BRB No. 07-0130 BLA

R.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/30/2007
	)	
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
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 Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Before: SMITH, HALL, and BOGGS, Administrative Appeal Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5125) of Administrative Law Judge Robert D. Kaplan, 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). Claimant filed an application for benefits on October 13, 2004. Director's Exhibit 2. The administrative law judge accepted the parties' stipulation to 27.77 years of coal mine employment, and considered the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and that the evidence of record, as a whole, supported a finding of pneumoconiosis. The administrative law judge also determined that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203, that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found, however, that claimant did not prove that he is totally disabled by a respiratory or

pulmonary impairment under 20 C.F.R. §718.204(b)(2). Based upon this finding, the administrative law judge found that claimant could not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the medical opinion evidence relevant to Section 718.204(b)(2)(iv). Claimant also maintains that because the administrative law judge erred in finding that claimant did not establish total disability under Section 718.204(b)(2), his finding that claimant could not prove that he is totally disabled due to pneumoconiosis under Section 718.204(c) must also be vacated. Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond, unless specifically requested to do so.[1]

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 applicable 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, 363 (1965).

The evidence considered by the administrative law judge pursuant to Section 718.204(b)(iv) consists of the medical opinions of Drs. Dittman, Kraynak, and Stelmach. Dr. Dittman, who is Board-certified in internal medicine, examined claimant on March 24, 2005. Employer's Exhibit 4. From his physical examination and a review of claimant's medical records, Dr. Dittman concluded there was no evidence of pulmonary disease, other than an x-ray finding of possible chronic obstructive pulmonary disease (COPD), consistent with claimant's smoking history of forty-five pack years. Claimant's Exhibit 5 at 16-17. Dr. Dittman indicated that the non-qualifying pulmonary function study (PFS) that he obtained was not valid, due to claimant's lack of effort, and opined that claimant's non-qualifying resting and exercise blood gas study (BGS) values showed no evidence of impairment. Employer's Exhibits 2, 4, 5 at 22.

Dr. Kraynak is Board-eligible in family medicine, and has treated claimant since 1988. Claimant's Exhibit 6. Dr. Kraynak noted that claimant first complained of shortness of breath and a cough in an October 2005 office visit, and again, when visiting his office in December 2005. *Id*. at 10. Dr. Kraynak obtained a non-qualifying PFS,

[1] The parties do not challenge the administrative law judge's finding that the evidence was not sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(3), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). These findings are, therefore, affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

which he described as revealing a severe restrictive defect. Dr. Kraynak opined that claimant is totally and permanently disabled due to pneumoconiosis. Claimant's Exhibit 6 at 17. Dr. Kraynak discussed the non-qualifying arterial blood gas studies of record and stated that the minimal exercise induced during testing was not comparable to the heavy exertional requirements of claimant's usual coal mine employment as a greaser and laborer on a shovel.[2] Claimant's Exhibit 6 at 14. Dr. Kraynak further explained that pulmonary function and arterial blood gas studies measure different aspects of lung function, as pulmonary function testing measures an individual's ability to move air in and out of the lungs, while arterial blood gas testing measures an individual's ability to oxygenate his or her blood during exercise by the diffusion of gases through the lungs. Claimant's Exhibit 6 at 17-18. Dr. Kraynak opined that it was not unusual for a miner to have a non-qualifying or even normal arterial BGS, but have a totally disabling pulmonary impairment as revealed on a PFS. Dr. Kraynak estimated that only five percent of miners collecting benefits would produce qualifying arterial blood gas values. Claimant's Exhibit 6 at 18. Dr. Kraynak further opined that the non-qualifying pulmonary function studies in claimant's medical records reveal a mild to moderate defect which, when considered in conjunction with the exertional requirements of claimant's usual coal mine employment, is totally disabling. Claimant's Exhibit 6 at 19, 24.

Dr. Stelmach, who is Board-certified in internal medicine, pulmonary disease, and critical care, examined claimant at the request of the Department of Labor on January 18, 2005. Director's Exhibit 12. Dr. Stelmach observed that the BGS values were normal, and that the PFS indicated a mild restrictive defect. *Id.* Dr. Stelmach diagnosed claimant as having chronic bronchitis, which he attributed to coal dust exposure and smoking. *Id.* In response to the question on the Report of Physical Examination form regarding the degree of severity of claimant's impairment, specifically, the extent to which the impairment would prevent the miner from performing his usual coal mine employment, Dr. Stelmach wrote the word "mild," and attributed 100% of claimant's impairment to smoking and coal dust exposure. *Id.* Attached to Dr. Stelmach's report was United States Department of Labor Form CM-911a, describing claimant's usual coal mine employment occupation as "Oiler on Shovel." *Id.*

Upon considering these medical opinions under Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Dittman's opinion, that claimant is not totally disabled, was well-documented and reasoned, and he concluded that Dr. Dittman's opinion was entitled to substantial weight. *Id.* With respect to Dr. Kraynak's opinion, that claimant is totally and permanently disabled due to coal workers' pneumoconiosis,

[2] Dr. Kraynak indicated that claimant informed him that during his last two years in the mines, he worked as a greaser and laborer on a shovel and that he was required to climb and frequently lift seventy-five to eighty pounds.

the administrative law judge concluded that Dr. Kraynak's status as claimant's treating physician gave him no relevant special knowledge or insight regarding claimant's respiratory or pulmonary health, because Dr. Kraynak had examined claimant only twice since October 3, 2005 for complaints relating to a pulmonary or respiratory condition. Decision and Order at 10. The administrative law judge then determined that:

> In reaching his conclusion that Claimant is totally disabled, Dr. Kraynak rejected the non-qualifying pulmonary function tests dated January 18, 2005 and March 24, 2005. Dr. Kraynak opined that those studies show, at a minimum, a mild to moderate defect. Dr. Kraynak concluded Claimant's "diminished pulmonary reserve" when viewed in light of the exertional requirements of Claimant's usual employment, "would not allow [claimant] to return to that employment or similarly arduous employment." However, the PFT dated October 3, 2005 and administered by Dr. Kraynak also produced non-qualifying values. Dr. Kraynak failed to reconcile the values produced in his own study with his conclusion that Claimant is totally disabled. Additionally, Dr. Kraynak opined that the exercise induced in the arterial blood gas studies did not correlate to the work required in Claimant's last employment. Dr. Kraynak also rejected the non-qualifying arterial blood gas studies as evidence that Claimant is not totally disabled in part because he is of the opinion that 95% of miners who are receiving coal mine benefits do not have qualifying arterial blood gas studies. I find Dr. Kraynak's basis for rejecting the arterial blood gas study to be unreasonable. Therefore, I find Dr. Kraynak's opinion is not reasoned or documented and entitled to no weight.

Decision and Order at 12 (internal citations omitted).

Regarding Dr. Stelmach's opinion, the administrative law judge acknowledged the doctor's notation that claimant's impairment is "mild," and inferred from this that it was Dr. Stelmach's opinion that claimant is not totally disabled. Decision and Order at 12. The administrative law judge noted Dr. Stelmach's reliance on objective clinical testing, including the non-qualifying pulmonary function and blood gas studies, and observed that the physician's physical examination of claimant revealed no significant abnormalities. *Id.* The administrative law judge therefore concluded that the opinion that he attributed to Dr. Stelmach, that claimant is not totally disabled, was reasoned and well documented. *Id.*

The administrative law judge then weighed the medical opinions of Drs. Dittman, Kraynak, and Stelmach together and observed that the qualifications of both Drs. Dittman and Stelmach were superior to those of Dr. Kraynak, and that Drs. Dittman and Stelmach based their medical opinions on objective medical testing. Decision and Order at 13. The administrative law judge stated that, "[i]n contrast, Dr. Kraynak's opinion explicitly

rejected the objective testing and rests solely on [c]laimant's complaints." *Id*. Concluding that the medical opinions of Drs. Dittman and Stelmach were better supported by the objective medical evidence of record, the administrative law judge found that their opinions outweighed the opinion of Dr. Kraynak. *Id.* The administrative law judge determined, therefore, that claimant failed to establish that he is totally disabled. *Id.*

Regarding the administrative law judge's consideration of Dr. Dittman's opinion, that claimant is not totally disabled, claimant asserts that because Dr. Dittman relied upon a PFS that he indicated was invalid due to lack of optimal effort, the administrative law judge erred in finding Dr. Dittman's opinion reasoned and documented. We disagree. Contrary to claimant's contention, the administrative law judge rationally determined that the fact that the PFS was not valid did not affect the credibility of Dr. Dittman's opinion, as "had [c]laimant's effort been better, the results of the study would only have been higher, thus supporting Dr. Dittman's conclusion that Claimant is not totally disabled." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 12.

With respect to the opinion in which Dr. Kraynak stated that claimant is totally disabled, claimant alleges that the administrative law judge erred in failing to accord Dr. Kraynak's opinion appropriate weight, given his status as claimant's treating physician. Claimant's contention is without merit. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Kraynak's opinion was not entitled to controlling weight based upon his status as claimant's treating physician in light of the fact that Dr. Kraynak "has examined [c]laimant only twice for complaints related to a pulmonary or respiratory condition." 20 C.F.R. §718.104(d); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396-7, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc on recon.*); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326, 10 BLR 2-220, 2-245 (3d Cir. 1987); *Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-105 (1994); *Clark*, 12 BLR at 1-153; Decision and Order at 10.[3]

Claimant also asserts that the administrative law judge erred in finding Dr. Kraynak's opinion unreasoned and undocumented because the doctor rejected the objective testing and relied solely upon claimant's subjective complaints. Claimant further alleges that the administrative law judge erred in discrediting Dr. Kraynak's opinion on the ground that the doctor did not discuss the non-qualifying PFS results that

[3] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 4-6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

he obtained during his examination of claimant. These contentions have merit. A review of the record establishes that, rather than rejecting the objective studies of record, Dr. Kraynak discussed claimant's BGS and PFS values in detail when setting forth his opinion that claimant cannot perform his usual coal mine employment. When articulating the rationale for his opinion that claimant is totally disabled, despite the non-qualifying blood gas study values, Dr. Kraynak explained that the level of exercise involved when the tests were administered was not representative of the exertional requirements of claimant's usual coal mine employment. Claimant's Exhibit 6 at 14. In addition, Dr. Kraynak's estimation that only five percent of miners who are receiving black lung benefits have qualifying arterial blood gas studies was part of a larger discussion in which Dr. Kraynak explained the difference between the types of impairments measured on blood gas studies and pulmonary function studies. Claimant's Exhibit 6 at 17-19.

With respect to the non-qualifying PFS evidence, Dr. Kraynak opined that the PFS values obtained by Drs. Dittman and Stelmach revealed a mild to moderate defect and, thus, supported a determination that claimant has a "diminished pulmonary reserve." Claimant's Exhibit 6 at 19. Dr. Kraynak then compared this impairment to the exertional requirements of claimant's usual coal mine employment and concluded that claimant is totally disabled. *Id*. Although the administrative law judge correctly observed that Dr. Kraynak did not discuss the results of the non-qualifying PFS that he conducted, the administrative law judge did not note that the values obtained by Dr. Kraynak were lower than those obtained by Drs. Dittman and Stelmach and, therefore, were consistent with Dr. Kraynak's analysis of the non-qualifying PFS evidence. Because the administrative law judge did not accurately characterize Dr. Kraynak's discussion of the objective studies of record and did not explain why he was apparently unpersuaded by Dr. Kraynak's comments regarding the non-qualifying exercise blood gas studies and the non-qualifying pulmonary function studies, we must vacate the administrative law judge's finding that Dr. Kraynak's opinion is unreasoned and undocumented. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant also contends that the administrative law judge erred in rejecting Dr. Stelmach's opinion. Claimant further asserts that the administrative law judge erred in inferring that Dr. Stelmach found that claimant is not totally disabled. These contentions have merit, in part. Contrary to claimant's initial allegation, the administrative law judge did not reject Dr. Stelmach's opinion, but instead determined that because Dr. Stelmach opined that claimant is not totally disabled, his opinion did not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12, 13. Dr. Stelmach offered no explicit opinion as to disability, and we note that the administrative law judge did not explain on what basis he inferred that Dr. Stelmach's opinion, that claimant has a mild impairment, constituted an opinion that claimant is not totally disabled. However, in order to conclude that Dr. Stelmach's report supported a finding

that claimant is not totally disabled, the administrative law judge was required to compare the exertional requirements of claimant's usual coal mine work to Dr. Stelmach's diagnosis of a mild impairment.[4] *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). We vacate, therefore, the administrative law judge's finding as to Dr. Stelmach's opinion under Section 718.204(b)(2)(iv).

For the reasons set forth above, we vacate the administrative law judge's findings that claimant failed to establish that he was totally disabled pursuant to Section 718.204(b)(2)(iv). We must also vacate the administrative law judge's finding under Section 718.204(c), that claimant could not establish total disability due to pneumoconiosis because he did not prove that he is totally disabled. On remand, the administrative law judge must first reconsider whether the medical opinion evidence is sufficient to establish total disability at Section 718.204(b)(2)(iv). In so doing, the administrative law judge must consider whether the physicians have set forth reasoned and documented diagnoses regarding claimant's ability to perform his usual coal mine employment. If the physician has not rendered a specific opinion on this issue or does not appear to have been informed of the exertional requirements of claimant's usual coal mine job, the administrative law judge must compare the physician's finding of an impairment to the exertional requirements of claimant's employment.

In the event that the administrative law judge finds total disability established under Section 718.204(b)(2)(iv), he must consider all of the evidence of record and weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine whether claimant has established total disability by a preponderance of the evidence. 20 C.F.R. §718.204(b)(2); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). If, on remand, the administrative law judge determines that total disability has been established pursuant to Section 718.204(b)(2), he must determine whether claimant has proven that pneumoconiosis is a substantially contributing cause of his total disability under Section 718.204(c). 20 C.F.R. §718.204(c); *see Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[4] The administrative law judge noted that claimant testified that his last coal mine job as an oiler on a shovel required him to roll fifty-five gallon barrels of grease, to lift up to 100 pounds, and to crawl and climb. Decision and Order at 3, citing Hearing Transcript at 10-13.

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.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge