

BRB No. 91-0443 BLA

RAYMOND KEEFER)
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 Claimant-Petitioner)
)
 v.)
)
 KOCHER COAL COMPANY)
)
 and)
)
 LACKAWANNA CASUALTY COMPANY) DATE ISSUED:
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of V. M. McElroy,
Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville,
Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton,
Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY,
Administrative Law Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (86-BLA-3004) of
Administrative Law Judge V. M. McElroy denying benefits on a claim filed pursuant

to the provisions of Title IV of the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). This is the second time this case has been before the Board. In his first Decision and Order, Administrative Law Judge V. M. McElroy determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, consequently, benefits were denied. On appeal, the Board remanded the case for further consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). See Keefer v. Kocher Coal Co., BRB No. 88-2600 (Apr. 30, 1990)(unpub.). On remand, the administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and that the pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge then considered the evidence pursuant to 20 C.F.R. §718.204 and determined that claimant failed to establish that he is totally disabled due to pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b) and (c)(4).¹ Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has chosen not to respond in this case.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

¹The administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) are affirmed as unchallenged on appeal. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

Initially, the administrative law judge considered the pulmonary function study evidence of record pursuant to 20 C.F.R. §718.204(c)(1) and determined that only two of the eleven tests of record produced qualifying results. See Decision and Order at 3; Claimant's Exhibits 3, 5. The administrative law judge then permissibly accorded these tests less weight as they had been found invalid upon review and because the remaining tests produced non-qualifying results.² See Decision and Order at 3; Employer's Exhibits 3, 10; Mabe v. Bishop Coal Co., 9 BLR 1-67 (1986); Siegel v. Director, OWCP, 8 BLR 1-156 (1985). The administrative law judge also noted that the record contained a non-qualifying pulmonary function study performed during the time between the two qualifying tests which were invalidated. See Employer's Exhibit 4. The administrative law judge stated that this report caused him to further question the reliability of the two qualifying tests. See Decision and Order at 3. The administrative law judge then permissibly determined that the weight of the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(c)(1). See Mabe, supra. This finding is supported by substantial evidence, and is affirmed.

The administrative law judge next considered the six medical opinions of record pursuant to 20 C.F.R. §718.204(c)(4). The opinions of Drs. Wagner, Wall, Singzon, and Kruk all concluded that claimant suffered no total disability. See Director's Exhibits 10, 28; Claimant's Exhibit 4. In a report dated October 3, 1986, Dr. Levinson stated that claimant suffers from disabling generalized arthritis and that this condition is not related to his previous occupational history. See Employer's Exhibit 4. Dr. Kraynak examined claimant and stated that claimant is totally and permanently disabled due to anthracosilicosis contracted during his coal mine employment. See Director's Exhibit 18. Upon considering this evidence, the administrative law judge permissibly accorded less weight to the opinion of Dr. Kraynak because it was based in part on pulmonary function studies that were found to be invalid, was unsupported by the objective evidence of record, and other physicians of record possessed superior qualifications. See Decision and Order at 3, 4; Scott v. Mason Coal Co., 14 BLR 1-37 (1990); King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Hall v. Director, OWCP, 8 BLR 1-193 (1985); Street v. Consolidation Coal Co., 7 BLR 1-65 (1984). The administrative law judge then permissibly stated that he found Dr. Levinson's opinion to be persuasive because Dr.

²The administrative law judge failed to consider a qualifying pulmonary function study performed on August 27, 1986 by Dr. Kruk. See Claimant's Exhibit 4. Any error would be harmless, however, as this test was invalidated by Dr. Levinson, whose opinion the administrative law judge had credited in finding two other qualifying tests invalid. See Decision and Order at 3; Claimant's Exhibit 4; Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

Levinson has superior qualifications and because his opinion is fully supported by the objective medical data and by the majority of the medical opinions of record. See Decision and Order at 4; Scott, supra; Dillon v. Peabody Coal Co., 11 BLR 1-113 (1988); King, supra.³

Claimant contends that the administrative law judge erred in failing to consider the opinion of Dr. Kruk. However, the administrative law judge considered this opinion in his prior Decision and Order and made reference to that discussion in the Decision and Order on Remand. See Claimant's Brief at 8; Decision and Order at 6; Decision and Order on Remand at 3. In his report, Dr. Kruk found that claimant suffers from severe lung disease and stated that his chest x-ray is consistent with anthracosilicosis. Dr. Kruk further stated that the results of claimant's pulmonary function study are significantly abnormal. See Claimant's Exhibit 4. In his Decision and Order, the administrative law judge permissibly accorded less weight to this report as Dr. Kruk relied upon a pulmonary function study which was invalidated on review, and thus is less persuasive than the opinion of Dr. Levinson. See Decision and Order at 6; Claimant's Exhibit 4; Employer's Exhibit 8; Siegel, supra; Lafferty v. Cannelton Industries, Inc., 12 BLR 1-190 (1989). As a result, the administrative law judge's finding that claimant did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is affirmed as it is supported by substantial evidence. As claimant has failed to establish that he is totally disabled by pneumoconiosis, essential elements of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial is affirmed. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

³It is noted that Dr. Levinson's opinion is probably sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), however the opinion is also sufficient to rule out causation pursuant to 20 C.F.R. §718.204(b), as is misstated by the administrative law judge.

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge