BRB No. 04-0204 BLA

JOSEPH J. BLAZINA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/25/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-1086) of Administrative Law Judge Robert D. Kaplan 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).[1] This case involves claimant's request for modification of a

[1]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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

duplicate claim filed on September 25, 1997.[2] In his initial consideration of claimant's 1997 duplicate claim, Administrative Law Judge Ralph A. Romano found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 44. Judge Romano, therefore, considered the merits of claimant's 1997 claim. After crediting claimant with five and one-half years of coal mine employment, Judge Romano found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Romano also found that the evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c) (2000). *Id.* However, Judge Romano found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Romano denied benefits. *Id.*

Claimant filed a request for modification on July 22, 1999. Director's Exhibit 45. In a Decision and Order dated August 17, 2000, Administrative Law Judge Robert D. Kaplan (the administrative law judge), after reviewing all of the evidence referenced in Judge Romano's Decision and Order, found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 76. The administrative law judge also found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, the administrative law judge denied benefits. *Id.*

Claimant subsequently filed a second request for modification on May 2, 2001. Director's Exhibit 77. The administrative law judge found that the newly submitted evidence (*i.e.*, the evidence submitted since the denial of claimant's first request for modification) was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)[3] and was, therefore, insufficient to establish a change in conditions pursuant

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[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on June 10, 1988. Director's Exhibit 23. The district director denied benefits on December 6, 1988 as he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on September 25, 1997. Director's Exhibit 1.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

to 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated June 30, 2003, the Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). *Blazina v. Director, OWCP*, BRB No. 02-0675 BLA (June 30, 2003) (unpublished). However, the Board vacated the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv) and remanded the case for further consideration.

On remand, the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). He further found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Claimant also contends that the administrative law judge erred in failing to adequately assess whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[4] an administrative law judge must perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, the administrative law judge found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)

[4]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

(2000). Director's Exhibit 76. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

Claimant contends that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R §718.204(b)(2)(i). The administrative law judge found that all of the newly submitted pulmonary function studies are invalid.[5] Consequently, the administrative law judge found that the newly submitted pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 3-5.

Claimant initially contends that the administrative law judge erred in finding that the March 8, 2001 pulmonary function study is invalid. In his consideration of claimant's March 8, 2001 study, the administrative law judge stated that:

> The report of the March 8, 2001 PFT does not conform to the quality requirements of the revised regulations because it does not contain a tracing of flow versus volume (flow-volume loop) as mandated by Part 718, Appendix B, §1(v) (2000). Section 718.101(b) requires that clinical tests and examinations performed after January 19, 2001 must conform to the standards in the revised regulations. Consequently, the March 8, 2001 PFT is not valid.

Decision and Order on Remand at 3.

Claimant argues that, because none of the physicians of record indicated that the absence of a flow volume loop rendered the March 8, 2001 study invalid, the administrative law judge impermissibly substituted his own opinion for that of the physicians in finding the study invalid on this basis. We disagree. Section 718.101 provides that all clinical tests "shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is offered." 20 C.F.R. §718.101(b).[6] "Unless otherwise provided, any evidence which is not in substantial

[5]The record contains five newly submitted pulmonary function studies conducted on March 8, 2001, May 29, 2001, October 11, 2001, October 22, 2001 and November 15, 2001. Director's Exhibits 77, 88; Claimant's Exhibits 1, 4, 7. Of these studies, only the one conducted on October 11, 2001 produced qualifying values.

[6]Because claimant's newly submitted pulmonary function studies were conducted after January 19, 2001, this evidence is subject to the standards set out in the revised regulations. 20 C.F.R. §718.101(b).

compliance with the applicable standard is insufficient to establish the fact for which it is offered." *Id.* Section 718.103(a) further provides, in relevant part, that:

> Any report of pulmonary function tests submitted in connection with a claim for benefits *shall* record the results of flow versus volume (flow volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing).

20 C.F.R. §718.103(a) (emphasis added).

Section 718.103(b) provides that:

> All pulmonary function test results submitted in connection with a claim for benefits *shall* be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings.

20 C.F.R. §718.103(b) (emphasis added).

Finally, Section 718.103(c) states that:

> Except as provided in this paragraph, no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed.

