function testing is effort dependent and that spurious high values are not possible. *Andruscavage*, slip op. at 10.

Under the facts of the instant case, the administrative law judge, within a permissible exercise of his discretion, found that because the non-qualifying values from claimant=s post-bronchodilator pulmonary function study on December 8, 1999 and claimant=s pre-bronchodilator pulmonary function study on October 26, 2000 were higher than the values obtained on the three qualifying tests, they were more indicative of claimant=s true pulmonary capacity and were, therefore, entitled to greater weight. *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpublished); *see also Keen v. Jewell Ridge Coal Corp*., 6 BLR 1-454 (1983) (when a pulmonary function study contains both pre-bronchodilator and post-bronchodilator results, and one qualifies while the other does not, the administrative law judge must weigh the values and explain which result he considers most probative); Decision and Order on Remand at 3; Director=s Exhibits 10, 27; Claimant=s Exhibit 7. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge=s finding that the pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. ' 718.204(b)(2)(i).

Claimant also contends that the administrative law judge erred in finding the opinions of Drs. Raymond Kraynak[7] and Matthew Kraynak[8] insufficient to establish total disability. We disagree. The administrative law judge properly found that the opinions of Drs.

[7] In a report dated December 20, 1999, Dr. Raymond Kraynak opined that claimant had a significant pulmonary impairment and that claimant could not do his coal mine employment. Director=s Exhibit 13.

In a letter dated August 22, 2000, Dr. Raymond Kraynak opined that:

> [Claimant=s] smoking history could give rise to some element of obstructive pulmonary disease. It would not give rise to the severe obstructive and restrictive defects noted on pulmonary function.

Claimant=s Exhibit 20.

During a January 5, 2001 deposition, Dr. Raymond Kraynak opined that claimant was totally disabled due to coal workers= pneumoconiosis. Claimant=s Exhibit 23 at 13-14. After reviewing additional medical evidence, Dr. Raymond Kraynak prepared a January 18, 2001 report wherein he reiterated his opinion that claimant was totally and permanently disabled due to coal workers= pneumoconiosis. Claimant=s Exhibit 24.

[8] In a report dated June 29, 2000, Dr. Matthew Kraynak opined that:

> Based upon [claimant=s] occupational history of having worked in the anthracite coal industry in excess of 25 years, the complaints with which he has presented, the diagnostic studies performed and my physical examination, it is my opinion that he is totally and permanently disabled, due to coal workers= pneumoconiosis, contracted during his employment in the anthracite coal industry.
>
> [Claimant=s] history of smoking, as listed in this report, may give rise to some obstructive pulmonary disease. It would not give rise to the severe obstructive and restrictive defects noted on pulmonary function.

Claimant=s Exhibit 10.

In a letter dated April 6, 2001, Dr. Matthew Kraynak stated that, after reviewing Dr. Rashid=s report, it was his opinion that claimant was Adisabled from returning to his last job in the coal mining industry or similarly physically arduous and comparable work.@ Claimant=s Exhibit 36.

Raymond Kraynak and Matthew Kraynak, that claimant is totally disabled, were not well reasoned because they failed to address how the evidence supported their determinations.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 4-7. Dr. Rashid, the only other physician to address the extent of claimant=s impairment, opined that claimant was Anot disabled as a result of working in the mines.@ Director=s Exhibit 23. Because Dr. Rashid=s opinion does not support a finding of total disability pursuant to 20 C.F.R. '718.204(b)(2)(iv), it cannot assist claimant in establishing this element of entitlement. Consequently, we affirm the administrative law judge=s finding that the medical opinion evidence is insufficient to establish total disability. *See* 20 C.F.R. '718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge=s finding that claimant failed to establish total disability pursuant to 20 C.F.R. '718.204(b), an essential element of entitlement, we affirm the administrative law judge=s denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[9] On remand, the administrative law judge reconsidered whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. *See* Decision and Order at 5-7. Because the Board had already affirmed the administrative law judge=s finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a) (2000), it was not necessary for the administrative law judge to reconsider this issue on remand.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge