BRB No. 98-1619 BLA

LEO V. VIOLA, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (92-BLA-1733) of Administrative Law Judge Clement J. Kichuk on a claim[1] 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). This case is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Frank D. Marden properly adjudicated this claim pursuant to 20 C.F.R. Part 718 and credited the parties' stipulation that claimant worked in qualifying coal mine employment for thirteen years. Administrative Law Judge

[1] Claimant, Leo V. Viola, Sr. filed his application for benefits on December 20, 1991. Director's Exhibit 1.

Marden then determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and accordingly, denied benefits. Claimant appealed and the Board affirmed Administrative Law Judge Marden's findings under 20 C.F.R. §718.202(a)(2)-(4), but vacated his determination under 20 C.F.R. §718.202(a)(1) and remanded the case for further consideration. *Viola v. Director, OWCP*, BRB No. 94-0173 BLA (Sep. 28, 1995)(unpub.).

On remand, Administrative Law Judge Marden again found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and hence, denied benefits. Claimant timely appealed to the Board and the Director, Office of Workers' Compensation Programs (the Director), subsequently filed a Motion to Remand conceding the existence of pneumoconiosis. In light of the Director's Motion to Remand, the Board remanded the case to the administrative law judge for him to determine the applicability of the concession to the relevant evidence in the case, and if necessary, to render findings regarding the other elements of entitlement. *Viola v. Director, OWCP*, BRB No. 96-1795 BLA (Jul. 22, 1997)(unpub.). Consequently, claimant filed a Motion for Reconsideration, requesting that the administrative law judge be precluded from revisiting the issue of pneumoconiosis, given the Director's concession. The Board, however, summarily denied claimant's motion. *Viola v. Director, OWCP*, BRB No. 96-1795 BLA (Oct. 3, 1997)(unpub. Order).

On remand, the case was reassigned without objection to Administrative Law Judge Clement J. Kichuk (administrative law judge), who found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), but failed to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant contests the administrative law judge's failure to find total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). The Director responds, urging affirmance of the denial of benefits.[2]

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,

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[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(c)(2), (c)(3) inasmuch as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 6-8.

and are consistent with the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to Section 718.204(c)(1), claimant argues that the administrative law judge erred by failing to consider Dr. Kraynak's consulting report validating the qualifying pulmonary function study[3] administered on April 12, 1993.[4] The Director responds, arguing that the administrative law judge's error has no prejudicial effect because it is reasonable to assume that the administrative law judge would have credited Dr. Sahillioglu's consulting opinion over that of Dr. Kraynak's inasmuch as Dr. Kraynak lacks demonstrated pulmonary expertise.[5] Claimant's argument is meritorious. After noting Dr. Sahillioglu's opinion that the April 1993 "vents were not acceptable" due to "less than optimal effort, cooperation, comprehension, [and] hesitancy," the administrative law judge discredited this qualifying pulmonary function study because the opinion of Dr. Sahillioglu, who is Board-eligible in internal medicine and pulmonary diseases, outweighed that of the administering technician, whose assessment of claimant's cooperation and comprehension was "fair." Decision and Order on Remand at 8; Director's Exhibit 28. The administrative law judge, however, failed to consider Dr. Kraynak's consulting report when determining the probative value of the April 1993 test. Claimant's Exhibit 9. Inasmuch as the Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence when making findings of fact and conclusions of law, *see* 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne*

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[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 yields values that exceed those values. 20 C.F.R. §718.204(c)(1).

[4] Claimant does not challenge the administrative law judge's failure to consider the pulmonary function study dated March 19, 1992 because this study yielded non-qualifying values and was invalidated by the administering physician, Dr. Cable, and consulting physician, Dr. Kraynak. *See* 20 C.F.R. Part 718, Appendix B; Claimant's Brief at 6-7; Director's Exhibit 12; Claimant's Exhibit 6 at 11. In addition, claimant does not contest the administrative law judge's rejection of the qualifying pulmonary function study taken on March 18, 1993 because the administering physician, Dr. Ahluwalia, found the test results to be uninterpretable and therefore, not valid. Claimant's Brief at 9-10; Director's Exhibit 26.

[5] The Director bases this argument on the fact that the administrative law judge credited Dr. Spagnolo's consulting opinion regarding the pulmonary function study dated February 10, 1993, over the consulting opinion of Dr. Kraynak because Dr. Spagnolo has superior pulmonary expertise.

Light Co., 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), we vacate the administrative law judge's finding under Section 718.204(c)(1) and remand the case for him to reconsider and reweigh all of the pulmonary function study evidence, in accordance with *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 Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23 (1993).[6]

Claimant contends further that the administrative law judge erroneously found that Dr. Spagnolo invalidated the entire pulmonary function study taken on February 10, 1993 when Dr. Spagnolo invalidated only the FVC values of this test. We disagree. Even though Dr. Spagnolo explained that there was "excessive variation in FVC values between trials," he also indicated that the "vents are not acceptable," which demonstrates that the "test does not meet the technical quality standards applicable at the time the evidence was submitted." Director's Exhibit 25; *see* 20 C.F.R. §718.103. Accordingly, we reject claimant's argument.