20 C.F.R. §718.103(c). In considering claimant's March 8, 2001 pulmonary function study, the administrative law judge properly found that the study did not conform to the standards in the revised regulations because it was not accompanied by flow versus time tracings. *See* 20 C.F.R. §§718.101(b), 718.103; *see generally 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); Decision and Order on Remand at 3. The administrative law judge, therefore, properly determined that claimant's March 8, 2001 pulmonary function study is invalid.

Claimant also contends that the administrative law judge erred in his consideration of the pulmonary function studies conducted on October 22, 2001 and November 15, 2001. Dr. Sherman invalidated claimant's October 22, 2001 and November 15, 2001 pulmonary function studies, finding, *inter alia*, that claimant had provided variable effort. Director's Exhibits 95, 101. Dr. Kraynak disagreed with Dr. Sherman's assessment of these studies, and opined that claimant's October 22, 2001 and November 15, 2001

pulmonary function studies were valid. Claimant's Exhibits 9, 23. The administrative law judge credited Dr. Sherman's assessment of claimant's October 22, 2001 and November 15, 2001 pulmonary function studies over that of Dr. Kraynak based upon Dr. Sherman's superior qualifications.[7] Decision and Order on Remand at 4-5. An administrative law judge may properly question the validity of a pulmonary function study that is invalidated by a better qualified physician. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is based upon substantial evidence, we affirm the administrative law judge's findings that claimant's October 22, 2001 and November 15, 2001 pulmonary function studies are invalid.

Claimant also contends that the administrative law judge erred in finding that the May 30, 2001 pulmonary function study[8] is invalid. In his consideration of claimant's May 30, 2001 pulmonary function study, the administrative law judge stated that:

> In a report dated November 24, 2001, Dr. John Michos (Board-certified in Internal Medicine and Pulmonary Disease) stated that the May 29, 2001 PFT showed "excessive variation in the peak flows with suboptimal flow volume loops" and "suboptimal MVV performance." (DX 93) In a report dated December 17, 2001, Dr. Raymond Kraynak (Board-eligible in Family Practice) stated that he disagreed with Dr. Michos' assessment and opined that the study is valid. (CX 8) Drs. David Prince (Board-certified in Internal Medicine and Pulmonary Disease), Michael Venditto (Board-certified in Internal Medicine and Medical Diseases of the Chest) and John Simelaro (Board-certified in Internal Medicine and Medical Disease of the Chest) all checked off boxes on forms stating that the PFT "is acceptable." (CX 2, 21, 22)

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[7]Dr. Sherman is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 96. Dr. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 10.

[8]The administrative law judge mischaracterized claimant's May 30, 2001 pulmonary function study as a study performed on May 29, 2001. Although the report of the study indicates that a calibration of the equipment was "performed" on May 29, 2001, the report indicates that the actual test was conducted on May 30, 2001. *See* Claimant's Exhibit 1. Although Dr. Prince also misidentified the study as having been conducted on May 29, 2001, *see* Claimant's Exhibit 2, Drs. Kraynak, Michos, Simelaro, and Venditto all identified the study as having been conducted on May 30, 2001. *See* Director's Exhibit 93; Claimant's Exhibits 8, 21, 22. The administrative law judge's error is harmless since it is apparent that the administrative law judge and the various physicians addressed the same study.

> Dr. Michos presented several specific rational reasons on which he based his opinion that the PFT is not valid Dr. Michos' bases for his opinion were specifically addressed in an attempt to rebut them only by Dr. Kraynak. As Dr. Michos' qualifications are superior to those of Dr. Kraynak, the former's opinion is entitled to greater weight. Further, the opinions of Drs. Prince, Venditto, and Simelaro that the PFT is "acceptable" do not directly address the specific defects in the study on which Dr. Michos relied for his contrary opinion. I find that the detailed opinion of Dr. Michos is entitled to greater weight than the summary and unexplained opinions of Drs. Prince, Venditto and Simelaro. Consequently, I find that the May 29, 2001 PFT is not valid.

Decision and Order on Remand at 4.

The administrative law judge erred in crediting Dr. Michos' assessment of claimant's May 30, 2001 pulmonary function study over that of Drs. Prince, Venditto and Simelaro because these latter doctors did "not directly address the specific defects in the study on which Dr. Michos relied for his contrary opinion."[9] Drs. Prince, Venditto and Simelaro were not required to address Dr. Michos' comments regarding the May 30, 2001 study. By characterizing claimant's May 30, 2001 pulmonary function study as "acceptable,"[10] these physicians implicitly found that claimant's effort on the study was sufficient to produce valid results. *See* Claimant's Exhibits 2, 21, 22. Consequently, the administrative law judge failed to provide a proper basis for crediting Dr. Michos'

[9]The Director, Office of Workers' Compensation Programs, contends that no physician of "comparable credentials" responded to Dr. Michos' findings. Although the administrative law judge found that Dr. Michos' qualifications were superior to those of Dr. Kraynak, he did not find that Dr. Michos' qualifications were superior to those of Drs. Prince, Venditto and Simelaro. Like Dr. Michos, Dr. Prince is Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 3. Drs. Venditto and Simelaro are Board-certified in Internal Medicine and Medical Diseases of the Chest. Claimant's Exhibits 19, 20. Thus, three physicians with qualifications comparable to those of Dr. Michos (Drs. Prince, Venditto and Simelaro) addressed the validity of claimant's May 30, 2001 pulmonary function study.

[10]The form completed by Drs. Prince, Venditto and Simelaro is entitled "Validation of Pulmonary Function and Arterial Blood Gas Studies." It allows a physician to indicate that a pulmonary function study is "acceptable" or "not acceptable." The form provides space for an explanation only when a physician finds a study "not acceptable."

assessment of claimant's May 30, 2001 pulmonary function study over the validations provided by Drs. Prince, Venditto and Simelaro.

In light of the above-referenced error, we vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and remand the case to the administrative law judge for further consideration.

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Kraynak and Green submitted medical opinions in connection with claimant's most recent request for modification. While Dr. Kraynak opined that claimant was totally and permanently disabled due to coal workers' pneumoconiosis, Director's Exhibit 81; Claimant's Exhibit 10 at 13, Dr. Green opined that claimant was capable of performing his last coal mine employment. Director's Exhibit 87. In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability, the administrative law judge questioned Dr. Kraynak's opinion in part because he relied heavily on invalid pulmonary function studies. Decision and Order at 6. In light of our holding that the administrative law judge erred in finding that all of the newly submitted pulmonary function studies are invalid, this basis for discrediting Dr. Kraynak's opinion cannot stand.

Assuming *arguendo* that Dr. Kraynak's opinion was sufficiently reasoned, the administrative law judge found that Dr. Green's contrary opinion was entitled to greater weight based upon the doctor's superior qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Claimant, however, argues that the administrative law judge erred in failing to address the fact that Dr. Green relied upon claimant's invalidated October 11, 2001 pulmonary function study in finding that claimant was not totally disabled. Claimant's October 11, 2001 pulmonary function study produced non-qualifying values. *See* Director's Exhibit 88. Although Dr. Green was aware that the results of the study were "skewed by poor patient effort," he opined that the measurements were "likely an underestimate of true values." *See* Director's Exhibit 88. In this case, Drs. Simelaro and Venditto invalidated claimant's October 11, 2001 study because they found excessive variation in the FEV1 values. *See* Claimant's Exhibits 17, 18. Thus, the administrative law judge erred in not addressing the significance of the fact that Dr. Green based his opinion in part upon the results of an invalid pulmonary function study.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In light of our decision to vacate the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv),

we also vacate the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Claimant also contends that the administrative law judge erred in finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). 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).

In considering whether there was a mistake in a determination of fact, the administrative law judge stated:

> I have considered the newly submitted evidence in conjunction with that which was previously submitted, and I find that no mistake in a determination of fact was made in the previous denial. In my 2000 D&O, I found that there were no valid, qualifying pulmonary function studies, no qualifying arterial blood gas studies, and that the physician opinions supporting Claimant's contentions were outweighed by Dr. Green's contrary opinion that was of record at that time because Dr. Green's opinion was better reasoned and documented than theirs and because of his superior credentials.

Decision and Order on Remand at 7.

Claimant contends that the administrative law judge's conclusory finding is insufficient to satisfy his obligation to adequately address whether there was a mistake in a determination of fact. We disagree. The administrative law judge considered and weighed the previously submitted evidence in his 2000 Decision and Order, finding it insufficient to establish that claimant suffered from a totally disabling respiratory and pulmonary impairment. The administrative law judge incorporated these findings into his present decision. Consequently, we affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge