BRB No. 99-0738 BLA

MICHAEL HOYSOCK	)	
	)	
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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1350) of Administrative Law Judge Ralph A. Romano denying benefits 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). The instant case involves a 1998 duplicate claim.[1] The administrative law judge initially found the evidence sufficient

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on September 6, 1988. Director's Exhibit 12. The district director denied benefits on November 21, 1988. *Id.* There is no indication

to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1998 claim on the merits. After crediting claimant with at least thirteen years of coal mine employment, the administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates his previous contentions.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on February 20, 1998. Director's Exhibit 1.

[2]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1), 718.203(b) and 718.204(c)(2) and (c)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially contends that the administrative law judge erred in finding the pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). The record contains three pulmonary function studies. While claimant's pulmonary function studies conducted on September 21, 1988 and July 6, 1998 are non-qualifying,[3] Director's Exhibits 4, 12, claimant's pulmonary function study conducted on November 11, 1998 is qualifying.[4] Claimant's Exhibit 1.

In his consideration of whether the pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), the administrative law judge noted that the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has recognized that pulmonary function studies which return disparately higher values tend to be more reliable indicators of an individual's capacity than those with lower values. Decision and Order at 8 (citing *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpublished). The administrative law judge further noted that the Third Circuit has recognized that spuriously low values are unreliable because pulmonary function testing is effort dependent and that spurious high values are not possible. *Id.* Based on the fact that pulmonary function studies are effort dependent, the administrative law judge found that claimant's November 11, 1998 pulmonary function study was "worthy of little weight" and that claimant's July 6, 1998 pulmonary function study was "more probative." Decision and Order at 8. The administrative law judge, therefore, found that the pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). *Id.*

Claimant argues that the administrative law judge erred in failing to address Dr. Raymond J. Kraynak's (Dr. R. Kraynak's) invalidation of claimant's July 6, 1988 pulmonary function study.[5] We agree. An administrative law judge's failure to

[3]Claimant's July 6, 1998 pulmonary function study produced non-qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 4.

[4]Dr. Sahillioglu invalidated the results of claimant's November 11, 1998 pulmonary function study. The administrative law judge, however, excluded Dr. Sahillioglu's report because it "violated the 20 day rule for submission of evidence...." Decision and Order at 8 n.3.

[5]During a December 18, 1998 deposition, Dr. Raymond J. Kraynak (Dr. R. Kraynak) noted that the tracings from claimant's July 6, 1998 pulmonary function study were very erratic and showed frequent breaks. Claimant's Exhibit 4. Dr. R.

discuss relevant evidence requires remand. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). Inasmuch as Dr. R. Kraynak's opinion is relevant to the reliability of claimant's July 6, 1998 pulmonary function study, the administrative law judge erred in not addressing it. *See* Claimant's Exhibit 4.

Claimant also contends that the administrative law judge erred in rejecting the results of claimant's November 11, 1998 pulmonary function study. We agree. Although a pulmonary function study conducted over four months earlier on July 6, 1998 produced non-qualifying values, there is no evidence of record calling into question the reliability of claimant's November 11, 1998 qualifying pulmonary function study. To the contrary, the record contains Dr. R. Kraynak's validation of claimant's November 11, 1988 pulmonary function study. *See* Claimant's Exhibit 4. Moreover, the instant case is distinguishable from the Third Circuit's unpublished *Andruscavage* decision. In *Andruscavage*, the Third Circuit held that a qualifying pulmonary function study was called into question by a subsequent non-qualifying pulmonary function study. However, in the instant case, the most recent pulmonary function study of record is itself qualifying.

Kraynak, therefore, opined that claimant's July 6, 1998 pulmonary function study should not be given any weight in assessing claimant's respiratory condition. *Id.*

Under the facts of the instant case, we cannot affirm the administrative law judge's finding that claimant's non-qualifying July 6, 1998 pulmonary function study undermined the results of claimant's subsequent November 11, 1998 pulmonary function study. We, therefore, vacate the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and remand the case for further consideration.[6]

[6]Claimant also argues that the administrative law judge should have assigned little, if any, probative value to claimant's September 21, 1988 pulmonary function study inasmuch as it was performed ten years prior to claimant's most recent pulmonary function studies. While it does not appear that the administrative law judge accorded any significant weight to claimant's non-qualifying September 21, 1988 pulmonary function study, the administrative law judge, on remand, should explain what weight, if any, that he accords to this study. *See* Director's Exhibit 12.

Claimant also contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). In his consideration of the medical opinion evidence, the administrative law judge properly accorded the greatest weight to the three most recent medical opinions of record; the opinions of Drs. Rashid, Dr. R. Kraynak and Dr. Matthew J. Kraynak (Dr. M. Kraynak). Director's Exhibit 5; Claimant's Exhibits 2, 4. The administrative law judge credited Dr. Rashid's opinion negating total disability because he found that Dr. Rashid's opinion was supported by the "creditable pulmonary function studies which were non-qualifying." Decision and Order at 10. The administrative law judge also questioned the opinions of Drs. R. Kraynak and M. Kraynak that claimant was totally disabled due to pneumoconiosis in light of their reliance upon the results of claimant's November 11, 1998 pulmonary function study. *Id.* at 10-11. In light of our holding that the administrative law judge erred in his consideration of the pulmonary function study evidence, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). On remand, the administrative law judge, after reconsidering the pulmonary function study evidence, is instructed to reconsider the relevant medical opinion evidence in light of those findings.[7]

Should the administrative law judge, on remand, find the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he must consider whether the evidence is sufficient to establish that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *See Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying 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

[7]We reject claimant's contention that the administrative law judge erred in finding that Dr. Rashid was better qualified than Drs. R. Kraynak and M. Kraynak. While Dr. Rashid is Board-certified in Internal Medicine, *see* Director's Exhibit 14, Dr. M. Kraynak is Board-certified in a more general specialty, Family Medicine. Claimant's Exhibit 2. Dr. R. Kraynak is merely Board-eligible in Family Medicine. Claimant's Exhibit 4.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge