BRB No. 09-0683 BLA

JAMES L. LENIG	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/29/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Request for Modification and Denying Benefits (08-BLA-5771) of Administrative Law Judge Ralph A. Romano (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case involves claimant's request for modification of the denial of a claim that

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

was filed on October 12, 2004.[2] Director's Exhibit 2. The administrative law judge credited claimant with 23.63 years of coal mine employment,[3] pursuant to the parties' stipulation and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge found that the new x-ray and medical opinion evidence submitted in support of modification established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b), and thus established a change in conditions pursuant to 20 C.F.R. §725.310. Considering all of the evidence on the merits, however, the administrative law judge found that, while the x-ray evidence established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), the evidence did not establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge concluded that claimant could not establish total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.[4]

[2] Initially, Administrative Law Judge Ralph Kaplan denied the claim on June 22, 2006, based on claimant's failure to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibits 60, 62. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Lenig v. Director, OWCP*, BRB No. 06-0739 BLA (June 28, 2007) (unpub.); Director's Exhibit 74. Claimant requested modification of the denial of benefits on March 12, 2008, which was denied by the district director in a proposed decision and order issued on April 21, 2008. Director's Exhibits 76, 80. Claimant requested a formal hearing on May 2, 2008, and the claim was transferred to the Office of Administrative Law Judges. Director's Exhibit 82.

[3] The record indicates that claimant's last coal mine employment was in Pennsylvania. Director's Exhibits 3-5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[4] In considering the merits of entitlement, the administrative law judge noted that Judge Kaplan, in his 2006 Decision and Order, overlooked Dr. Cappiello's positive reading of the December 15, 2005 x-ray. Decision and Order at 5; Director's Exhibit 57. The administrative law judge further noted that Judge Kaplan transposed the FVC and MVV values of Dr. Kruk's October 19, 2005 pulmonary function study. Decision and Order at 5. The administrative law judge considered Dr. Cappiello's positive x-ray reading in finding that the x-ray evidence, as a whole, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 7-8. In addition, considering the corrected FVC and MVV values, the administrative law judge found that the October 19, 2005 pulmonary function study is still non-qualifying,

On appeal, claimant contends that, in considering all of the evidence on the merits, the administrative law judge erred in his analysis of the medical opinion evidence in determining that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant further contends that the administrative law judge erred in his analysis of the pulmonary function study and medical opinion evidence in determining that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Additionally, claimant contends that the administrative law judge erred by failing to address the issue of disability causation pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[5]

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, and 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).725.309.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Turning first to the issue of total disability, claimant contends that administrative law judge erred in his evaluation of the pulmonary function study evidence, pursuant to

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pursuant to 20 C.F.R. §718.204(b)(2)(i), and that the evidence, as a whole, does not establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 5, 14-16.

[5] Because the Director, Office of Workers' Compensation Programs, does not challenge the administrative law judge's findings that claimant established a change in conditions pursuant to 20 C.F.R. §725.310, or his finding, on the merits, that claimant established pneumoconiosis at 20 C.F.R. §718.202(a)(1), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding of 23.63 years of coal mine employment, and his findings, on the merits, that claimant did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Skrack*, 6 BLR at 1-711.

20 C.F.R. §718.204(b)(2)(i). The administrative law judge initially found that, while the most recent pulmonary function study, performed by Dr. Kraynak on September 17, 2008, produced qualifying values,[6] the results were invalid. Decision and Order at 13-14; Claimant's Exhibit 2. The administrative law judge further found that of the remaining studies, dated December 14, 2004, December 15, 2005, October 19, 2005 and November 1, 2005, only the pre-bronchodilator values of the December 15, 2005 study produced qualifying values. Decision and Order at 14; Director's Exhibits 11, 41, 50, 51. Thus, the administrative law judge concluded that the weight of the pulmonary function studies did not support a finding of total disability. Decision and Order at 14. Claimant specifically contends that the administrative law judge erred in finding Dr. Kraynak's September 17, 2008 qualifying pulmonary function study to be invalid. Claimant's Brief at 7-11; Claimant's Exhibit 2. This contention lacks merit.

The regulations provide that, in evaluating the pulmonary function study evidence, the administrative law judge should first consider whether a study substantially conforms to the quality standards set forth in 20 C.F.R. §718.103 and Part 718, Appendix B. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638-39, 13 BLR 2-259, 2-267 (3d Cir. 1990). The applicable quality standard provides, in pertinent part:

> The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater.

20 C.F.R. Part 718, Appendix B(2)(ii)(G). Considering Dr. Kraynak's September 17, 2008 qualifying pulmonary function study, the administrative law judge correctly noted that, in a report dated September 28, 2008, Dr. Michos, who is Board-certified in Internal Medicine and Pulmonary Medicine, invalidated the study. Decision and Order at 13-14; Director's Exhibit 88. Specifically, Dr. Michos opined that claimant provided less than optimal effort, cooperation and comprehension, as evidenced by "greater than a 5% variation between the 2 best FVC [and] FEV1 values, [and] suboptimal MVV performance." Director's Exhibit 88.

The administrative law judge further noted that, in a report dated December 18, 2008, Dr. Kraynak, who is Board-eligible in Family Medicine, disagreed with Dr. Michos' opinion, stating that the study was valid because "the two largest FEV1 values vary by less than 100 [milliliters], corresponding to the regulations" and "there was good MVV performance given throughout." Claimant's Exhibit 6. In his October 17, 2008

[6] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

deposition, however, Dr. Kraynak testified that the two largest FEV1 values were only "close to being a hundred milliliters apart." Decision and Order at 14; Claimant's Exhibit 4 at 11.

Reviewing the record evidence, the administrative law judge correctly found that the two largest FEV1 values for the September 17, 2008 study, recorded by Dr. Kraynak as 1.21 liters and .95 liters, in fact vary by .26 liters, or 260 milliliters,[7] which is greater than the 100 milliliter variation allowed by regulations. 20 C.F.R. Part 718, Appendix B(2)(ii)(G); Decision and Order at 14; Claimant's Exhibit 2. In concluding that the September 17, 2008 pulmonary function study is invalid, the administrative law judge credited Dr. Michos' opinion over Dr. Kraynak's opinion, based on Dr. Michos' superior credentials and because Dr. Kraynak incorrectly stated that the two FEV1 values varied by less than 100 milliliters, or were "close," when the values are actually 260 milliliters apart. Decision and Order at 14.

Claimant asserts that, in concluding that the September 17, 2008 pulmonary function study is invalid, the administrative law judge impermissibly substituted his own opinion for that of Dr. Kraynak. Claimant's Brief at 10-11, *citing Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). Contrary to claimant's contention, unlike the facts of *Schetroma*, where an administrative law judge discredited two pulmonary function studies as invalid, despite the fact that one physician validated the studies and no physician of record found claimant's effort unacceptable, here the administrative law judge was required to resolve the conflict in medical opinion between Drs. Kraynak and Michos as to the validity of the September 17, 2008 study. In discounting Dr. Kraynak's opinion, the administrative law judge permissibly concluded that the record evidence, which reflects a difference of 260 milliliters between the two largest FEV1 values, does not support Dr. Kraynak's conclusion that the values were "close" to being within one-hundred milliliters of each other. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Nor is there any merit to claimant's contention that the administrative law judge improperly relied, in part, on Dr. Michos' superior credentials to credit his opinion that the greater than five percent variation between the two largest FEV1 values renders the September 17, 2008 pulmonary function study invalid. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 14. While claimant correctly asserts that the regulations require that the variation between the two largest FEV1 values "should not exceed 5 percent of the largest FEV1 *or 100 ml, whichever is greater*," 20 C.F.R. Part 718, Appendix B(2)(ii)(G) (emphasis added), as the administrative law judge correctly found, the record reflects that the variation between

[7] 1.21 liters - .95 liters = .26 liters or 260 milliliters.

the September 17, 2008 FEV1 values is much larger than 100 milliliters, rendering the test non-conforming under either criteria. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's findings that the September 17, 2008 pulmonary function study is invalid, and that total disability is not established by the weight of the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); Decision and Order at 14.

Claimant next contends that the administrative law judge erred in rejecting Dr. Kraynak's medical opinion in determining that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree.

Relevant to the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Mariglio,[8] Rashid,[9] Kruk,[10] and Kraynak.[11] Director's Exhibits 10, 43, 51, 78. The administrative law judge initially accorded little weight to Dr. Kraynak's opinion as based, in part, on the September 17, 2008 invalid pulmonary function study, and not well-reasoned or documented. Decision and Order at 16; Director's Exhibits 54, 78; Claimant's Exhibit 4. By contrast, the administrative law judge accorded the greatest weight to Dr. Mariglio's opinion, that

[8] Dr. Mariglio, who is Board-certified in Internal Medicine with a subspecialty in Pulmonary Medicine, opined that claimant has no respiratory impairment and is capable of performing his prior coal mine employment. Director's Exhibit 10.

[9] Dr. Rashid, who is Board-certified in Internal Medicine, opined that claimant has no pulmonary impairment and is not disabled by a respiratory condition. Director's Exhibit 43.

[10] Dr. Kruk, who is Board-certified in Internal Medicine, opined that claimant is totally and permanently disabled due to pneumoconiosis. Director's Exhibit 51.

[11] In his first report, dated November 7, 2005, Dr. Kraynak, who is Board-eligible in Family Medicine, opined that claimant is totally and permanently disabled due to pneumoconiosis. Director's Exhibit 54. In a subsequent report dated March 11, 2008, Dr. Kraynak opined that claimant's condition was worsening and again concluded that claimant is totally and permanently disabled due to pneumoconiosis. Director's Exhibit 78. In his deposition dated October 17, 2008, based, in part, on the September 17, 2008 pulmonary function study, Dr. Kraynak reiterated his opinion that claimant has a totally disabling respiratory impairment. Claimant's Exhibit 4 at 6-8. Dr. Kraynak added that even if the September 17, 2008 study was excluded from consideration, he would still find claimant totally disabled "[b]ased on [the] physical findings, his complaints [and] . . . numerous office visits." Claimant's Exhibit 4 at 9.

claimant had normal pulmonary status and was capable of performing his prior coal mine employment, based on the physician's superior qualifications. Decision and Order at 16; Director's Exhibit 10. The administrative law judge concluded, therefore, that the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 16.

Contrary to claimant's contention, the administrative law judge permissibly discredited Dr. Kraynak's opinion because it was based, in part, on the September 17, 2008 invalid pulmonary function study. *See Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). The administrative law judge also rationally accorded little weight to Dr. Kraynak's alternative opinion that, excluding the September 17, 2008 study from consideration, he would still find claimant totally disabled "[b]ased on [the] physical findings, his complaints [and] . . . numerous office visits," because it was conclusory and lacked reasoning and documentation. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Further, as the Director asserts, having discredited Dr. Kraynak's opinion as unreasoned, there is no merit to claimant's contention that the administrative law judge should have accorded greater weight to Dr. Kraynak's opinion, based on his status as a treating physician, or on the recency of his report. *See* 20 C.F.R. §718.104(d)(5); *see Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Claimant's Brief at 13, 16; Director's Brief at 10. Rather, contrary to claimant's argument, having permissibly discredited Dr. Kraynak's more recent report, the administrative law judge rationally accorded greatest weight to Dr. Mariglio's opinion, that claimant is not disabled, based on the physician's superior credentials as a pulmonary specialist. *See Dillon*, 11 BLR at 1-114; *Wetzel*, 8 BLR at 1-141; Decision and Order at 16. We, therefore, affirm the administrative law judge's finding that total disability was not established by medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) are supported by substantial evidence and thus are affirmed. Consequently, we further affirm the administrative law judge's conclusion that claimant cannot establish that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Decision and Order at 16. Finally, because we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2), we need not address claimant's challenge to the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of entitlement to benefits is precluded in this case. *See Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order Awarding Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge