BRB No. 99-0151 BLA

JOHN POLCOVICH	)	
	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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 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 (97-BLA-1199) of Administrative Law Judge Ainsworth H. Brown 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). In his Decision and Order, the administrative law judge determined that the evidence of record supported claimant's allegation of thirty-eight years of coal mine employment. Based on the filing date of September 18, 1996, the administrative law judge adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to demonstrate the presence of a totally disabling

respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge at Section 718.204(c)(1) and (c)(4) and alleges that the administrative law judge failed to make proper findings of fact at 20 C.F.R. §§718.202(a) and 718.203(b) and on the length of coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), responds asking for remand on the issue of total disability.[1] In a reply brief, claimant agrees with the Director that the administrative law judge credited claimant with thirty-eight years of coal mine employment.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, claimant contends that the administrative law judge failed to make specific findings on the length of coal mine employment and asks for remand to the administrative law judge to make a finding on the years of coal mine employment. The Director responds, arguing that claimant's contention is without merit as the administrative law judge noted that claimant alleged thirty-eight years of coal mine employment, and then found this allegation supported by the documentary and testimonial evidence of record. Thus, the Director contends that the administrative law judge found thirty-eight years of coal mine employment, a finding that he does not challenge. In her reply brief, claimant agrees with the Director's contention. We agree with the parties that the inference to be drawn from the findings of the administrative law judge is that he credited claimant with thirty-eight years of coal mine employment, *see* Decision and Order at 2, and as that finding is unchallenged

[1]We affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c)(2), and (3), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Claimant correctly argues that the administrative law judge made no findings of fact on the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203(b). In his response brief, the Director concedes that claimant established the existence of pneumoconiosis by x-ray at Section 718.202(a)(1) and that claimant's pneumoconiosis arose out of his coal mine employment at Section 718.203(b). In light of the Director's concession, we hold that claimant has established the existence of pneumoconiosis arising out of his coal mine employment at Sections 718.202(a)(1) and 718.203(b). *See* 20 C.F.R. §§718.202(a)(1), 718.203(b); *see generally Pendley v. Director, OWCP,* 13 BLR1-23 (1989)(*en banc*).

At Section 718.204(c)(1), claimant and the Director argue that the administrative law judge erred when he found the qualifying pulmonary function study administered by Dr. Kraynak on February 17, 1998 invalid because an earlier pulmonary function study was invalidated.[2] The Director further states that since the record contains no evidence which supports the administrative law judge's conclusion that the pulmonary function study performed on February 17, 1998 is invalid, this test must be accepted as credible. We agree that the administrative law judge erred in finding the February 17, 1998, pulmonary function study invalid because an earlier pulmonary function study was found to be invalid. *See* Decision and Order at 4, *see generally Greer v. OWCP,* 940 F.3d 88, 15 BLR 2-167 (4th Cir. 1991).

Claimant next argues that the administrative law judge erred when he rejected the July 9, 1997 and October 28, 1997 pulmonary function studies administered by Dr. Kraynak on the basis of Dr. Spagnolo's invalidation of the FVC maneuvers only. The Director agrees that the administrative law judge erred in rejecting these tests, stating these tests must be considered qualifying and conforming because the FEV1 and MVV maneuvers were not invalidated by Dr. Spagnolo, the reviewing physician, and the FEV1 and MVV values are qualifying under the regulatory criteria pursuant to 20 C.F.R. §718.204(c)(1), Appendix B. In light of the Director's concession we hold that the qualifying pulmonary function studies performed on July 9, 1997, and

[2]The record contains five qualifying pulmonary function studies and one non-qualifying pulmonary function study. Claimant Exhibits 6, 9, 15, 19; Director's Exhibits 13, 27.

October 28, 1997,
are valid under the regulatory criteria, and are, thus, credible evidence. *See* 20 C.F.R. §718.204(c)(1), Appendix B.

Claimant also argues that the administrative law judge erred in his treatment of the nonqualifying pulmonary function study administered by Dr. Green on August 29, 1997, as the basis for determining the validity and reliability of the other pulmonary function studies of record. Claimant asserts that by so doing, the administrative law judge placed on him an inconsistent burden of proof and standard of review. In discussing the August 29, 1997 pulmonary function study, the administrative law judge stated that:

> The Claimant provided an invalidation opinion by Dr. Strimlan, a well qualified expert respecting Dr. Green's testing. Dr. Green concluded that the testing was compromised by suboptimal effort. The claimant maintains a semantic argument about the distinction between fair effort and suboptimal as variously stated by Dr. Green. I do not find that there is any significance to the contention as Dr. Green employed language that means about the same thing. While Dr. Stirmlan's invalidation is probably accurate, the claimant fails to tell me why the studies may not be used as an index of his pulmonary capacity as the highest values he was able to produce over the nearly year and half that is involved in the seven test procedures. The Benefits Review Board has held just because a test is invalid does not mean that it can not be utilized by a physician. Since the test is effort dependent it is eminently plausible to look at the highest values especially in view of the conflicting views on validity within the context of values that ebb and flow.

Decision and Order at 5. We agree that the administrative law judge did not provide a sufficient basis for his finding that the higher test results achieved in Dr. Green's testing were inherently more reliable than lower test results. *See Greer, supra*. We therefore vacate the administrative law judge's finding at Section 718.204(c)(2) and remand the case for reconsideration of the pulmonary function study evidence.

At Section 718.204(c)(4), claimant argues that the administrative law judge provided an inadequate explanation for his treatment of the medical opinions of record and requests remand. The Director agrees that the case must be remanded

to the administrative law judge for reconsideration of the medical opinions under Section 718.204(c)(4). The Director contends that before the administrative law judge credits the medical opinion evidence, on remand the administrative law judge must determine the exertional requirements of claimant's usual coal mine employment. We agree that the administrative law judge must reconsider the medical opinion evidence at Section 718.204(c)(4).

In finding that claimant failed to establish total disability under Section 718.204(c)(4), the administrative law judge stated that:

> As the present record is constructed the more credible conclusions as to the extent of any respiratory impairment belongs to Dr. Green. Dr. Kraynak not only relied on dubious ventilatory testing; but also though that there was physical examination findings indicative of respiratory disease that was not confirmed by Dr. Green's findings.

Decision and Order at 6.

As the Director has conceded that the July 9, 1997, October 28, 1997 and February 17, 1998 pulmonary function studies performed by Dr. Kraynak are valid, qualifying and conforming tests, the administrative law judge must reconsider the medical opinions of Drs. Kraynak and Green in light of this concession. *See Lucostic v. United States Steel Corp.*, 8 BLR 1- 46 (1985). Furthermore, before he credits the medical opinions of Dr. Green or Dr. Kraynak, the administrative law judge must determine the exertional requirements of claimant's usual coal mine employment, and then compare the physicians' impairment findings or assessment of physical abilities with the physical requirements of claimant's usual coal mine duties to determine if claimant's respiratory or pulmonary impairment prevents him from performing his usual coal mine employment. *See Collins v. J & L Steel*, BRB No. 97-1356 BLA (July 26, 1999)(pub.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, vacate the findings of the administrative law judge at Section 718.204(c)(4) and remand this case for further consideration.[3]

[3]We note that the Director, Office of Workers' Compensation Programs, argues that if the administrative law judge finds the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment on remand, he must award benefits as the record does not contain any evidence which contradicts the conclusion of Dr. Kraynak that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.204(b).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, reversed in part, vacated in part and this case is remanded to the administrative law judge for further consideration 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