BRB No. 98-0107 BLA

GLENN T. HUBLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order After Remand - Denying Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order After Remand - Denying Benefits (93-BLA-0681) of Administrative Law Judge Ellin M. O'Shea 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 9, 1992. Director's Exhibit 1. Following a finding of nonentitlement by the district director, claimant requested a hearing, which was held before Administrative Law Judge Frank D. Marden. On September 22, 1993, Judge Marden issued a Decision and Order in which he denied benefits on the ground that the evidence of record did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Claimant appealed the denial of benefits to the Board. Based upon the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant is

suffering from pneumoconiosis, the Board remanded the case to Judge Marden for consideration of the remaining elements of entitlement. *Hubler v. Director, OWCP*, BRB No. 94-0174 BLA (Dec. 13, 1994)(unpublished). On remand, Judge Marden determined that the Board had misinterpreted the significance of the Director's concession and found, once again, that the evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a). Accordingly, benefits were denied. Claimant appealed to the Board.

The Board reversed the findings rendered by Judge Marden under Section 718.202(a) and remanded the case to him for consideration of whether claimant demonstrated that he is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.203, 718.204(b), and 718.204(c). *Hubler v. Director, OWCP*, BRB No. 95-1850 BLA (May 31, 1996)(unpublished). The case was reassigned to Administrative Law Judge Ellin M. O'Shea (the administrative law judge) on remand due to the unavailability of Judge Marden.

In her Decision and Order, the administrative law judge accepted the parties' stipulation to fifteen or more years of coal mine employment and weighed the evidence relevant to Sections 718.203 and 718.204. The administrative law judge determined that claimant was entitled to the presumption, set forth in Section 718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found, however, that the evidence of record was insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c). Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the pulmonary function studies and medical opinions of record. The Director has responded and urges affirmance of the administrative law judge's findings with respect to the issues of total disability and total disability due to pneumoconiosis. Nevertheless, the Director also asserts that remand of this case to the district director is appropriate in light of the fact that the Director did not provide claimant with a complete and credible pulmonary evaluation as is required under the Act. *See* 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101, 718.401, 725.405(b).[1]

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 applicable 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).

[1]We affirm the administrative law judge's findings under 20 C.F.R. §§718.203(b) and 718.204(c)(2), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Concerning the administrative law judge's treatment of the pulmonary functions studies of record under Section 718.204(c)(1), the administrative law judge determined that the qualifying studies obtained under Dr. Kraynak's direction on January 5, April 5, and April 6, 1993 were not valid based upon the consulting opinions of Drs. Sahillioglu and Levinson. Decision and Order at 7-8; Director's Exhibits 20, 22; Claimant's Exhibits 1, 3. The administrative law judge also found that the remaining qualifying study of record, which claimant performed for Dr. Ahluwalia on May 13, 1993, was entitled to little weight based upon Dr. Ahluwalia's comments as to the adequacy of claimant's effort. Decision and Order at 8; Director's Exhibit 23. In his medical report, Dr. Ahluwalia indicated that the results of the May 1993 pulmonary function study demonstrated a moderate to severe airflow limitation, but also noted that these results could be explained by submaximal patient effort in light of the marked decline from the nonqualifying values reflected on the study performed by claimant on June 17, 1992. Director's Exhibit 23.

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Sahillioglu and Levinson as to the invalidity of the pulmonary function studies obtained by Dr. Kraynak over the opinion of Dr. Kraynak as to the validity of those studies. Claimant also asserts that the administrative law judge mischaracterized Dr. Ahluwalia's comments regarding the pulmonary function study that he obtained from claimant. These contentions are without merit. The United States Court of Appeals for the Third Circuit, within whose jurisdiction the present case arises, has held that the administrative law judge must make a finding as to whether the pulmonary function studies substantially conform to the quality standards set forth in 20 C.F.R. §718.103 and 20 C.F.R. Part 718, Appendix B.[2] *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Studies which do not substantially conform are unreliable and cannot establish total disability under Section 718.204(c)(1). *See Siwiec*, *supra*; *Mangifest*, *supra*. The quality standards that are relevant to the dispute in the present case mandate that a miner's effort is judged unacceptable if the miner has not reached full inspiration before the forced expiration, has not used maximal effort during the entire forced expiration, or has had an unsatisfactory start of expiration as characterized by excessive hesitation. *See* Appendix B to 20 C.F.R. Part 718, Section (2)(ii)(A), (B), (F).

In the present case, the administrative law judge did not abuse her discretion in crediting Dr. Sahillioglu's statements regarding the validity of the pulmonary function studies obtained on January 5 and April 5 of 1993, despite the brevity of those

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

statements. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Hall v. Director, OWCP*, 12 BLR 1-133 (1988). In addition, contrary to claimant's suggestion, the administrative law judge did not find that Dr. Sahillioglu's statement regarding the lack of documentation of claimant's initial inspiration provided a basis for invalidating the studies administered by Dr. Kraynak. The administrative law judge acknowledged that the regulations do not require that claimant's initial inspiration be recorded, as the quality standards permit the initial inspiration to be taken from the open atmosphere rather than the spirometer. Decision and Order at 7; Appendix B to 20 C.F.R. Part 718, Section (2)(ii).

The administrative law judge also acted rationally in determining that because Dr. Kraynak did not directly refute Dr. Sahillioglu's conclusion that the studies reflected less than optimal effort, Dr. Kraynak's rebuttal was not persuasive.[3] Decision and Order at 7;

[3]With respect to the studies performed on January 5 and April 5 of 1993, Dr. Sahillioglu indicated that they were not valid based on a lack of demonstration of inspiratory effort, inconsistent FVC trials and poor effort on the MVV maneuvers. Director's Exhibit 20. Dr. Levinson stated that the test obtained on April 6, 1993, was not valid due to marked hesitancy on the onset of the FVC maneuver, less than maximal effort throughout the FVC, excessive variability of claimant's FEV1 attempts, and poor effort on the MVV portion of the test. Director's Exhibit 22. Dr. Kraynak responded to the findings of Drs. Sahillioglu and Levinson in a letter dated May 24, 1993. Claimant's Exhibit 5. With respect to Dr. Sahillioglu's comments, Dr. Kraynak stated that the regulations do not require documentation of the inspiratory portion of the FVC and that his review of the tracings showed that they were in compliance with the relevant quality standards regarding variability and that the MVV curves corresponded

Director's Exhibit 20; Claimant's Exhibit 5; *see Clark*, *supra*. In this regard, the administrative law judge determined appropriately that Dr. Kraynak's statement, that the relationship between the various curves did not exceed the level of variability permissible under the quality standards, did not establish conclusively that claimant's effort was optimal, as the relevant standards refer separately to evidence of optimal effort and the degree of variation permitted between the FEV1, FVC, and MVV curves. Decision and Order at 7; Appendix B to 20 C.F.R. Part 718, Section (2)(ii)(A), (B), and (G).

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to good and complete effort. *Id.*. Dr. Kraynak stated that Dr. Levinson's determination regarding the validity of the April 6, 1993 study was unfounded, inasmuch as the technician who administered the test stated that claimant's cooperation and comprehension were good. Dr. Kraynak also noted that his review of the tracings supports findings of acceptable variability and good effort. *Id.*.

In addition, the administrative law judge acted within her discretion in according additional weight to the opinions of Drs. Levinson and Sahillioglu based upon their superior qualifications. Decision and Order at 7-8; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge rationally determined that Dr. Kraynak's status as a Board-eligible physician in Family Medicine indicates that he possesses less relevant expertise than Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease and Dr. Sahillioglu, who is Board-eligible in Internal Medicine and Pulmonary Disease and who is Medical Director of Mercy Hospital's Pulmonary Laboratory.[4] Decision and Order at 7-8; Director's Exhibits 20, 22; Claimant's Exhibits 1, 3, 5. In light of this appropriate determination, the administrative law judge was not required to defer to Dr. Kraynak's opinion merely on the ground that he is claimant's treating physician and the physician who administered two of the pulmonary function studies in question. *See Siegel*, *supra*; *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Finally, regarding the pulmonary function study that claimant performed for Dr. Ahluwalia on May 13, 1993, we hold that the administrative law judge did not abuse her discretion in finding that this study was entitled to little weight. The administrative law judge's finding is rational and supported by substantial evidence, inasmuch as Dr. Ahluwalia indicated, on Department of Labor Form CM-911 and the computer print-out of the study, that the results may have been secondary to submaximal effort on claimant's part. Director's Exhibit 23; *see Mangifest*, *supra*; *Siwiec*, *supra*. Dr. Ahluwalia's acknowledgment that the administering technician described claimant's effort and

[4]Claimant also alleges that the administrative law judge erred in noting that the qualifications of the respiratory technician to whom Dr. Kraynak referred in his response to Dr. Levinson's opinion were not of record. Decision and Order at 8; Director's Exhibits 20, 22; Claimant's Exhibit 5. We hold that the administrative law judge did not adopt a standard requiring the parties to report the qualifications of the technicians who administer pulmonary function studies. Rather, the administrative law judge acted within her discretion in determining that the opinions of reviewing medical doctors who are either Board-certified or Board-eligible in Pulmonary Disease are of greater value than the opinion of a respiratory technician. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

cooperation as "fairly good" does not render the administrative law judge's interpretation of the significance of Dr. Ahluwalia's remarks irrational. Director's Exhibit 23; *see Clark*, *supra*. Thus, we affirm the administrative law judge's finding that the pulmonary function studies of record do not establish total disability under Section 718.204(c)(1).

With respect to the administrative law judge's findings under Section 718.204(c)(4), claimant contends that the administrative law judge erred in discrediting the opinion in which Dr. Kraynak determined that claimant is totally disabled due to pneumoconiosis. Claimant also asserts that the administrative law judge should have determined that the opinions of Drs. Cable and Ahluwalia supported a finding of total disability. Regarding the administrative law judge's consideration of Dr. Kraynak's opinion, the administrative law judge acted within her discretion in finding that the credibility of Dr. Kraynak's diagnosis of a totally disabling impairment was diminished on the ground that the doctor based his determination upon invalid pulmonary function studies.[5] Decision and Order at 9; Claimant's Exhibits 2, 6 at 9, 8; *see Siwiec*, *supra*; *Winters v. Director, OWCP*, 6 BLR 1-877 (1984). The administrative law judge also acted properly in finding that the opinion in which Dr. Ahluwalia diagnosed chronic obstructive pulmonary disease (COPD) and a moderate to severe pulmonary impairment did not establish total disability under Section 718.204(c)(4) on the ground that Dr. Ahluwalia questioned the validity of the results of the pulmonary function study upon which he relied. Decision and Order at 10; Director's Exhibit 23; *see Siwiec*, *supra*.

Regarding the opinion in which Dr. Cable diagnosed a moderate impairment and attributed it equally to COPD and angina, the administrative law judge rationally concluded that inasmuch as Dr. Cable did not explicitly state that claimant's pulmonary condition, as distinguished from his angina, was totally disabling, his opinion could not support a finding of total disability under Section 718.204(c)(4). Decision and Order at 10; Director's Exhibit 10; *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). In light of these permissible determinations by the administrative law judge, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(c)(4).

[5]Claimant maintains that the other grounds upon which the administrative law judge relied in discrediting Dr. Kraynak's opinion, *i.e.*, that Dr. Kraynak did not discuss claimant's condition thoroughly, that his opinion was not as well-documented as the opinions of Drs. Cable and Ahluwalia, and that Dr. Kraynak's conclusion as to the source of claimant's disabling impairment was based upon an inaccurate smoking history, were improper. Inasmuch as the administrative law judge provided a valid alternative rationale for according little weight to Dr. Kraynak's medical report under Section 718.204(c)(4), any error in the other grounds to which the administrative law judge referred is harmless. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161,164 n.5 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Turning to the issue of total disability causation, claimant alleges that the administrative law judge did not properly weigh the medical opinions of Drs. Cable, Kraynak, and Ahluwalia. Because the administrative law judge rationally determined that these opinions did not support a finding of total disability under Section 718.204(c)(4), however, we need not address claimant's contentions under Section 718.204(b). *See generally Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Finally, the Director states that if the Board affirms the administrative law judge's findings that the medical evidence of record is insufficient to establish entitlement to benefits under Part 718, the Board should remand this case to the district director so that claimant can be given a complete and credible pulmonary evaluation. The Director maintains that the medical reports submitted by Drs. Cable and Ahluwalia, both of whom examined claimant at the request of the Department of Labor, do not satisfy the Director's obligation under the Act. According to the Director, these reports are flawed, as neither physician sufficiently indicated the degree to which claimant is disabled by a respiratory or pulmonary impairment.[6] The Director also asserts that because Drs. Cable and Ahluwalia concluded that claimant does not have pneumoconiosis, a position that is contrary to the Director's concession, their attribution of claimant's COPD solely to cigarette smoking is entitled to little weight. We hereby vacate the denial of benefits and grant the Director's request to remand the case to the district director based upon the Director's concession that the Department of Labor failed to provide claimant with a complete and credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

Accordingly, the administrative law judge's findings under Sections 718.203(b) and 718.204(c)(1)-(4) are affirmed, but the Decision and Order After Remand - Denying Benefits of is vacated and the present case is remanded to the district director for further development of the evidence and for reconsideration of the merits of the claim in light of all of the evidence of record.

SO ORDERED.

ROY P. SMITH

[6]Dr. Cable diagnosed a "moderate impairment" but did not state clearly whether the effects of claimant's COPD, as opposed to his angina, are totally disabling. Director's Exhibit 10. Dr. Ahluwalia stated that claimant has a moderate to severe impairment but then indicated that claimant is unable to perform any work due to arthritis in his back. Director's Exhibit 23.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge