BRB No. 01-0609 BLA

ALFRED W. WRIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KITCHEKAN FUEL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Alfred W. Wright, Rock, West Virginia, *pro se*.[1]

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge John C. Holmes. In a letter dated May 4, 2001, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0595) of Administrative Law Judge John C. Holmes (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 credited claimant with twenty-one years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Further, the administrative law judge found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000),[3] and thus, he denied benefits.[4] On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response to claimant's appeal.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v.*

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[2]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.

[3]The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

[4]Claimant filed a claim for benefits on May 7, 1992. Director's Exhibit 1. On July 27, 1995, Administrative Law Judge Reno E. Bonfanti issued a Decision and Order denying benefits, Director's Exhibit 37, which the Board affirmed, *Wright v. Kitchekan Fuel Corp.*, BRB No. 95-2137 BLA (June 21, 1996)(unpub.). Judge Bonfanti's denial was based upon claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibit 37. On June 6, 1997, claimant filed a request for modification. Director's Exhibit 52.

[5]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), which are not adverse to this *pro se* claimant, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Director, OWCP, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

In the previous decision denying benefits, Administrative Law Judge Reno E. Bonfanti found the evidence insufficient to establish total disability due to pneumoconiosis. Director's Exhibit 37. On modification,[6] the administrative law judge considered the newly submitted medical evidence along with the previously submitted medical evidence of record, and found the evidence insufficient to establish total disability and total disability due to pneumoconiosis.[7] In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by *wholly new evidence*, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993).

[6]The pertinent regulation provides that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a) (2000).

[7]The administrative law judge stated, "[b]ecause this is a *de novo* review of the totality of the record under a mistake of fact analysis, I am not bound by the determinations of Judge Bonfanti." Decision and Order at 6.

The administrative law judge found the evidence insufficient to establish total disability. With respect to 20 C.F.R. §718.204(b)(2)(i), the record consists of five pulmonary function studies. The studies dated September 14, 1994, June 6, 1997 and July 14, 1999 yielded qualifying values,[8] Director's Exhibits 32, 52, 77, and the studies dated May 21, 1985 and June 17, 1992 yielded non-qualifying values, Director's Exhibits 6, 35. The administrative law judge stated that "[t]he three most recent PFTs did produce qualifying values, but the last two [studies dated June 6, 1997 and July 14, 1999] are invalid because of a poor effort by the [c]laimant."[9] Decision and Order at 8. The administrative law judge also indicated that Dr. Hippensteel noted poor effort by claimant in the study he administered on September 14, 1994. Further, the administrative law judge indicated that Dr. Hippensteel noted that the study he administered on September 14, 1994 differed markedly from the study Dr. Vasudevan administered on June 17, 1992. The administrative law judge concluded that "[t]hese circumstances, combined with the invalidation of the latest PFTs, causes me to question the reliability of all the most recent PFT results, which are the only tests showing any impairment." *Id*. However, an administrative law judge is required to provide a rationale for preferring the opinion of a consulting physician over that of an administering physician. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Here, the administrative law judge did not provide a reason for according determinative weight to Dr. Gaziano's opinion that the June 6, 1997 and July 14, 1999 studies are invalid. Thus, we remand the case to the administrative law judge for further consideration of the evidence at 20 C.F.R. §718.204(b)(2)(i). *See Brinkley*, *supra*; *Siegel*, *supra*.

Next, since none of the arterial blood gas studies of record yielded qualifying values, Director's Exhibits 8, 32, 52, total disability at 20 C.F.R. §718.204(b)(2)(ii) is not

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[8]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(b)(2)(i).

[9]Dr. Gaziano opined that the pulmonary function studies dated June 6, 1997 and July 14, 1999 are invalid because of less than optimal effort, cooperation and comprehension. Director's Exhibits 58, 77. However, the comments in the June 6, 1997 pulmonary function study administered by Dr. Cardona indicate that claimant's cooperation and effort were good. Director's Exhibit 52. In addition, the comments in the July 14, 1999 pulmonary function indicate that claimant's cooperation and effort were good. Director's Exhibit 77. The record indicates that this comment was made by a registered nurse, D. Coleman, RN. *Id*. The record also indicates that someone else provided another comment in the 1999 study, finding that the test is reproducible and that he or she agrees that the test indicates moderate restriction. *Id*. The signature of the person who provided this comment is illegible. *Id*.

established. In addition, since there is no evidence of cor pulmonale with right sided congestive heart failure, total disability at 20 C.F.R. §718.204(b)(2)(iii) is not established.

Further, in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of the West Virginia Occupational Pneumoconiosis Board and Drs. Cardona, Hippensteel, Rana and Vasudevan. The administrative law judge stated that "[o]f all these physicians, only Dr. Hippensteel approaches a finding that the [c]laimant was totally disabled by his pulmonary impairment." Decision and Order at 7. Whereas Dr. Hippensteel opined that claimant suffers from a pulmonary impairment that would keep him from climbing a lot of stairs on a regular basis or from doing heavy manual labor, Director's Exhibit 32, Dr. Vasudevan opined that claimant does not suffer from a pulmonary impairment, Director's Exhibit 7. Similarly, the West Virginia Occupational Pneumoconiosis Board opined that claimant does not suffer from a pulmonary impairment.[10] Director's Exhibit 3. Dr. Cardona opined that claimant suffers from a moderate (40%) impairment. Director's Exhibit 50. Dr. Rana diagnosed chronic obstructive pulmonary disease, black lung and arthritis, and opined that claimant is disabled. Director's Exhibit 52. The administrative law judge permissibly discredited Dr. Rana's opinion because it is not reasoned.[11] *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The administrative law judge also discredited Dr. Hippensteel's opinion because it is based upon an unreliable pulmonary function study.[12] As previously noted, the administrative law judge found that the three most recent pulmonary function studies dated September 14, 1994, June 6, 1997 and July 14, 1999 yielded qualifying values. Nonetheless, the administrative law judge found that "the last two [studies] are invalid based on poor effort by the [c]laimant." Decision and Order at 8. Further, the administrative law judge stated that "[t]he September 14, 1994 test [administered by Dr. Hippensteel]...noted a poor effort in some respects." *Id*. The administrative law judge also stated that "Dr. Hippensteel noted that

[10]Based upon the West Virginia Occupational Pneumoconiosis Board's opinion, which was signed by Drs. Walker, Revercomb and Kugel, the West Virginia Workers' Compensation Fund granted claimant a 5% award. Director's Exhibit 3.

[11]The administrative law judge stated that "[Dr. Rana's] opinion...contains no reasoning, and cannot be afforded weight as a medical opinion under the Act." Decision and Order at 7.

[12]The administrative law judge stated, "Dr. Hippensteel based his opinion upon data that I find is not entirely trustworthy." Decision and Order at 7.

his test differed markedly from that of Dr. Vasudevan, who noted reversibility." *Id*. Hence, the administrative law judge stated that "[t]hese circumstances, combined with the invalidation of the latest PFTs, causes me to question the reliability of all the most recent PFT results he considered." *Id*. The administrative law judge therefore stated, "I cannot fully credit Dr. Hippensteel's conclusions, as there is evidence that the test results he relied upon may not be accurate."[13] *Id*. However, the administrative law judge did not render an unequivocal finding that the results of the September 14, 1994 pulmonary function study are inaccurate. As previously noted, the administrative law judge did not provide a rationale for preferring the opinion of Dr. Gaziano, a consulting physician, over that of the physicians who administered the June 6, 1997 and July 14, 1999 studies. *See Brinkley, supra*; *Siegel, supra*.

[13]The administrative law judge stated, "I wish to stress that it is solely the fact that there are doubts about the tests performed by Dr. Hippensteel which causes me to ascribe his opinion less weight." Decision and Order at 8. The administrative law judge further stated, "[i]f I could accept that the tests he performed are fully valid, I would place great reliance upon his opinion." *Id*.

Additionally, the record does not contain a consulting physician's opinion that the September 14, 1994 study is invalid. Although Dr. Hippensteel noted a poor effort by claimant with respect to the vital capacity in the September 14, 1994 study he administered, Dr. Hippensteel nevertheless relied upon this study.[14] Since the administrative law judge did not adequately explain why he found that Dr. Hippensteel's opinion is based upon an unreliable pulmonary function study, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On remand, the administrative law judge must consider whether Dr. Cardona's opinion is sufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). As previously noted, Dr. Cardona opined that claimant suffers from a moderate (40%) impairment. Director's Exhibit 50. The administrative law judge found that Dr. Cardona did not "relate[] his finding to the [c]laimant's ability to perform his last coal mine work, which I find, based upon the testimony of the [c]laimant, was as a Central Control Operator." Decision and Order at 7. The administrative law judge further stated that "[t]his required him to climb steps and occasionally carry varying amounts of weight." *Id*. However, there is no specific indication that the administrative law judge compared Dr. Cardona's opinion with the exertional requirements of claimant's usual coal mine employment. An administrative law judge must determine the exertional requirements of a miner's usual coal mine work, and compare those requirements with the doctor's opinions regarding the degree of the miner's disability and/or inability to perform usual coal mine work. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash, supra*; *Keen v. Laurel Creek Coal Co.*, 7 BLR 1-498 (1984). The opinion of Dr. Cardona may, if credited, and when compared with the exertional requirements of claimant's usual coal mine employment, support a finding of total disability. *See Budash, supra*; *cf. Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

In addition, on remand, the administrative law judge must consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R.

[14]In a report dated September 14, 1994, Dr. Hippensteel stated that "[claimant's] lung volumes showed a very poor effort regarding vital capacity but if his vital capacity from the better spirometry were used, then his total lung capacity would be normal at 84% predicted." Director's Exhibit 32.

§718.204(b)(2), if reached. *See Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

Finally, we address the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge stated that "the [c]laimant presented no additional evidence to refute Judge Bonfanti's finding as affirmed by the BRB, that no tie between that disability and pneumoconiosis has been shown." Decision and Order at 8. The administrative law judge also stated, "I would find that the [c]laimant has failed to establish by a preponderance of the evidence that his pulmonary impairment is related to his pneumoconiosis in any way, even if I were to accept that Dr. Hippensteel's objective testing was valid." *Id*. at 9. Dr. Hippensteel opined that claimant's pulmonary impairment is not due to coal workers' pneumoconiosis. Director's Exhibit 32. The administrative law judge, however, did not consider whether Dr. Cardona's opinion is sufficient to establish total disability due to pneumoconiosis. Director's Exhibit 50. As previously noted, Dr. Cardona's opinion that claimant suffers from a moderate impairment may support a finding of total disability. *See Budash, supra*. Dr. Cardona opined that claimant's moderate impairment is due to occupational pneumoconiosis. Director's Exhibit 50. Thus, we vacate the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the relevant evidence.[15] *See* 20 C.F.R. §718.204(c).[16]

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[15]The relevant disability causation evidence consists of the opinions of Drs. Cardona, Hippensteel and Rana. Whereas Dr. Hippensteel opined that claimant's pulmonary impairment is not due to coal workers' pneumoconiosis, Director's Exhibit 32, Dr. Cardona opined that claimant's moderate impairment is due to occupational pneumoconiosis, Director's Exhibit 50. Although Dr. Rana opined that claimant suffers from black lung disease and is disabled, Dr. Rana did not specifically indicate that claimant's disability is due to black lung disease. Director's Exhibit 52. Dr. Rana also diagnosed arthritis and back pain. *Id*. Nonetheless, the administrative law judge permissibly discredited Dr. Rana's opinion with respect to total disability because it is not reasoned. *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[16]The revised regulation at 20 C.F.R. §718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's

disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

In view of our disposition of the case at 20 C.F.R. §§718.204(b)(2) and 718.204(c), we vacate the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), and remand the case for further consideration of the evidence. *See Jessee*, *supra*.

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 proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge