BRB No. 01-0758 BLA

RONALD C. DONTON	)	
	)	
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 Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Timothy S. Williams (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: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2000-BLA-1000) of Administrative Law Judge Paul H. Teitler rendered 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] Claimant filed his application for benefits on October 12, 1999. Director's Exhibit 1. The District Director of the Office

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

of Workers' Compensation denied benefits and claimant requested a hearing, which was held on February 7, 2001.

In the ensuing Decision and Order Denying Benefits, the administrative law judge credited claimant with twenty-five years of coal mine employment pursuant to the parties' stipulation, and found that both the x-ray evidence and the medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge additionally found, however, that the relevant medical evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting into evidence a pulmonary function study review report submitted by the Director, Office of Workers' Compensation Programs (the Director), without determining whether good cause existed for the Director's failure to exchange the report with claimant at least twenty days before the hearing as required by 20 C.F.R. §725.456(b)(1),(2)(2000). Claimant alleges further that the administrative law judge erred in finding one of the four pulmonary function studies of record to be invalid. Additionally, claimant argues that the administrative law judge mischaracterized the three remaining pulmonary function studies, and erred in his analysis of the medical opinions relating to the presence of total disability. The Director responds, urging affirmance of the administrative law judge's ruling admitting the contested report into evidence and his finding that one of the pulmonary function studies was invalid. However, the Director contends that substantial evidence does not support the administrative law judge's analysis of the remaining evidence, and urges remand of the case for the administrative law judge to properly weigh the three remaining pulmonary function studies, and to then reweigh the medical opinions to determine whether claimant is totally disabled by a respiratory or pulmonary impairment. Claimant has filed a reply brief reiterating his contentions.[2]

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 law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] We affirm as unchallenged on appeal the administrative law judge's findings of twenty-five years of coal mine employment, that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that the presence of a totally disabling respiratory or pulmonary impairment was not established pursuant to 20 C.F.R. §718.204(c)(2), (3)(2000). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Initially, claimant contends that the administrative law judge erred by admitting into the record Dr. John Michos's review and invalidation of the November 16, 2000 pulmonary function study. Claimant notes that the Director failed to send Dr. Michos's report to claimant at least twenty days before the hearing, and asserts that the administrative law judge did not determine whether the Director demonstrated good cause for failing to timely exchange Dr. Michos's report before the administrative law judge admitted the report into the record.

Any evidence not submitted to the district director "may be received into evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(1)(2000). Evidence that was not sent to all parties at least twenty days before the hearing may nevertheless be admitted by the administrative law judge if the parties waive the twenty-day requirement, or "upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph." 20 C.F.R. §725.456(b)(2)(2000). We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(*en banc*).

The hearing in this case was scheduled for February 7, 2001. Thus, any evidence to be submitted had to be sent to all other parties by January 18th. Review of the record indicates that on January 17, 2001 the Director moved for an enlargement of time within which to submit Dr. Michos's report. The Director reported that he did not receive the November 16, 2000 pulmonary function study tracings from claimant until January 4, 2001. Director's Motion for Enlargement of Time at 1-2. The Director stated that he had immediately forwarded the tracings to Dr. Michos, but did not expect to receive Dr. Michos's report before the twenty-day deadline. *Id*. The Director further indicated that claimant had agreed to the enlargement of time, and that the Director would allow claimant additional time to rebut Dr. Michos's validation report. *Id*. Ultimately, Dr. Michos completed his report on January 24, 2001, and the Director both submitted it to the administrative law judge and sent a copy to claimant on January 25, 2001.

Review of the hearing transcript indicates that when claimant objected to Director's Exhibit 41, Dr. Michos's report, based on the twenty-day rule, counsel for the Director reminded the administrative law judge of the January 17, 2001 motion for enlargement of time. Tr. at 6. Thereupon, the administrative law judge admitted Dr. Michos's report into the record and ruled that claimant could submit post-hearing evidence in rebuttal. *Id*.

On these facts, we conclude that the administrative law judge satisfied his obligation to make a good cause determination under 20 C.F.R. §725.456(b)(2)(2000). *See Conn v. White Deer Coal Co*., 6 BLR 1-979, 1-982 (1984); *cf. Buttermore v. DuQuesne Light Co*., 8 BLR 1-36 (1985)(Smith, J.,

dissenting). We detect no abuse of discretion in the administrative law judge's implicit conclusion that good cause was shown under the circumstances, and we therefore hold that he did not err in admitting Dr. Michos's pulmonary function study review report into the record. *See Clark, supra*. In reaching this conclusion, we note that the administrative law judge held the record open for sixty days for claimant to submit post-hearing evidence in response to Dr. Michos's report. Tr. at 6, 25; *see* 20 C.F.R. §725.456(b)(3)(2000); *North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Baggett v. Island Creek Coal Co*., 6 BLR 1-1311, 1-1314 (1984). The administrative law judge admitted that post-hearing evidence into the record and considered it. Claimant's Exhibit 31. Therefore, we reject claimant's allegation of error and we affirm the administrative law judge's ruling admitting Dr. Michos's report into the record. Accordingly, we now turn to the administrative law judge's consideration of the medical evidence.

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).

Pursuant to Section 718.204(c)(1)(2000), the administrative law judge found that the four pulmonary function studies of record did not establish total disability. All four studies yielded qualifying[3] values, but the technical validity of all but one was questioned by physicians who reviewed the tracings. Director's Exhibits 11, 29, 39, 41; Claimant's Exhibits 8, 9, 21, 23, 27, 29-32, 34, 37, 38. Claimant contends that the administrative law judge erred in finding the November 16, 2000 pulmonary function study to be invalid. This argument lacks merit.

[3] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values. The December 8, 1999 study was qualifying prior to the administration of bronchodilator medication, but was non-qualifying post-bronchodilator. Director's Exhibit 10. The April 10, 2000 study was qualifying without bronchodilator medication and no post-bronchodilator testing was conducted. Claimant's Exhibit 7. Thereafter, the October 26, 2000 study was non-qualifying pre-bronchodilator and qualifying post-bronchodilator. Director's Exhibit 27. Finally, the November 16, 2000 study was qualifying without bronchodilator and no post-bronchodilator testing was conducted. Claimant's Exhibit 22.

Contrary to claimant's contention, the administrative law judge permissibly deferred to the consulting opinions of Dr. Michael Sherman and Dr. Michos that the study administered on November 16, 2000 was invalid because it did not conform to the applicable quality standards. Director's Exhibits 39, 41; *see* 20 C.F.R. §718.103(c)(2000); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). Drs. Sherman and Michos, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, concluded based on review of the tracings that the test was improperly administered and that claimant's effort was unacceptable. The administrative law judge considered Dr. Raymond Kraynak's disagreement with these invalidations, Decision and Order at 13; Claimant's Exhibits 29-31, but rationally deferred to Dr. Sherman's and Dr. Michos's conclusion based on their "superior credentials in the area of pulmonary disease. . . ."[4] Decision and Order at 13; *see Dillon v. Peabody Coal Co*., 11 BLR 1-113, 1-114 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985). Additionally, the administrative law judge considered the report of Dr. David Prince validating the November 16, 2000 pulmonary function study, but permissibly accorded it less weight because Dr. Prince merely checked a box indicating that the study was valid without "offer[ing] any explanation for his validation."[5] Decision and Order at 13; *see Clark*, 12 BLR at 1-155. Consequently, we hold that the administrative law judge permissibly found that the November 16, 2000 pulmonary function study was invalid.

However, both claimant and the Director correctly note that the administrative law judge mischaracterized the remaining studies in the record as non-qualifying. Because substantial evidence does not support the administrative law judge's finding that "[o]nly one of the four pulmonary function studies in the record produced qualifying values," Decision and Order at 13, we must vacate his finding pursuant to 20 C.F.R. §718.204(c)(1)(2000) and remand this case for him to reconsider the remaining pulmonary function studies of record.

In addition, review of the administrative law judge's Decision and Order reveals that his analysis of the medical opinion evidence was affected by his erroneous conclusion that the underlying pulmonary function studies were non-qualifying. Decision and Order at 14-16. Therefore, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(4)(2000) and instruct him to reweigh the medical opinions of Drs. Raymond Kraynak, Matthew Kraynak, and

---

[4] Review of the record indicates that Dr. Raymond Kraynak is Board-eligible in Family Practice. Claimant's Exhibit 18.

[5] Because the administrative law judge permissibly discounted Dr. Prince's report for this reason, his failure to consider that Dr. Prince is Board-certified in Pulmonary Disease constitutes harmless error. Decision and Order at 13 (noting only Board-certification in Internal Medicine); *see Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984).

Abdul Rashid, after he has reassessed the pulmonary function studies.

Further, there is merit in claimant's contention that the administrative law judge erred in discounting Dr. Raymond Kraynak's opinion that claimant is totally disabled because Dr. Kraynak did not indicate his awareness of claimant's usual coal mine work. In fact, Dr. Kraynak reviewed the exertional requirements of claimant's job as a foreman, concluded that the job involved "very arduous[,] heavy work," Claimant's Exhibit 23 at 7, and opined that severe ventilatory obstruction and restriction prevents claimant from performing that work. Director's Exhibit 13; Claimant's Exhibits 20, 23 at 13, 24, 36. Additionally, as claimant contends, the administrative law judge erred in discounting Dr. Matthew Kraynak's opinion that claimant is totally disabled, based on the irrelevant reason that Dr. Kraynak "fail[ed] to explain how Claimant's coal mine employment caused him to contract pneumoconiosis." Decision and Order at 15; *see* 20 C.F.R. §718.204(b)(i)(the issue at disability is whether "the miner has a pulmonary or respiratory impairment which . . . prevents . . . the miner" from performing his usual coal mine work). Finally, as the Director asserts, the fact that the administrative law judge discounted Dr. Rashid's conclusion that claimant does not have pneumoconiosis does not automatically render Dr. Rashid's opinion "moot," Decision and Order at 16, on the separate question of whether claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(i). Therefore, the administrative law judge should revisit these issues when he reweighs the medical opinions on remand.

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
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge