BRB No. 04-0155 BLA

BRUCE I. NEUMEISTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RONALD BUSH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/29/2004
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM

Claimant appeals the Decision and Order Denying Benefits (03-BLA-0085) of Administrative Law Judge Robert D. Kaplan 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 filed a request for modification on August 27, 2002, which was denied by the district director on October 31, 2002.[2] Director's Exhibits 80, 82, 86. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing, which was held on June 25, 2003. In a Decision and Order dated October 9, 2003, the administrative law judge denied benefits, finding that claimant failed to establish either a mistake in a determination in fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge specifically determined that the newly submitted evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, claimant's request for modification and claim for benefits were denied.

Claimant appeals, arguing that the administrative law judge erred by not permitting him the opportunity to submit rebuttal evidence in response to evidence submitted by employer prior to the hearing. Claimant challenges the administrative law

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amendments to the regulation at 20 C.F.R. §725.310 (2001) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[2] Claimant originally filed a claim for benefits on January 4, 1983, which was denied by the district director on June 6, 1983 because claimant was unable to prove total disability. Director's Exhibit 60. Claimant filed a duplicate claim on August 6, 1999. Director's Exhibit 1. Following a formal hearing held before Administrative Law Judge Ainsworth Brown, benefits were denied in a Decision and Order dated January 10, 2002. Judge Brown found that claimant established the existence of pneumoconiosis arising out of thirty-seven years of coal mine employment. However, Judge Brown also found that claimant was not totally disabled due to pneumoconiosis, and therefore that claimant was unable to establish a material change in conditions under 20 C.F.R. §725.309(d) (2000). Director's Exhibit 70. Judge Brown rejected all seven of the pulmonary function studies of record on the basis that they were non-conforming studies. There were no qualifying arterial blood gas studies of record. With respect to the medical opinion evidence, Judge Brown credited the weight of the medical opinions from Drs. Hertz and Dittman, who examined claimant and opined that he was not totally disabled. Judge Brown credited these physicians' opinions based on their superior credentials as compared to the credentials of Drs. Raymond and Matthew Kraynak, who treated claimant and opined that he was totally disabled due to pneumoconiosis. *Id.* Claimant appealed the denial of benefits to the Board, but his appeal was later dismissed in order that he could pursue a request for modification. Director's Exhibits 80, 82.

judge's finding of "no mistake in a determination of fact" and contends that his Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant further argues that the administrative law judge erred in finding that he was not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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 alleges that the administrative law judge erred by not permitting him the opportunity to submit post-hearing rebuttal evidence in response to Employer's Exhibit 8, which consists of the May 17, 2003 report of Dr. Hertz. Prior to the hearing held on June 25, 2003, counsel for employer submitted a consulting medical report dated May 17, 2003 from Dr. Hertz, a physician who had previously examined claimant for the employer. Dr. Hertz's May 17, 2003 report consists of his review of the medical record, and was received by claimant on June 2, 2003, twenty-three days before the hearing. Employer's Exhibit 8; Hearing Transcript at 10. On June 4, 2003, employer also submitted a copy of the transcript from the deposition of Dr. Dittman conducted on May 9, 2003. Employer's Exhibit 9; Hearing Transcript at 10. In his deposition, Dr. Dittman addressed a pulmonary function study conducted in connection with his examination of claimant on October 18, 2002, opining that the tracings from the study, although non-qualifying, showed poor effort by claimant, and therefore the results were lower than expected if claimant had made a good effort. Dr. Dittman also reviewed the results of pulmonary function studies dated August 20, 2002 and February 13, 2002 and opined that they were invalid due to poor effort. Employer's Exhibits 8, 9. The transcript of Dr. Dittman's May 9, 2003 deposition was received by claimant on June 6, 2003, which was nineteen days before the hearing and therefore in violation of the twenty-day deadline for the submission of evidence. Hearing Transcript at 16.

At the hearing, claimant requested an opportunity to respond to Dr. Hertz's May 17, 2003 report, noting that the report constituted surprise evidence and that Dr. Hertz's opinion, as presented on modification, was now the only opinion on modification rendered by a Board-certified pulmonary expert. Hearing Transcript at 11, 14. Claimant expressed his fear that Dr. Hertz's opinion would once again be credited as rendered by the most qualified physician of record. Hearing Transcript at 11. The administrative law judge, however, denied claimant's request to obtain and submit a new pulmonary expert's

report in response to Dr. Hertz's May 17, 2003 report, pointing out that claimant had had the opportunity at any time prior to the hearing to submit a medical report from a Board-certified pulmonary expert if he had so chosen. Notwithstanding, the administrative law judge did agree to allow claimant the opportunity post-hearing to submit a supplemental report from Dr. Raymond Kraynak, addressing Dr. Dittman's invalidations of the August 20, 2002 and February 13, 2003 pulmonary function studies. Hearing Transcript at 15-17.

Citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*), claimant challenges the administrative law judge's ruling. Claimant's Brief at 6-10; Hearing Transcript at 8-15. In *Shedlock*, the Board held that the submission of a "surprise" medical report by claimant just prior to the deadline imposed by the twenty-day rule for submitting documentary evidence, coupled with the administrative law judge's refusal to allow employer the opportunity to respond to claimant's introduction of this "surprise" evidence, constituted a denial of employer's due process right to a fair hearing. *See Shedlock*, 9 BLR at 1-200. Claimant contends that employer's submission of Dr. Hertz's report just prior to the twenty-day deadline equates to "surprise" evidence, and therefore, that the administrative law judge violated claimant's due process right to a fair hearing by not permitting him to respond to Dr. Hertz's opinion by obtaining post-hearing a consultative report from a pulmonary expert of his own choosing. Claimant argues that due to limited resources, he should not be forced to obtain consultative opinions unless absolutely necessary. Claimant further maintains that the need to obtain a report from a pulmonary expert did not arise in this case until employer submitted Dr. Hertz's May 17, 2003 report.

We reject claimant's contention that his right to due process was denied. The regulation at 20 C.F.R. §725.456(b)(1) provides that any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing. *See* 20 C.F.R. §725.456(b)(1). Moreover, an administrative law judge is generally afforded broad discretion in dealing with procedural matters, so long as the administrative law judge insures a full and fair hearing on all the issues presented. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Because claimant received Dr. Hertz's opinion three days prior to the twenty day rule, employer actually submitted it in accordance with Section 725.456(b). We hold, therefore, that Dr. Hertz's opinion was not "surprise" evidence.[3] Further, as noted by the administrative law judge, claimant was already on notice that Dr. Hertz's qualifications were superior to those of his treating

[3] Claimant continued to obtain reports from Dr. M. Kraynak and Dr. R. Kraynak. Dr. M. Kraynak provided a report on May 7, 2003. The administrative law judge accepted that employer obtained Dr. Hertz's supplemental opinion after its receipt of the May 7, 2003 report from Dr. M. Kraynak.

physicians by virtue of Judge Brown's January 10, 2002 Decision and Order. Although Dr. Hertz's report invalidates a pulmonary function study obtained during Dr. Kraynak's examination and thereby undermines his opinion regarding claimant's disability, the administrative law judge did permit claimant to submit post-hearing a supplemental report from Dr. Kraynak, albeit in response to Dr. Dittman's deposition transcript, wherein Dr. Kraynak disputed the invalidations of Drs. Dittman and Hertz of the qualifying pulmonary function studies. Therefore, because claimant was given the opportunity to submit rebuttal evidence to Dr. Dittman's report, which was the only evidence submitted in violation of the twenty-day rule, we hold that the administrative law judge did not abuse his discretion in denying claimant the opportunity to submit an entirely new report from a pulmonary expert solely in response to Dr. Hertz's opinion. We thus affirm the administrative law judge's procedural ruling in this regard.

Claimant next challenges the administrative law judge's finding, that there was "no mistake in a determination of fact" on the grounds that it fails to comport with the requirements of the APA. Specifically, claimant asserts that the administrative law judge failed to provide a statement of his findings of fact and conclusions of law, and the reasons or bases therefore, on this issue. Claimant's Brief at 3-6. Claimant's argument is without merit. The administrative law judge discussed the previously submitted medical evidence and found no mistake in a determination of fact. He referred to the evidence and explained his reasoning adequately to permit review. *See Lane Hollow Coal Co. v. Director, OWCP (Lockhart)*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998). We therefore hold that the administrative law judge's finding that there was no mistake in a determination of fact contained in the prior denial is in accordance with the APA.

Claimant further argues that the administrative law judge erred in finding that he was not totally disabled by a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv).[4] We disagree. The record evidence with respect to claimant's request for modification included three pulmonary function studies, two of

[4] In considering the modification issue, the administrative law judge must conduct an independent assessment of the newly submitted evidence to determine whether the newly submitted evidence, including any evidence submitted subsequent to the district director's determination, is sufficient to establish the requisite change in conditions or mistake in a determination of fact. *See Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon*, 16 BLR 1-71 (1992). Because claimant's original claim was denied on the grounds that he was not totally disabled, the administrative law judge properly considered whether the newly submitted evidence established that claimant was now totally disabled, and thereby established the requisite change in conditions. 20 C.F.R. §725.310 (2000).

which were qualifying.[5] Contrary to claimant's contention, the administrative law judge was not required to credit the qualifying studies obtained by his treating physician, Dr. Raymond Kraynak, during his testing of claimant on August 20, 2002 and February 13, 2003. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). The administrative law judge provided a valid rationale for rejecting theses studies as invalid, based on a review of the relative qualifications of the physicians. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). We thus hold that the administrative law judge permissibly credited the opinions of Drs. Hertz, Dittman, Levinson, and Kaplan, that the qualifying pulmonary function study dated August 20, 2002 was invalid due to poor effort, based upon their superior qualifications.[6] Director's Exhibit 82; Decision and Order at 7-8. Similarly, the administrative law judge permissibly found the February 13, 2003 qualifying pulmonary function study to be invalid based on the superior qualifications of Drs. Hertz, Dittman and Levinson. Claimant's Exhibit 8; Decision and Order at 9. The remaining pulmonary function study dated October 18, 2002 was non-qualifying; therefore, claimant was unable to establish total disability at Section 718.204(b)(2)(i). Claimant's Exhibit 15; Decision and Order at 8-9. Accordingly, the administrative law judge properly found that claimant failed to establish total respiratory disability based on the pulmonary function study evidence at Section 718.204(b)(2)(i) and we affirm that finding.[7]

Further, substantial evidence supports the administrative law judge's permissible crediting of the opinions of Drs. Hertz and Dittman at Section 718.204(b)(2)(iv). Contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v.*

[5] A "qualifying" pulmonary function study or blood gas 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, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii), formerly 20 C.F.R. §718.204(c)(1)-(2) (2000).

[6] We reject claimant's contention that the administrative law judge erred in considering Dr. Dittman to be better qualified than Dr. Matthew Kraynak. The administrative law judge reasonably considered Dr. Dittman to be better qualified given that he is Board-eligible in pulmonary medicine, a subspecialty not shared by Dr. Kraynak. Claimant's Brief at 15.

[7] We affirm the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal, Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

Director, OWCP, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco*, 18 BLR at 1-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In weighing the conflicting medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge permissibly found that the opinions of Drs. Raymond and Matthew Kraynak, that claimant was totally disabled, were entitled to less weight since they based their opinions regarding disability in part on qualifying but invalid pulmonary function studies. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 10 n.4. Although Drs. Hertz and Dittman also considered an invalid and non-qualifying pulmonary function study in reaching their opinion that claimant was not disabled due to a respiratory or pulmonary impairment, we reject claimant's contentions that the opinions of Drs. Hertz and Dittman are of no probative value at Section 718.204(b)(2)(iv) and that the administrative law judge selectively analyzed the evidence in order to assign greater weight to their opinions. Claimant's Brief at 15. First, the administrative law judge properly noted that even with poor effort, claimant produced a non-qualifying study, which lends credence to the opinions of Drs. Hertz and Dittman that claimant is not totally disabled.[8] Secondly, the administrative law judge permissibly credited the opinions of Dr. Hertz and Dittman based on their superior qualifications. *See Scott*, 14 BLR at 1-37; *McMath*, 12 BLR at 1-6; *Dillon*, 11 BLR at 1-113. Additionally, we affirm the administrative law judge's permissible finding at Section 718.204(b)(2)(iv) that the opinions of Drs. Hertz and Dittman were better supported by the results of the non-qualifying arterial blood gas studies, and were therefore better reasoned than the contrary opinions of claimant's treating physicians.[9] *See Wetzel*, 8 BLR at 1-139; Decision and Order at 9-10.

[8] It was rational for the administrative law judge to consider the qualifying pulmonary function studies of August 20, 2002 and February 13, 2003 to be unreliable based on the results of the October 13, 2002 non-qualifying pulmonary function study. The administrative law correctly noted that such tests are effort-dependent, and that while it is possible to produce an inaccurate low value, it is not possible to produce a spurious high value. *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984).

[9] Claimant argues that the administrative law judge mischaracterized Dr. Raymond Kraynak's opinion on total disability, ignoring the fact that the physician testified that claimant was totally disabled based solely on the results of the October 18, 2002 arterial blood gas study. Claimant's Brief at 13. The administrative law judge, however, permissibly assigned controlling weight to Dr. Dittman's opinion that this arterial blood gas study was normal, based on his superior qualifications. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

We therefore affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.203(b)(2)(iv) as supported by substantial evidence. Because the administrative law judge properly found that claimant failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant failed to establish a basis for modification at 20 C.F.R. §725.310 (2000).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge