BRB No. 99-1066 BLA

MARK MINNICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0257) of Administrative Law Judge Paul H. Teitler 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). This case involves claimant's request for modification of the denial of his duplicate claim. Claimant filed his original claim for benefits on September 17, 1979. Director's Exhibit 39. This claim was denied on May 22, 1980, as claimant did not submit any evidence. Director's Exhibit 39. Claimant filed another claim on March 31, 1987, which was denied on June 2, 1987. Director's Exhibit 40. Claimant filed a third claim for benefits on July 14, 1989, which was denied on December 28, 1989, and January 22, 1990. Director's Exhibits

1, , 26, 28. A fourth claim was filed by claimant on November 23, 1990, and was denied by the district director on March 11, 1991. Director's Exhibits 30, 37. This duplicate claim was denied by the administrative law judge in a Decision and Order issued on August 12, 1992, which found that the parties stipulated to twenty years of coal mine employment, and that the evidence supported the Director's, Office of Workers' Compensation Programs (the Director), concession that claimant suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge further found however, that the newly submitted evidence failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and thus, failed to establish a material change in condition pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, the Board reversed the finding that claimant failed to establish a material change in condition, and vacated and remanded the administrative law judge's findings at Section 718.204(c)(1),(4). *Minnich v. Director, OWCP,* BRB No. 92-2568 BLA (Nov. 12, 1993)(unpub.). On remand, the administrative law judge again determined that claimant failed to establish total disability pursuant to Section 718.204(c)(1),(4), and benefits were denied. On appeal, the Board again vacated and remanded for the administrative law judge to weigh all the relevant evidence pursuant to Section 718.204(c)(1),(4). *Minnich v. Director, OWCP,* BRB No. 94-2719 BLA (May 22, 1995)(unpub.). On remand, the administrative law judge again found that total disability had not been established, and benefits were denied. Claimant filed a timely appeal of this denial, but before the Board rendered a decision, claimant moved to remand the case to the district director in order to file a request for modification. Director's Exhibits 71, 79. The Board granted claimant's motion, dismissed the appeal, and remanded the instant case to the district director. *Minnich v. Director, OWCP,* BRB No. 96-0991 BLA (June 20, 1997)(Order)(unpub.). Claimant formally requested modification on September 23, 1997. Director's Exhibit 81. The parties agreed to a decision on the record, and on June 15, 1999, the administrative law judge issued a Decision and Order finding that claimant had again failed to establish total disability pursuant to Section 718.204(c), or a material change in condition or a mistake of fact. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by failing to find the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1),(4) based on the pulmonary function studies of record and the opinion of claimant's treating physician. The Director, Office of Workers' Compensation Programs responds urging affirmance of the denial of benefits.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest,* 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*).[1] Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

Initially, we hold that substantial evidence supports the administrative law judge's finding that the evidence of record fails to establish a mistake in a determination of fact. Contrary to claimant's contention, the Decision and Order satisfies the provisions of the Administrative Procedure Act (the APA),[2] since it indicates that the administrative law judge reviewed the evidence of record, and the previous Decision and Orders, and rationally concluded that no mistake of fact was demonstrated. The administrative law judge is not required to reweigh the record evidence before making a finding on this issue, and claimant has raised no specific assignment of error in the administrative law judge's determination. Accordingly, it is affirmed. *Napier v. Director, OWCP,* 17 BLR 1-111 (1993); *Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989); *Hall v. Director, OWCP,* 12 BLR 1-80 (1988).

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

[2]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 §932(a).

Claimant contends that the administrative law judge erred in his weighing of the pulmonary function studies and medical reports of record pursuant to Section 718.204(c)(1)(4). The Decision and Order indicates that the administrative law judge considered the newly submitted evidence relevant to total disability which includes a non-qualifying pulmonary function study[3] dated February 12, 1998, three qualifying pulmonary function studies dates August 27, 1997, January 19, 1998, and March 18, 1998, a non-qualifying arterial blood gas study performed on February 18, 1998, and the reports of Drs. Kraynak and Rashid. Claimant's Exhibits 1-4; Director's Exhibits 81, 88, 89. Dr. Kraynak, claimant's treating physician, who is board-eligible in family medicine, diagnosed totally disabling coal workers' pneumoconiosis. Dr. Rashid, who is board-certified in internal medicine, diagnosed the presence of coal workers' pneumoconiosis, but found no respiratory impairment. The record also includes Dr. Sahillioglu's report which found the pulmonary function study of August 1997 invalid due to poor effort and improper performance, and Dr. Kraynak's opinion that Dr. Rashid's non-qualifying pulmonary function study of February 1998, was invalid due to improper performance. Director's Exhibit 81.

The administrative law judge considered the newly submitted pulmonary function studies at Section 718.204(c)(1), stated that all the qualifying studies were performed by Dr. Kraynak, and found that Dr. Sahillioglu's invalidation report of the August 1997 study was worthy of greater weight than Dr. Kraynak's opinion of this test, and concluded that the study did not meet the quality standards expressed in the regulations. *See* 20 C.F.R. §718.103. The administrative then considered the remaining three studies and credited the non-qualifying study of Dr. Rashid , since all of the studies were close in time, and the significantly higher values of Dr. Rashid's test rendered the remaining studies unreliable. The administrative law judge also rejected Dr. Kraynak's invalidation of Dr. Rashid's non-qualifying study on the basis that Dr. Kraynak is not a pulmonary specialist, and total disability was not found at this section. The administrative law judge also found that total disability could not be established pursuant to Section 718.204(c)(2),(3), since the newly submitted arterial blood gas study produced non-qualifying values and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. At Section 718.204(c)(4), the administrative law judge also found that total disability was not established based on his crediting of Dr. Rashid's report, due to this physician's superior qualifications, and his finding that it was well supported by its underlying documentation. Decision and Order at 6. The administrative law judge

[3]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(c)(1),(2).

found that Dr. Kraynak's opinion was not well reasoned or documented since the administrative law judge found that Dr. Kraynak relied solely on his invalid pulmonary function studies, and failed to adequately address the significance of the invalidation of his August 1997 pulmonary function study, and the non-qualifying values of Dr. Rashid's February 1998 pulmonary function study and arterial blood gas study. Accordingly, the administrative law judge found that total disability had not been established pursuant to Section 718.204(c)(4), and that his findings precluded a finding of a change in condition, and entitlement to benefits. Decision and Order at 6.

We hold that remand of the administrative law judge's findings at Section 718.204(c) is required. The administrative law judge, although noting that the duplicate claims provisions and the modification provisions of Sections 725.309 and 725.310 are applicable herein, considered only the evidence submitted in support of claimant's request for modification. Remand is required therefore, to allow the administrative law judge to consider whether this evidence, in conjunction with the evidence submitted in support of claimant's duplicate claim, establishes a required element of proof which could establish a change in condition, which would in turn, establish a material change in condition. *Hess v. Director, OWCP,* 21 BLR 1-141 (1998). Accordingly, on remand the administrative law judge must consider the relevant evidence in accordance with the holding in *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308, BLR 2- (3d Cir. 1995), and *Hess, supra.* .

We further hold that claimant correctly contends that the administrative law judge erred by failing to provide a rationale for crediting Dr. Sahillioglu's invalidation report of Dr. Kraynak's qualifying pulmonary function study of August 27, 1997 over Dr. Kraynak's contrary opinion as required by the APA. *Hall, supra; Wojtowicz, supra.* Moreover, the administrative law judge erred by finding that since this test was found invalid by Dr. Sahillioglu, that it also failed to conform to the quality standards, despite the inclusion of claimant's height, age, tracings and statement of cooperation and comprehension. *Mangifest, supra; Director, OWCP, v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991). The administrative law judge further erred by rejecting Dr. Kraynak's invalidation of the February 1998 study since this doctor is not a pulmonary specialist, since this is not a regulatory requirement. We reject however, claimant's contention that the administrative law judge's statement that Dr. Kraynak conducted the qualifying pulmonary function study of March 1998 is reversible error since the study was not found unreliable on this basis, and we further reject claimant's assertion that the administrative law judge erred by finding that the February 1998 non-qualifying study was not conducted by Dr. Rashid, since the record clearly indicates that it was conducted on his behalf by his medical technician, and was part of Dr. Rashid's documentation underlying his opinion. Director's Exhibit 88. It was

also rational for the administrative law judge to find that the qualifying studies of January and March 1998, were unreliable based on the results of the February non-qualifying pulmonary function study, since 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. *Andreuscavage v. Director, OWCP,* No. 93-3291 (3d Cir. Feb. 22, 1994)(unpub. slip op. at 9-10); *Baker v. North American Coal Corp.,* 7 BLR 1-79 (1984). Pursuant to Section 718.204(c)(4), we agree with claimant's contention that the administrative law judge erred by finding that Dr. Kraynak's opinion was based solely on his invalid pulmonary function studies, since the record indicates that this physician also relied on his examination, claimant's history, and symptoms in reaching his conclusions, although the administrative law judge may find a medical report unreliable if it is based on pulmonary function studies which are invalidated by a reviewing physician. *Siegel v. Director, OWCP,* 8 BLR 1-156 (1985); *Street v. Consolidation Coal Corp.,* 7 BLR 1-65 (1984). Moreover, the administrative law judge is not required to accord determinative weight to the opinion of claimant's treating physician, although that is a factor which may be considered in weighing the medical evidence. *See Mancia v. Director, OWCP,* 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Schaaf v. Matthews,* 574 F.2d 160, (3d Cir. 1978); *Tedesco v. Director, OWCP,* 18 BLR 1-104 (1994); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). The administrative law judge did not err however, by finding that Dr. Kraynak did not adequately address the significance of Dr. Rashid's non-qualifying 1998 pulmonary function study, or arterial blood gas study, or by requiring a greater burden of claimant's physician than of the Director's, or by requiring that Dr. Kraynak perform arterial blood gas studies. It is within the administrative law judge's discretion to determine whether a medical report is adequately documented and reasoned, and the administrative law judge may credit the evidence which he finds more persuasive and better supported by the objective evidence of record. *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.,* 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989); *Mabe v. Bishop Coal Co.,* 9 BLR 1-67 (1986); *Stark v. Director, OWCP,* 9 BLR 1-36 (1986).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge