BRB No. 97-0934 BLA

NORMAN S. LUCAS	)	
	)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; 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, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (96-BLA-1404) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) 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). The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310,[1]

[1]Claimant filed his claim on May 1, 1980. Director's Exhibit 1. On April 23, 1985, Administrative Law Judge A.A. Simpson, Jr. issued a Decision and Order denying benefits. Director's Exhibit 45. Although Judge Simpson credited the miner with twenty-three years of coal mine employment and found the evidence sufficient to establish the existence of

and thus, he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.[2]

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pneumoconiosis arising out of coal mine employment, he nonetheless found the evidence insufficient to establish total disability. *Id*. The Board affirmed Judge Simpson's denial of benefits. *Lucas v. Director, OWCP*, BRB No. 85-1182 BLA (May 22, 1987)(unpub.). Further, the United States Court of Appeals for the Third Circuit affirmed the denial of benefits on January 28, 1988. Director's Exhibit 59. Claimant filed a request for modification on March 9, 1988. On November 6, 1989, Administrative Law Judge Thomas W. Murrett issued a Decision and Order denying benefits. Director's Exhibit 73. The basis of Judge Murrett's denial was claimant's failure to establish total disability. *Id*. Claimant again requested modification on October 5, 1990. Director's Exhibits 80, 85. On October 19, 1992, Administrative Law Judge Robert D. Kaplan issued a Decision and Order denying benefits, Director's Exhibit 111, which the Board affirmed in part and vacated in part. The Board remanded the case for further consideration of the evidence. *Lucas v. Director, OWCP*, BRB No. 93-0455 BLA (Nov. 30, 1994)(unpub.). On July 26, 1995, Judge Kaplan issued a Decision and Order on Remand denying benefits. Director's Exhibit 121. The basis of Judge Kaplan's denial was claimant's failure to establish total disability. *Id*. Claimant filed his most recent request for modification on October 2, 1995. Director's Exhibit 122.

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R.

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

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§718.204(c)(2) and (c)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). We disagree. Of the seven newly submitted pulmonary function studies of record, five studies yielded qualifying[3] values, Director's Exhibits 126, 127, 130, 136, 137; Claimant's Exhibit 2, and two studies yielded non-qualifying values, Director's Exhibits 124, 135. The administrative law judge properly discredited the qualifying studies because they are inconsistent with the contemporaneous non-qualifying September 5, 1996 study.[4] *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994). Thus, we reject claimant's argument that the administrative law judge erred by discrediting the qualifying pulmonary function studies of record.[5] Claimant argues that the

[3]A "qualifying" pulmonary function 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, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

[4]The administrative law judge stated "that the qualifying studies are not a valid indicator of Claimant's pulmonary condition in light of the fact that Claimant achieved much higher values in the September 5, 1996 study." Decision and Order at 5.

[5]Claimant asserts that the administrative law judge erred by discrediting the qualifying pulmonary function studies dated September 5, 1995, December 18, 1995, June 26, 1996 and October 31, 1996 based on the invalidation reports of Drs. Levinson and Sahillioglu. Contrary to claimant's assertion, the administrative law judge did not discredit these studies based on the invalidation reports of Drs. Levinson and Sahillioglu. Rather, the administrative law judge properly discredited these qualifying studies because they are inconsistent with the non-qualifying September 5, 1996 study. *See* Decision and Order at 5-6; *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1994).

September 5, 1996 pulmonary function study does not comply with the quality standards at 20 C.F.R. §718.103 because the requisite number of tracings for the MVV maneuvers were not performed. Contrary to claimant's argument, the September 5, 1996 pulmonary function study complies with the quality standards because it records the FEV1 and FVC values. *See* 20 C.F.R. §718.103(a). The regulations require an FEV1 value and an FVC **or** MVV value. *Id*. (emphasis added). Therefore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), as supported by substantial evidence.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We disagree. Whereas Dr. Rashid opined that claimant does not suffer from a pulmonary impairment, Director's Exhibit 135, Drs. Kraynak and Kruk opined that claimant is totally disabled,[6] Claimant's Exhibits 1, 6. The administrative law judge properly accorded determinative weight to the opinion of Dr. Rashid over the contrary opinion of Dr. Kraynak because he found Dr. Rashid's opinion to be better reasoned and documented.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).[8] In addition, the administrative law judge properly discounted the opinions of Drs. Kraynak and Kruk because they are based on pulmonary function studies that he discredited. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Baker*, *supra*. Thus, we reject claimant's argument that the administrative law judge erred by discrediting the opinions of Drs. Kraynak and Kruk. Claimant also argues that the administrative law judge should have accorded determinative weight to Dr. Kraynak's opinion because he is a treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v.*

[6]The administrative law judge stated that "[t]he current record contains no explicit opinion by Dr. Tavaria regarding whether Claimant is totally disabled." Decision and Order at 6.

[7]The administrative law judge stated "that Dr. Rashid's opinion is reasoned and documented based on his normal laboratory studies." Decision and Order at 7. However, the administrative law judge stated that "Dr. Kraynak offered no cogent reason why he apparently wholly discounted the normal ventilatory study performed on September 5, 1996." *Id*.

[8]Claimant argues that the administrative law judge erred by relying on the medical opinion of Dr. Rashid because Dr. Rashid's opinion is based on the mistaken premise that claimant does not suffer from pneumoconiosis. However, since a diagnosis with respect to pneumoconiosis does not go to the issue of disability, we reject claimant's argument that the administrative law judge erred by relying on Dr. Rashid's medical opinion. *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J, concurring and dissenting); *see also York v. Director, OWCP*, 7 BLR 1-641 (1985); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983).

Director, OWCP, 14 BLR 1-2 (1989), he is not required to do so, *see Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Therefore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Moreover, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310.[9]

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

SO ORDERED.

[9]The administrative law judge stated that "Claimant has waived any contention that there was a mistake in a determination of fact in the prior denial of the claim." Decision and Order at 4. As noted by the administrative law judge, the record contains a letter dated March 19, 1997 by claimant's counsel which advises the administrative law judge that claimant was not alleging a mistake in a determination of fact in the prior denial. *Id.* at 2 n.1; *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

I concur in the result only:

REGINA C. McGRANERY
Administrative Appeals Judge