Relevant to Section 718.204(c)(4), claimant argues that the administrative law judge impermissibly accorded determinative weight to Dr. Ahluwalia's opinion that claimant "probably [has] no impairment" because Dr. Ahluwalia relied upon an "uninterpretable" pulmonary function study and his opinion was supported by that of Dr. Cable, whose opinion the administrative law judge found to be "unreliable." Decision and Order on Remand at 9; Director's Exhibits 13, 26. We agree. The administrative law judge stated, "Dr. Ahluwalia ... wrote that the Claimant probably has [an] impairment but he did not offer a definitive opinion because the pulmonary function studies were 'uninterpretible' [sic] due to poor patient effort. Dr. Ahluwalia's opinion is well documented and well reasoned." Decision

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[6] Claimant argues additionally that the administrative law judge, on remand, should be precluded from finding that Dr. Sahillioglu has superior medical expertise to Dr. Kraynak inasmuch as Dr. Sahillioglu's Board-eligibility in internal and pulmonary medicine carries no more distinction that Dr. Kraynak's Board-eligibility in family medicine. Inasmuch as this is a credibility determination within the discretion of the administrative law judge, we reject claimant's argument. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984).

and Order on Remand at 9. However, because Dr. Ahluwalia based his opinion upon "uninterpretable" objective test studies, and does not provide any additional explanation or discussion for his conclusion that claimant "probably [has] no impairment," we cannot affirm the administrative law judge's finding that this physician's opinion is "well documented and well reasoned." *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984). Furthermore, the administrative law judge's crediting of Dr. Ahluwalia's opinion because it was supported by Dr. Cable's opinion, that claimant has "no impairment for [his] age," is unreasonable inasmuch as the administrative law judge previously rejected Dr. Cable's opinion in his total disability analysis. Decision and Order on Remand at 9; Director's Exhibit 13. Inasmuch as a review of the record reveals that the administrative law judge's weighing of the evidence and the relative credibility of his determinations are unsupported by the evidence relevant to the issue of total disability, we vacate the administrative law judge's Section 718.204(c)(4) determination, *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Szafraniec v. Director, OWCP*, 7 BLR 1-397, 1-400 (1984), and remand this case for reconsideration of the evidence thereunder.

Claimant additionally challenges the administrative law judge's rejection of Dr. Kraynak's opinion that claimant is unable to return to this usual coal mine work due to his coal workers' pneumoconiosis, averring that the administrative law judge engaged in a selective analysis of this physician's opinion. Claimant's Exhibits 3, 6. Specifically, claimant asserts that the administrative law judge erroneously discredited Dr. Kraynak's opinion because the physician relied upon an invalidated pulmonary function study and a physical examination that did not support his opinion. Claimant's contentions have merit. The administrative law judge accorded "no weight" to the opinion of Dr. Kraynak because Dr. Kraynak relied on an invalidated pulmonary function study, diagnosed unsupported physical examination findings, and failed to describe other medical evidence demonstrating total disability. Decision and Order on Remand at 8. Although the administrative law judge correctly found that Dr. Kraynak relied, *inter alia*, upon an invalidated pulmonary function test, the administrative law judge improperly substituted his expertise for that of Dr. Kraynak by determining that Dr. Kraynak's physical examination findings of "slightly cyanotic lips, mild increases in anterior-posterior diameters of the lungs, and scattered wheezes" did not support the doctor's conclusion. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986)(administrative law judge may not substitute his own judgment for that of physician and is not free to set his own expertise against that of physician who presents competent evidence); Claimant's Exhibits 3. 6. Inasmuch as we vacate the administrative law judge's Section 718.204(c)(4) determination, the administrative law judge must also reconsider Dr. Kraynak's total disability assessment contained in his report and deposition testimony. Claimant's Exhibits 3, 6.

Claimant asserts that the administrative law judge irrationally rejected the opinion of Dr. DiNicola, claimant's treating physician for more than thirty years, because it contained insufficient objective evidence inasmuch as Dr. DiNicola relied on claimant's medical history, symptomatology, and physical examination. A review of Dr. DiNicola's opinion reveals that it is based upon claimant's medical and work histories, symptomatology, chest x-ray, and physical examination; however, it lacks evidence of any diagnostic tests or clinical studies that would demonstrate whether claimant suffers from a totally disabling respiratory or pulmonary impairment. Claimant's Exhibit 6. The administrative law judge, after discussing Dr. DiNicola's findings on physical examination of claimant, determined that Dr. DiNicola's finding of total disability was not well reasoned and not supported by the physician's findings. Hence, the administrative law judge, within a proper exercise of discretion, found Dr. DiNicola's opinion, that claimant is totally and permanently disabled, unreliable and entitled to "no determinative weight." Decision and Order at 9. Although as claimant contends Dr. DiNicola's opinion may be sufficiently documented, *see Fuller v. Gibraltar Coal Corp.*, 7 BLR 1-1291 (1984), the administrative law judge permissibly found that it was not reasoned. *See* 20 C.F.R. §718.204(c)(4); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987)(20 C.F.R. §718.204(c)(4) requires medical report to be both appropriately documented and reasoned); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Peskie v. U.S. Steel Corp.*, 8 BLR 1-126 (1985); *Fuller*, *supra*. We, therefore, reject claimant's argument. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Consequently we vacate the administrative law judge's determination that claimant failed to demonstrate total disability under Section 718.204(c)(1) and (c)(4), and remand the case for the administrative law judge to reconsider all relevant evidence of record. If, on remand, the administrative law judge finds that claimant affirmatively established total disability under either subsection, he must then determine whether the contrary, probative evidence, if any, outweighs the evidence supportive of a finding of total respiratory disability. *See Fields*, *supra*; *Shedlock*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987), and then, render findings under Section 718.204(b), if reached.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge