

BRB No. 90-1277 BLA

JAMES T. SHEVITSKI )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 NORTH MOUNTAIN COAL COMPANY )  
 ) DATE ISSUED:  
 Employer-Respondent )  
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 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-In-Interest ) ORDER ON RECONSIDERATION

Claimant has timely filed a Motion for Reconsideration of the Board's Decision and Order in *Shevitski v. North Mountain Coal Co.*, BRB No. 90-1277 BLA (Nov. 18, 1992)(unpub.). See 20 C.F.R. §802.407(a). In *Shevitski*, the Board affirmed the administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (4) and the administrative law judge's denial of benefits. See *Shevitski, supra*. In its motion for reconsideration, claimant contends that the Board erred in affirming the administrative law judge's weighing of the pulmonary function study evidence pursuant to Section 718.204(c)(1) and the administrative law judge's weighing of the medical opinion evidence of record pursuant to Section 718.204(c)(4).

Specifically, claimant contends that the Board erred in holding that the administrative law judge permissibly stated that he is not precluded from relying on a non-conforming vent study when he considered the 1989 pulmonary function study performed by Dr. Ahluwalia. See *Shevitski* at 2; Decision and Order at 9; Director's Exhibit 40. Upon considering this pulmonary function study, the administrative law judge stated that it was invalidated by Dr. Kraynak because claimant coughed and choked during the study. See Decision and Order at 9; Claimant's Exhibit 15. The administrative law judge also stated that Dr. Ahluwalia noted that there were "Normal flows on spirometry" and that Dr. Ahluwalia clearly relied on his study as a valid indicator of claimant's pulmonary or respiratory condition. The administrative law judge further noted that the tracings contain only one point at which coughing was noted and one point at which both coughing and choking were noted. See Decision and Order at 9. The administrative law judge did not mention that Dr. Ahluwalia stated that claimant complained that he felt short of breath and experienced a choking feeling with the noseclips on. See Director's Exhibit 40. The administrative law judge then stated that he was not precluded from relying on a non-conforming ventilatory study pursuant to *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1976). See D&O at 9. While the administrative law judge is not precluded from relying on a non-conforming pulmonary function study, he must first make a finding as to whether the pulmonary function study is in substantial compliance with quality standards as set forth in 20 C.F.R. §718.103. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 13

BLR 2-259 (1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). The quality standards specifically state that an effort shall be judged unacceptable when the patient has coughed or closed his glottis. See 20 C.F.R. Part 718, Appendix B(2)(ii)(D). The administrative law judge did not make any findings as to whether the pulmonary function studies were in substantial compliance with the quality standards in Section 718.103. The sole reference the administrative law judge made with respect to the quality standards, was his reliance on the Board's decision in *Gorman*. The administrative law judge's reliance on the holding in *Gorman* is contrary to the rule espoused in *Siwiec* and *Mangifest*, as well as to the language in Section 718.103(c). The rule in *Mangifest* and *Siwiec* requires more than merely referring to the quality standards. As a result, claimant's motion for reconsideration is granted, the administrative law judge's findings pursuant to Section 718.204(c)(1) are vacated and the case is remanded to the administrative law judge for further discussion of the pulmonary function study evidence pursuant to Section 718.204(c)(1) and Section 718.103. The administrative law judge's findings pursuant to Section 718.204(c)(4) are also vacated and on remand the administrative law judge must reconsider the medical opinion evidence pursuant to Section 718.204(c)(4) as the administrative law judge relied on Dr. Ahluwalia's pulmonary function study in discrediting Dr. Kraynak's medical opinion. See Decision and Order at 9. Further, if an award of benefits is made, the administrative law judge must make a finding as to whether claimant's wife and granddaughter

shall be considered his dependents for the purpose of augmentation of benefits.

Accordingly, claimant's motion for reconsideration is granted, the