BRB No. 02-0858 BLA

THOMAS McSURDY Claimant-Respondent v. BELTRAMI ENTERPRISES, INCORPORATED and LACKAWANNA CASUALTY COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest	)	DATE ISSUED: 09/26/2003 DECISION and ORDER

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

William E. Wyatt, Jr. (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-BLA-00678) 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] Claimant=s initial application for benefits filed on June 4, 1979 was denied as abandoned on September 6, 1979, after he failed to submit information necessary for the processing of his claim. Director's Exhibits 22-1, 22-4, 22-5; *see* 20 C.F.R. '725.409(a)(2000).

On March 21, 1991, claimant filed the current application for benefits. Director's Exhibit 1. In a Decision and Order issued on September 7, 1993, Administrative Law Judge Paul H. Teitler accepted the parties= stipulation of thirty seven years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. ''718.202(a)(1), 718.203(b), but determined that claimant was not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(c)(2000). Director's Exhibit 77. Accordingly, Judge Teitler denied benefits.

Claimant timely requested modification pursuant to 20 C.F.R. '725.310(2000). In a Decision and Order issued on May 7, 1996, Administrative Law Judge Robert D. Kaplan found that although the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. ''718.202(a)(1), 718.203(b), claimant did not establish that he was totally disabled. Director's Exhibit 124. Accordingly, Judge Kaplan denied benefits. Claimant then filed a second request for modification. Director's Exhibit 139. By order issued April 15, 1998, Judge Kaplan dismissed the modification request because claimant failed to comply with the administrative law judge=s order to submit to a chest x-ray scheduled by employer.[2] Director's Exhibits 149, 150; *see* 20 C.F.R. ''725.465(a), 725.466. Thereafter, claimant filed a third request for modification. Director's Exhibit 151. At this stage of the proceedings, employer conceded the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a), 718.203(b). Director's Exhibit 186 at 12-14. In a Decision and Order issued on December 29, 1999, Judge Kaplan again denied benefits based on a finding that claimant did not

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

[2] The administrative law judge=s order specified that only the pending modification request was dismissed, not the underlying claim. Director's Exhibit 150.

establish total disability. Director's Exhibit 187.

On September 29, 2000, claimant filed his fourth and current request for modification. Director's Exhibit 189. Administrative Law Judge Ainsworth H. Brown held a hearing on claimant=s modification request on March 12, 2002, but was unavailable to decide the claim. Consequently, the case was assigned to Judge Kaplan for decision. Order, May 1, 2002.

In the ensuing Decision and Order Awarding Benefits, the administrative law judge found that no mistake of fact was established in the prior denials of the claim, but determined that newly submitted pulmonary function studies and medical opinions demonstrated a change in conditions because they established that claimant is now totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. ''718.204(b). The administrative law judge further found that claimant=s total disability is due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c). Accordingly, the administrative law judge granted modification and awarded benefits payable from September 2000, the month in which claimant requested modification. *See* 20 C.F.R. '725.503(d)(2).

On appeal, employer contends that the administrative law judge erred in his analysis of the pulmonary function studies when he determined that claimant is totally disabled, and erred in crediting medical opinions that claimant is totally disabled without considering whether the opinions are based on reliable medical evidence. Claimant has not responded to employer=s appeal,[3] and the Director, Office of Workers= Compensation Programs (the Director), has declined to participate in the appeal.[4]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. '901; 20 C.F.R. ''718.3, 718.202, 718.203, 718.204.

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[3] The Board dismissed claimant=s cross-appeal, BRB No. 02-0858 BLA-A, as abandoned, on April 30, 2003. *McSurdy v. Beltrami Enters.*, BRB Nos. 02-0858 BLA, 02-0858 BLA-A (Apr. 30, 2003)(Order)(unpub.).

[4] We affirm as unchallenged on appeal the administrative law judge=s findings that no mistake of fact was established pursuant to 20 C.F.R. '725.310(2000), and that total disability was not established pursuant to 20 C.F.R. '718.204(b)(2)(ii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered seven new pulmonary function studies developed in connection with claimant=s fourth modification request. The technical validity of all but one was disputed by physicians who reviewed the study tracings. Director's Exhibit 190; Claimant's Exhibits 1, 5, 9-11, 17-20, 22, 24, 27, 29-32; Employer's Exhibits 3, 6, 7. The administrative law judge found that the pulmonary function studies conducted on July 9, July 11, and August 16, 2001, were unreliable because they were not in substantial compliance with the applicable quality standards. *See* 20 C.F.R. ''718.101(b), 718.103, and App. B. He further determined that the studies conducted on April 19, 2000, February 12, 2002, and February 14, 2002, substantially complied with the applicable quality standards. The administrative law judge did not address whether the pulmonary function study conducted on July 20, 2001, was in substantial compliance with the applicable quality standards.

The administrative law judge found that the April 19, 2000, February 14, 2002, and July 20, 2001 pulmonary function studies yielded qualifying [5] values, and that the February 12, 2002 study was Aborderline nonqualifying.@ Decision and Order at 10. Based on this finding, the administrative law judge found that Athe weight of the PFT evidence supports that Claimant is totally disabled.@ *Id*.

Employer contends that substantial evidence does not support the administrative law judge=s finding because he erred in determining that the pulmonary function studies were in substantial compliance with the applicable quality standards. Employer's Brief at 5-6.

[5] A Aqualifying@ pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A Anon-qualifying@ study exceeds those values. *See* 20 C.F.R. '718.204(b)(2)(i),(ii). Those tables list values for miners up to age 71, whereas claimant was tested at age 73, 74, and 75. The administrative law judge did not set forth his methodology for determining the qualifying or non-qualifying nature of the studies in this case, but employer does not challenge the administrative law judge=s characterization of the studies on appeal.

Employer=s contention has merit.

We agree with employer that the administrative law judge analyzed the April 19, 2000[6] pulmonary function study inconsistently with other studies that he found to be invalid. Upon review of the study tracings, Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease, stated that the April 19, 2000 study was unacceptable because it was improperly performed. Dr. Levinson explained that the entire FVC curve was not displayed on the tracing, and there was evidence of exhalation before the Azero point.@ Director's Exhibit 190. Dr. Prince, who is also Board-certified in Internal Medicine and Pulmonary Disease, checked a box indicating that the study was valid. Claimant's Exhibit 17. Dr. Kraynak, who is Board-Eligible in Family Medicine, opined that the study was valid. Claimant's Exhibit 1.

On similar facts, the administrative law judge found that the July 9, July 11, and August 16, 2001 pulmonary function studies were not in substantial compliance with the quality standards, because Dr. Prince=s unexplained check-box opinion did not rebut Dr. Levinson=s specific observations of non-compliance, and because Dr. Kraynak lacked relevant medical qualifications. Decision and Order at 5-6. Yet, when weighing the tracing review reports concerning the April 19, 2000 study, the administrative law judge found, without explanation, that A[s]ince the opinion evidence is in equipoise, . . . Claimant=s April 19, 2000 PFT substantially complies with the applicable quality standards.@ Decision and Order at 5. The administrative law judge=s finding is not affirmable because it unexplainedly conflicts with his analysis of the July 9, July 11, and August 16, 2001 pulmonary function studies. Additionally, as employer further argues, the administrative law judge erred in determining that technical review opinions found to be in equipoise satisfied claimant=s burden to establish the validity of the pulmonary function study upon which he seeks to rely to establish his total disability. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v.Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Peabody Coal Co. v. OWCP* [*Goodloe*], 116 F.3d 207, 212, 21 BLR 2-140, 2-151 (7th Cir. 1997)(Holding, in a Part 727 claim, that claimant bears the burden of proving the validity of a disputed study Aby a preponderance of the evidence.@). Consequently, we vacate the administrative law judge=s finding regarding the April 19, 2000 pulmonary function study, and remand this case for him

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[6] The administrative law judge correctly recognized that because the April 19, 2000 pulmonary function study was administered prior to January 19, 2001, it is governed by the quality standards of the former regulation set forth at 20 C.F.R. '718.103(2000). *See* 20 C.F.R. '718.101(b).

to reconsider whether the study is in substantial compliance with the applicable quality standards. *See* 20 C.F.R. ' 718.103(c)(2000); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993).

As employer further contends, the administrative law judge=s analysis of the February 14, 2002 pulmonary function study is insufficiently explained. Upon review of the study tracings, Dr. Levinson identified several specific deficiencies in the performance of the study that rendered it technically unacceptable. Employer's Exhibit 6. As noted above, when the administrative law judge considered a similar review by Dr. Levinson of the July 9, July 11, and August 16, 2001 studies, the administrative law judge determined that an unexplained check-box opinion could not rebut Dr. Levinson=s specific criticisms. Decision and Order at 5-6. In response to Dr. Levinson=s review of the February 14, 2002 study, the administrative law judge had before him check-box validation forms from Drs. Simelaro and Venditto, who are Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibits 31, 32. The administrative law judge found that Athe combined weight of the opinions of Drs. Simelaro and Venditto@ established that the February 14, 2002 study substantially complied with the applicable quality standards. Decision and Order at 7. Reviewing the administrative law judge=s finding in the context of his decision as a whole, his reasoning appears to be that one check-box validation form by an equally qualified physician does not outweigh Dr. Levinson=s specific opinion, but two such check-box forms do outweigh his opinion. The Board is unable to approve such reasoning. *See Wensel v. Director, OWCP*, 888 F.2d 14, 16, 13 BLR 2-88, 2-92 (3rd Cir. 1989)(AA bare statement that items of evidence pointing one way outnumber or outweigh others pointing in a different direction does not demonstrate a reasoned choice.@). Consequently, we must vacate the administrative law judge=s finding regarding the technical compliance of the February 14, 2002 study and instruct him to reconsider this issue, and to Aprovide an adequate statement of the reasons for his findings.@ *Wensel*, 888 F.2d at 16, 13 BLR at 2-92.

Employer argues that the administrative law judge erred by relying on the July 20, 2001 pulmonary function study, which the administrative law judge found was qualifying before the administration of bronchodilator medication, because Dr. Dittman testified that in his opinion, the study values did not Asuggest impairment or disability.@ Employer's Exhibit 5 at 17. Employer=s specific contention lacks merit. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3rd Cir. 1986)(AThe ALJ is not bound to accept the opinion or theory of any medical expert . . . .@). However, to avoid any repetition of error on remand, we instruct the administrative law judge to determine whether the July 20, 2001 pulmonary function study is in substantial compliance with the applicable quality standards. *See* 20 C.F.R. ' 725.456(d)(AAll medical records and reports . . . shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 . . . .@); *Mangifest*, 826 F.2d at 1332, 10 BLR at 2-244 (Holding, under former regulations, that

the quality standards Aconstitute mandatory guidelines.@). The record reflects that the July 20, 2001 study lacks any statement of claimant=s ability to understand and follow directions or of his degree of cooperation in performing the test, as required by the quality standards. Employer=s Exhibit 1; *see* 20 C.F.R. '718.103(b)(5). However, the record also contains medical opinions suggesting that the July 20 study may nevertheless be in substantial compliance with the quality standards. Claimant's Exhibits 22, 24; Employer's Exhibit 5 at 15. The administrative law judge must consider this evidence and determine whether the study is in substantial compliance. 20 C.F.R. ''725.456(d), 718.101(b); *see Siwiec*, 894 F.2d at 639, 13 BLR at 2-266; *Mangifest*, 826 F.2d at 1332, 10 BLR at 2-244.

In light of the foregoing analysis, we must vacate the administrative law judge=s finding that total disability was established by the weight of the pulmonary function study evidence pursuant to 20 C.F.R. '718.204(b)(2)(i). The administrative law judge should reconsider this issue after he has reassessed the pulmonary function studies for substantial compliance with the applicable quality standards.

Pursuant to 20 C.F.R. '718.204(b)(2)(iv), employer contends that the administrative law judge erred in finding certain medical opinions to be well reasoned without considering whether the pulmonary function studies the physicians based their opinions on were reliable. Employer's Brief at 7. Employer=s contention has merit. The administrative law judge found the opinions of Drs. Kruk, Simelaro, Ranganath, and Kraynak, that claimant is totally disabled, to be Areasoned and documented, especially because the weight of the PFT evidence supports their conclusion.@ Decision and Order at 10-11. Because we have vacated the administrative law judge=s finding pursuant to 20 C.F.R. '718.204(b)(2)(i) and instructed him to reconsider whether the pulmonary function studies are in substantial compliance with the applicable quality standards, we must also vacate his finding regarding the medical opinions pursuant to 20 C.F.R. '718.204(b)(2)(iv). *See Siwiec*, 894 F.2d at 639, 13 BLR at 2-267 (A report based upon unreliable medical data Adoes not constitute a well reasoned medical judgment. . . .@). After the administrative law judge has reassessed the pulmonary function study evidence, he must examine the validity of the reasoning of each medical opinion Ain light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.@ *Id*. On remand, the administrative law judge should evaluate the September 7, 2001 deposition testimony of Dr. Kraynak, claimant=s treating physician, under the criteria of 20 C.F.R. '718.104(d). *See* 20 C.F.R. '718.101(b); *Sturgill v. Old Ben Coal Co*., BRB No. 02-0874 BLA (Aug. 28, 2003)(published).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge