BRB No. 01-0661 BLA

JOHN G. GLASSIC	)	
	)	
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 Upon Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Appeals (the Director), appeals the Decision and Order Upon Remand (98-BLA-0162) of Administrative Law Judge Ralph A. Romano 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).[1]

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

This case has been before the Board previously.[2] On remand from the Board, the

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Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). Therefore, any arguments made by the parties in response to the Board's Order are now moot.

[2]In *Glassic v. Director, OWCP*, BRB No. 99-0636 BLA (Aug. 31, 2000)(unpub.), the Board noted the Director's concession that claimant suffers from pneumoconiosis arising out of coal mine employment and remanded the case to the administrative law judge to determine whether claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. 718.204. Additionally, the Board affirmed as

administrative law judge determined that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were awarded. On appeal, the Director contends that the administrative law judge erred by according determinative weight to Dr. Kraynak's opinion and requests that the Board reverse the award of benefits. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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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unchallenged on appeal the administrative law judge's finding that claimant established ten and three-quarter years of coal mine employment.

[3]We affirm the administrative law judge's determination that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), as it has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On appeal, the Director contends that the administrative law judge erred in finding that Dr. Kraynak's opinion is sufficient to establish total respiratory disability pursuant to Section 718.204(c) (2000).[4] Pursuant to Section 718.204(c)(4), the administrative law judge found that the record contained the medical opinions of Drs. Green and Kraynak. Dr. Green stated that claimant was suffering from hypertension, which would affect his ability to perform coal mine work, but that there was no evidence of respiratory disease. Director's Exhibit 11. In a medical report dated April 2, 1998, Dr. Kraynak opined that based upon claimant's work history, subjective complaints, physical examination, and diagnostic tests, claimant is totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 2. Dr. Kraynak further found that claimant is unable to lift, carry, climb steps or walk for any period of time. He also stated that claimant must be able to sit, stand and lay down, at his leisure, secondary to his respiratory impairment. Dr. Kraynak was deposed on June 26, 1998, at which time he reaffirmed his opinion regarding claimant's pulmonary status. Claimant's Exhibit 14. Furthermore, Dr. Kraynak disagreed with Dr. Green's statement that claimant's hypertension was untreated, stating that claimant had been taking medication to control his blood pressure medicine for some time. *Id*.

In crediting Dr. Kraynak's opinion over Dr. Green's opinion, the administrative law judge referred to Dr. Kraynak's status as claimant's treating physician and found that Dr. Kraynak looked at the totality of the evidence, in contrast to Dr. Green, who relied upon an incomplete medical history, only examined claimant once, and failed to explain how he came to the conclusion that claimant was suffering from hypertension rather than pneumoconiosis. Decision and Order at 6-7. The administrative law judge also found that Dr. Kraynak's opinion is well supported by the objective laboratory data and was thus entitled to greater weight than Dr. Green's opinion. *Id*. Accordingly, the administrative law judge concluded that Dr. Kraynak's opinion was sufficient to establish total disability pursuant to Section 718.204(c) (2000).

[4]The administrative law judge applied the total disability regulation set forth at 20 C.F.R. 718.204(c)(2000). After revision of the regulations, the total disability regulation is now set forth at Section 718.204(b)(2)(2001).

The Director contends that because the administrative law judge found, pursuant to Section 718.204(c)(1) (2000), that none of the pulmonary function studies are a reliable indicator of claimant's respiratory condition, there is no basis for Dr. Kraynak's diagnosis of a totally disabling respiratory impairment. Pursuant to Section 718.204(c)(1) (2000), the administrative law judge determined that the pulmonary function evidence was "inconclusive regarding the issue of total disability." Decision and Order at 4. The administrative law judge based his finding upon Dr. Kraynak's invalidation of the single non-qualifying study of record, obtained by Dr. Green, and Dr. Michos's invalidation of two of the three qualifying studies obtained by Dr. Kraynak.[5] Decision and Order at 3-4; Director's Exhibits 10, 21, 22; Claimant's Exhibits 1, 4. As for the third qualifying study, performed on June 29, 1988, under Section 718.204(c)(1) (2000), the administrative law judge noted that it included an FEV1 value that was significantly lower than one obtained in a previous study three months earlier, with no explanation for the disparity in the record. Decision and Order at 4; Claimant's Exhibit 11.

In light of the administrative law judge's determination that the pulmonary function study evidence did not support a finding of total disability, which has been affirmed as unchallenged on appeal, we must vacate the administrative law judge's crediting of Dr. Kraynak's opinion under Section 718.204(c)(4) (2000). The administrative law judge indicated correctly that he was not required to discredit Dr. Kraynak's opinion because it was based, in part, upon non-qualifying and non-conforming pulmonary function studies. Nevertheless, in light of his determination that the pulmonary function study evidence was "inconclusive," without a more detailed explanation from the administrative law judge, it is unclear precisely what data provides the foundation for Dr. Kraynak's diagnosis of total respiratory disability. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[5]A "qualifying" pulmonary function study or arterial 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 and C, respectively. A "non-qualifying" study yields values that exceed the table values. 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

As the Director has noted, x-ray evidence of pneumoconiosis and claimant's work and social histories are not relevant to the issue of whether claimant is totally disabled. In addition, Dr. Kraynak's findings on examination of cyanosis, a mild increase in claimant's chest diameter, and scattered wheezes are not sufficient, in and of themselves, to establish total disability. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Although Dr. Kraynak described the results of the non-qualifying blood gas study of record as "abnormal," he did not state that the test was indicative of a particular level of impairment. Claimant's Exhibit 14 at 11. Finally, Dr. Kraynak's status as a treating physician does not automatically entitle his opinion to additional weight. Consideration must be given to how his status has enabled him to form a credible opinion regarding claimant's condition and whether his opinion is adequately reasoned.[6] *See Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997).

Therefore, we vacate the administrative law judge's finding with respect to Dr. Kraynak's opinion and remand the case to the administrative law judge for reconsideration of whether it is adequately supported by the underlying documentation.[7] If the administrative law judge determines that Dr. Kraynak's opinion is reasoned, the administrative law judge must then weigh all of the evidence relevant to total respiratory disability together to determine whether total disability is established by a preponderance of the evidence pursuant to Section 718.204(b). Finally, because the administrative law judge's relied upon his weighing of Dr. Kraynak's opinion under Section 718.204(c)(4) (2000) to find total disability due to pneumoconiosis established pursuant to Section 718.204(b) (2000), we must also vacate this finding. If the administrative law judge finds

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[6]The Director notes that Dr. Kraynak's April 1998 medical opinion was composed only one month after he first saw claimant and that Dr. Kraynak's "treating physician" status is based upon only three months of treating claimant.

[7]We decline to grant the Director's request that we reverse the award of benefits, inasmuch as the question of whether Dr. Kraynak's opinion is reasoned and documented is an issue that must be resolved by the administrative law judge in his role as fact-finder. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

total disability established, he must then reconsider whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the Decision and Order upon Remand and the award of benefits is vacated and the case remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge