

BRB No. 99-1091 BLA

WALTER POGIRSKI)
)
 Claimant-)
 Petitioner)
)
 v.)
) DATE ISSUED:
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR) DECISION AND ORDER
 Respondent

Appeal of the Decision and Order on Remand - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-BLA-1469) of Administrative Law Judge Ralph A. Romano 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). This case is before the Board for the second time. In his original Decision and Order, the

administrative law judge determined that the case at bar involves a request for modification dated December 9, 1996, of his Decision and Order - Denying Benefits issued on October 4, 1995, which was affirmed by the Board in a Decision and Order dated August 28, 1996.¹ Addressing claimant's petition for

¹ In his 1995 Decision and Order - Denying Benefits, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 in light of claimant's June 3, 1994 filing date. In addition, the administrative law judge accepted the parties' stipulation of ten years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge, however, found the evidence of record insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. Director's Exhibit 28.

On appeal, the Board affirmed the administrative law judge's findings regarding the length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, as unchallenged on appeal. In addition, the Board affirmed the administrative law judge's finding that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). Consequently, the Board affirmed the administrative law judge's denial of benefits. *Pogirski v. Director, OWCP*, BRB No. 96-0193 BLA (August 28, 1996)(unpub.); Director's Exhibit 34.

modification, the administrative law judge noted that the existence of pneumoconiosis was established in the prior decision and, thus, in order to establish modification, claimant must establish a totally disabling respiratory or pulmonary impairment. In weighing the newly submitted evidence, the administrative law judge found that this evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and, thus, sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge next weighed all of the relevant evidence of record, old and new, and found that it was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

Claimant appealed this denial to the Board, forwarding additional medical evidence and requesting that the case be remanded to the administrative law judge for consideration of this additional evidence. The Board, however, held claimant's appeal and the submission of additional medical evidence to be a motion for modification and, therefore, dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *Pogirski v. Director, OWCP*, BRB No. 98-0445 BLA (November 23, 1998)(Order)(unpub.). Pursuant to claimant's motion for reconsideration, the Board vacated its November 23, 1998 Order dismissing claimant's appeal. Noting claimant's original request for the case to be remanded to the administrative law judge for consideration of the additional medical evidence submitted with his appeal, as well as a letter from the administrative law judge advising the Board that this additional evidence had been misfiled and was not associated with the formal record prior to the issuance of his November 1997 Decision and Order, the Board remanded this case to the administrative law judge for further proceedings. *Pogirski v. Director, OWCP*, BRB No. 98-0445 BLA (January 6, 1999)(Order)(unpub.).

On remand, the administrative law judge admitted the misfiled evidence into the formal record. Decision and Order at 1. The administrative law judge stated that in his November 1997 Decision and Order, he found that the parties had stipulated that claimant suffered from pneumoconiosis arising out of his coal mine employment and also stipulated to ten years of coal mine employment. In addition, the administrative law judge stated that he found the newly submitted evidence was sufficient to establish a change in conditions and, therefore, he was considering all of the evidence of record, old and new, to establish entitlement to benefits. In weighing the medical evidence, including the misfiled evidence, the administrative law judge found the medical evidence of record insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(c)(4). Accordingly, the administrative law judge again denied benefits.

In challenging the administrative law judge's denial of benefits, in the instant appeal, claimant contends that the administrative law judge erred in his weighing of the pulmonary function study evidence and medical opinion evidence of record pursuant to Section 718.204(c)(1) and (c)(4). In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits.²

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that the pulmonary function study evidence supports a finding of total disability and that the administrative law judge erred in rejecting the April 22, 1997 and October 16, 1997 studies, Director's Exhibit 41; Claimant's Exhibit 1, based on the invalidation reports of Drs. Levinson and Rashid, Director's Exhibits 42, 46. Claimant argues that, while Dr. Levinson and Dr. Rashid possess qualifications superior to those of Dr. Kraynak, the physician who administered the studies, this factor should not affect the credibility of these studies. Claimant further contends that in the invalidation reports, Drs. Levinson and Rashid do not provide an adequate rationale for their conclusions.

² The parties do not challenge the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3). These findings are thus affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We reject claimant's assertions and affirm the administrative law judge's determination that the pulmonary function study evidence failed to demonstrate a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1). In considering the pulmonary function study evidence, the administrative law judge found that, while the April 22, 1997 and October 16, 1997 studies produced qualifying values,³ they were entitled to less weight based on the conclusions of reviewing physicians, Drs. Levinson and Rashid, that claimant put forth poor effort on the studies. Decision and Order at 3; Director's Exhibits 42, 46; see also 1997 Decision and Order at 5. Contrary to claimant's contentions, the administrative law judge could reasonably determine that these consultative reports provided an adequate rationale for invalidating these studies and, thus, called into question the probative value of the April 22, 1997 and October 16, 1997 studies relied upon by claimant. Decision and Order at 3; see *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); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). Furthermore, the administrative law judge reasonably exercised his discretion in according greater weight to the consultative reports of Drs. Levinson and Rashid based upon their superior professional qualifications. Decision and Order at 3; see *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); see also *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting). Inasmuch as claimant does not otherwise challenge the administrative law judge's findings pursuant to Section 718.204(c)(1), we affirm his finding that the pulmonary function study is insufficient to demonstrate total respiratory disability.

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in rejecting the medical opinions of Drs. Kruk and Kraynak, that claimant was totally and permanently disabled, see Director's Exhibits 19, 21, 35, in favor of the contrary opinion of Dr. Ahluwalia, Director's Exhibit 8. We disagree.

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).

In finding the medical opinion evidence insufficient to establish total respiratory disability, the administrative law judge reasonably exercised his discretion in finding that the opinions of Drs. Kraynak and Kruk were entitled to little weight because they were based on invalid pulmonary function studies and also because the physicians failed to account for the non-qualifying blood gas study in their conclusions. Decision and Order at 4; see *Siwiec, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); see also 1997 Decision and Order at 10. Moreover, the administrative law judge considered Dr. Kraynak's status as claimant's treating physician, but permissibly accorded greater weight to Dr. Ahluwalia's opinion based on his determination that Dr. Ahluwalia's opinion was better reasoned and supported by the objective evidence of record. Decision and Order at 4; see *Kertesz v. Director, OWCP*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lucostic, supra*; *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Inasmuch as substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4).

Inasmuch as claimant failed to establish total respiratory disability, a necessary element of entitlement under Part 718, an award of benefits is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We therefore affirm the administrative law judge's denial of claimant's request for modification. See *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand
- Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge