BRB No. 07-0971 BLA

R.H. Claimant-Petitioner v. BLASCHAK COAL CORPORATION and SOMERSET CASUALTY INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/22/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05406) of Administrative Law Judge Janice K. Bullard (the administrative law judge)[1] with respect to 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). Based on claimant's November 22, 2004 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and found that the evidence of record established nineteen years of coal mine employment. Addressing the merits of entitlement, the administrative law judge found that the parties did not contest the issue of the existence of pneumoconiosis arising out of coal mine employment and, therefore, determined that the only issues before her were whether the evidence establishes total respiratory disability and disability causation. Weighing the relevant evidence, the administrative law judge found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). In addition, she found that because claimant did not establish the threshold issue of total disability, claimant has not established disability causation under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the pulmonary function study and medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i), (iv). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response in claimant's appeal, unless specifically requested to do so by the Board.[2]

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,

[1] This case was originally assigned to Administrative Law Judge Paul Teitler, who presided over the formal hearing on August 29, 2006. Hearing Transcript at 4. Subsequent to the hearing, but prior to issuing a decision, Judge Teitler died. This case was thereafter reassigned to Administrative Law Judge Janice K. Bullard for decision. Decision and Order at 2.

[2] The parties do not challenge the administrative law judge's findings of nineteen years of coal mine employment, or that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially argues that the administrative law judge erred in determining that the pulmonary function study evidence was insufficient to establish total disability under Section 718.204(b)(2)(i). The record contains four pulmonary function tests. On March 9, 2005, Dr. Talati performed pre-bronchodilator and post-bronchodilator tests, both of which produced qualifying values.[4] Director's Exhibit 8. Dr. Talati indicated in a handwritten note that there was "sub-optimal effort as per graph and tech note" and noted in the report of his examination of claimant that another study was required in order to assess the degree of claimant's impairment. *Id*. When Dr. Kraynak was asked at his deposition to express his opinion concerning the validity of the March 9, 2005 studies, he stated:

> The tracings, in my opinion, showed good effort throughout. They are very reproducible, very uniform. And when you look at the - the FEV1, there are three attempts. Each attempt was 54% of predicted. So you can't get better than that. The values were 2.11, 2.13, 2.11. The forced vital capacity was 70%, 67%, 67%. They're very close in proximity to each other, and again are very reproducible and would show good effort . . . It would be almost impossible for this gentleman to blow 54% on three occasions without giving good effort.

Claimant's Exhibit 2 at 10. On July 27, 2005, Dr. Talati performed pre-bronchodilator

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

and post-bronchodilator tests, both of which yielded non-qualifying values. Director's Exhibit 9. Dr. Talati did not comment on the validity of the results but opined that they showed possible early obstructive impairment. *Id*. Dr. Kraynak reviewed this testing and initially stated that it did not conform to the requirement in the regulations that the spirometer be calibrated on the day of the testing. Claimant's Exhibit 2 at 12; *see* 20 C.F.R. §718.103(b), Appendix B to 20 C.F.R. Part 718. In addition, Dr. Kraynak opined that the study was invalid because the flow loop tracings were erratic and claimant may have been coughing. Claimant's Exhibit 2 at 13. On June 16, 2006, Dr. Kraynak obtained a pre-bronchodilator study that yielded qualifying values and stated that the test was valid and showed a moderate to severe air flow defect. Claimant's Exhibit 2.

In considering the testing performed by Dr. Talati on March 9, 2005, the administrative law judge initially indicated that Dr. Kraynak was incorrect in stating that claimant produced an FEV1 that was 54% of predicted on three occasions, as "the test results were recorded as 54%, 37%, and 54%." Decision and Order at 6. The administrative law judge further stated that:

> My review of Dr. Talati's study reveals that his report includes tracings and a technician's note which documents suboptimal effort. The objective record supports Dr. Talati's opinion regarding the validity of this test . . . I grant less weight to Dr. Kraynak's interpretation of this test, as he is not Board-certified in any field of medicine and was not the physician who administered the study. Instead, I accord more weight to Dr. Talati as he is better qualified and is the physician who administered the study. Accordingly, I find that the March 2006 study administered by Dr. Talati is invalid due to [c]laimant's suboptimal effort.

Id. at 7, citations omitted.[5] Similarly, the administrative law judge credited the opinion of Dr. Talati regarding the validity of the July 27, 2005 non-qualifying pulmonary function testing over Dr. Kraynak's opinion, based on Dr. Talati's credentials. Decision and Order at 7; Director's Exhibit 9; Claimant's Exhibit 2. The administrative law judge further found that the qualifying June 16, 2006 pulmonary function study was valid. Decision and Order at 7; Claimant's Exhibit 1. Based on these findings, the administrative law judge determined that the pulmonary function study evidence was in equipoise, because the record contained two valid pulmonary function studies, one yielding qualifying values and the other yielding non-qualifying values. Decision and Order at 7. Accordingly, the administrative law judge found that the pulmonary function

[5] Dr. Talati is Board-certified in internal medicine and pulmonary disease. Dr. Kraynak testified at his deposition that he is Board-eligible in family medicine. Claimant's Exhibit 2 at 4.

study evidence was insufficient to support a finding of total disability pursuant to Section 718.204(b)(2)(i).

On appeal, claimant contends that the administrative law judge erred in discrediting the March 9, 2005 pulmonary function tests and in crediting the non-qualifying tests obtained on July 27, 2005. Claimant argues that the administrative law judge substituted her interpretation of the March 9, 2005 study for that of Dr. Kraynak, who explained why he disagreed with Dr. Talati's determination that the results were not valid. In addition, claimant asserts that the administrative law judge erred in crediting the opinion of Dr. Talati as the physician who administered the tests, arguing that the evidence reflects that a technician - Stephen Shipierski – actually administered the study. Claimant's Brief at 8. Claimant further contends that the administrative law judge mischaracterized the record because Dr. Talati did not actually render a finding regarding the validity of the March 9, 2005 tests. *Id*. Claimant also alleges that the administrative law judge erred in crediting the July 27, 2005 pulmonary function tests, as Dr. Kraynak stated correctly that "the study is not conforming and not in compliance with the governing criteria," as it was not calibrated the day of the testing. Claimant's Brief at 9. Consequently, claimant maintains that the administrative law judge erred in finding the pulmonary function study evidence is in equipoise.

We reject claimant's contention that the administrative law judge erred in finding that Dr. Talati invalidated the March 9, 2005 pulmonary function tests. Although Dr. Talati did not use the terms "valid" or "invalid," the administrative law judge acted within her discretion as fact-finder in treating the doctor's reference to claimant's "suboptimal effort" and his statement that a "repeat PFT" was needed as an opinion that the testing was invalid. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 6-7. We also hold that there is no merit in claimant's allegations of error regarding the administrative law judge's finding that the July 27, 2005 non-qualifying pulmonary function testing was valid. The administrative law judge noted Dr. Kraynak's opinion that the tests were nonconforming and acted within her discretion as fact-finder in determining that Dr. Talati's treatment of the results as valid outweighed the invalidation report by Dr. Kraynak, due to Dr. Talati's superior qualifications. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984); Decision and Order at 7. Moreover, because neither party challenges the administrative law judge's weighing of the June 16, 2006 qualifying pulmonary function study, we affirm her finding that this is a valid study. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7; Claimant's Exhibit 1.

With regard to the validity of the pulmonary function testing performed on March 9, 2005, however, claimant is correct in arguing that the rationale provided by the administrative law judge for giving more weight to Dr. Talati's opinion than to Dr. Kraynak's opinion is not supported by substantial evidence. Specifically, contrary to the

administrative law judge's finding, Dr. Kraynak accurately reported in his deposition that the three best pre-bronchodilator FEV1 maneuvers produced values of 2.11, 2.11, and 2.13, each of which resulted in a percent of predicted of 54.[6] Director's Exhibit 8; Claimant's Exhibit 2 at 10. Thus, contrary to the administrative law judge's finding, Dr. Kraynak's opinion was premised upon a correct summary of the pre-bronchodilator FEV1 results. Because the administrative law judge did not have an accurate understanding of Dr. Kraynak's opinion, she could not fully assess whether the conclusions that Drs. Kraynak and Talati expressed regarding the validity of the March 9, 2005 pulmonary function testing were reasoned and documented. We cannot affirm, therefore, the administrative law judge's determination that Dr. Talati's invalidation opinion was entitled to greater weight than Dr. Kraynak's contrary opinion based upon his superior qualifications. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We further hold that the administrative law judge has not provided a valid alternative rationale for her finding, as we cannot discern whether the administrative law judge's determination that Dr. Talati "administered" the March 9, 2005 pulmonary function tests is supported by the record. Decision and Order at 10. The administrative law judge did not identify the basis for her finding and Dr. Talati's citation of a "graph" and a "tech note" in support of his opinion that claimant's effort was suboptimal suggests that Dr. Talati was not actually present during the testing. Director's Exhibit 8. Accordingly, we must vacate the administrative law judge's finding, pursuant to Section 718.204(b)(2)(i), that the March 9, 2005 pulmonary function testing was not valid. Because we have vacated the administrative law judge's rejection of the tests obtained on March 9, 2005, which produced qualifying results, we must also vacate the administrative law judge's determination that the valid pulmonary function study evidence is in equipoise. On remand, the administrative law judge must first reconsider the validity of the pre-bronchodilator and post-bronchodilator pulmonary function tests performed on March 9, 2005. The administrative law judge must then reconsider whether claimant has established total disability pursuant to Section 718.204(b)(2)(i) by a preponderance of the valid pulmonary function tests.

Claimant also alleges that the administrative law judge erred in finding that total disability was not established by the medical opinion evidence at Section 718.204(b)(2)(iv). The record contains the medical opinions of Drs. Talati and Kraynak.

[6] The report of the March 9, 2005 pulmonary function testing shows that the three best post-bronchodilator maneuvers produced FEV1 values of 1.47, 1.26 and 1.16, which resulted in percents of predicted of 37, 32, and 30 respectively. Director's Exhibit 8. The source of the administrative law judge's determination that "the test results were recorded as 54%, 37%, and 54%," Decision and Order at 6, cannot be discerned, therefore.

Dr. Talati, who provided the Department of Labor pulmonary evaluation, diagnosed the existence of simple coal workers' pneumoconiosis. On the issue of total disability, Dr. Talati stated that he was unable to provide an opinion because the pulmonary function study associated with the examination was not valid due to sub-optimal effort. Director's Exhibit 8. After he obtained additional pre-bronchodilator and post-bronchodilator tests on July 25, 2005, Dr. Talati commented that the results were consistent with early obstructive pulmonary impairment. Director's Exhibit 9. Dr. Kraynak, claimant's treating physician since 1985, opined that claimant was totally and permanently disabled from performing his usual coal mine employment and all employment due to his coal workers' pneumoconiosis. Claimant's Exhibit 2. Dr. Kraynak reiterated this opinion in his deposition testimony. *Id*.

The administrative law judge found that Dr. Talati "failed to conclude whether and to what extent [c]laimant is disabled" and, therefore, accorded his opinion no weight. Decision and Order at 8. The administrative law judge determined that Dr. Kraynak's opinion was not entitled to substantial weight because it was not reasoned or documented. Decision and Order at 9. Consequently, the administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv) by a preponderance of the evidence.

Claimant contends that the administrative law judge erred in failing to provide an adequate explanation for rejecting the opinion of Dr. Kraynak, who treated claimant over a 20-year period, and in failing to consider Dr. Kraynak's deposition testimony. Claimant's Brief at 17. We agree with claimant that the administrative law judge has not considered Dr. Kraynak's opinion in its entirety, because she did not fully discuss Dr. Kraynak's deposition testimony. In according little weight to Dr. Kraynak's opinion, the administrative law judge stated that "Dr. Kraynak's report is merely a one-sentence-long conclusory statement that is not supported by any documentation of [c]laimant's alleged total disability." Decision and Order at 9. However, in his deposition testimony, Dr. Kraynak discussed the evidence of record, provided his opinion concerning claimant's condition, and identified the objective evidence that supports his conclusion. Claimant's Exhibit 2. Consequently, we vacate the administrative law judge's finding that Dr. Kraynak's opinion is insufficient to establish total respiratory disability and remand the case for the administrative law judge to consider Dr. Kraynak's deposition testimony in conjunction with his written medical opinion. *See Hunley v. Director, OWCP*, 8 BLR 1-323, 1-326 (1985); *see also Tackett*, 7 BLR at 1-706; *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648, 1-651 (1985).

However, contrary to claimant's contention, on remand, the administrative law judge is not required to accord additional weight to Dr. Kraynak's opinion based solely on his status as claimant's treating physician. As the administrative law judge correctly noted, the weight given to the opinion of a miner's treating physician shall also be based

on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole. Decision and Order at 9, citing 20 C.F.R. §718.104(d). Therefore, while the United States Court of Appeals for the Third Circuit has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997), the Court has also indicated that automatic preferences are disfavored, *Mancia*, 130 F.3d at 590-91, 21 BLR at 2-238; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). On remand, the administrative law judge must examine Dr. Kraynak's opinion, in its entirety, and make a reasoned judgment about its credibility, with proper deference given to his opinion as claimant's treating physician, if warranted. *See* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-91, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-201.

If, on remand, the administrative law judge finds the evidence sufficient to establish a totally disabling respiratory or pulmonary impairment, she must then determine whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). 20 C.F.R. §718.204(c).

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 administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge