BRB No. 97-1337 BLA

CHARLES J. HALON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

James E. Pocius and Joan M. Sullivan (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1726) of Administrative Law Judge Robert D. Kaplan (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 adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310,[1]

[1]Claimant filed his initial claim on September 30, 1981. Director's Exhibit 24. This claim was denied by the Department of Labor (DOL) on March 10, 1982 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on October 19,

and thus, he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). Employer urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has

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1987. Director's Exhibit 1. This claim was denied by the DOL on February 8, 1988 and July 10, 1989. Director's Exhibits 17, 25. On April 23, 1990, claimant filed another claim, which constitutes a request for modification because it was filed within a year of the DOL's denial. Director's Exhibit 26. Administrative Law Judge Robert D. Kaplan issued a Decision and Order denying benefits on June 16, 1992. Director's Exhibit 72. Although Judge Kaplan credited claimant with forty-two years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(b), he nonetheless found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). *Id*. The Board affirmed Judge Kaplan's findings at 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(2) and (c)(3). However, the Board vacated and remanded Judge Kaplan's finding at 20 C.F.R. §718.204(c)(1) and (c)(4). *Halon v. Reading Anthracite Co., Inc.*, BRB No. 92-2087 (May 27, 1994)(unpub.). On August 25, 1994, Judge Kaplan issued a Decision and Order Upon Remand denying benefits, Director's Exhibit 76, which the Board affirmed, *Halon v. Reading Anthracite Co.*, BRB No. 94-3958 BLA (June 20, 1995)(unpub.). Claimant filed his most recent request for modification on November 10, 1995. Director's Exhibit 83.

declined to participate in this appeal.[2]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). We disagree. Of the four newly submitted pulmonary function studies of record, three studies yielded qualifying[3] values, Director's Exhibits 85, 87; Claimant's Exhibit 1, and one study yielded non-qualifying values, Employer's Exhibit 2. The administrative law judge properly accorded greater weight to the opinions of Drs. Kaplan, Levinson and Sahillioglu, invalidating the qualifying pulmonary function studies dated August 17, 1995, December 27, 1995 and November 5, 1996, than to the contrary opinion of Dr. Kraynak,[4] an administering physician, because of the doctors' superior qualifications.[5] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting). Thus, we reject claimant's argument that the administrative law judge erred by relying on the invalidation reports of Drs. Kaplan, Levinson and Sahillioglu to discredit the newly submitted qualifying pulmonary function studies of record.[6] Furthermore, we affirm the administrative law judge's finding that the

[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).

[4]The administrative law judge noted that Dr. Kraynak testified that he disagreed with the conclusions of Drs. Kaplan, Levinson and Sahillioglu concerning these tests. Decision and Order at 6-7.

[5]The administrative law judge stated that "Dr. Kaplan is Board certified in internal medicine, pulmonary disease, and critical care." Decision and Order at 5. The administrative law judge also stated that "Dr. Levinson is Board-certified in internal medicine and pulmonary disease." *Id*. Further, the administrative law judge stated that "Dr. Sahillioglu is Board-eligible in internal medicine and pulmonary disease." *Id*. Finally, the administrative law judge stated that "Dr. Kraynak is Board-eligible in family medicine." *Id.* at 6.

[6]Claimant asserts that Drs. Kaplan, Levinson and Sahillioglu failed to provide adequate explanations for invalidating the newly submitted qualifying pulmonary function studies of record. Contrary to claimant's assertion, Drs. Kaplan, Levinson and Sahillioglu provided proper reasons for invalidating the qualifying studies dated August 17, 1995, December 27, 1995 and November 5, 1996. Dr. Kaplan invalidated the August 27, 1995 study because of "uncertainty as to the accuracy of the spirometer: no calibration is documented." Director's Exhibit 92. Similarly, Dr. Kaplan listed "no acceptable documentation of calibration of the spirometer" as his basis for invalidating the December 27, 1995 study. *Id*. Further, Dr. Kaplan invalidated the November 5, 1996 study because "[t]he actual MVV is greater than the MVV expected based on the actual FEV1.0." Employer's Exhibit 1. Dr. Kaplan stated that this "is possible only if the actual FEV1.0 is falsely low...[and] is also [a] strong indication that the Claimant's effort was submaximal." *Id*. Dr. Levinson invalidated the studies dated August 17, 1995, December 27, 1995 and November 5, 1996 because "it appears...that the actual starting point of exhalation has preceded that point marked as the zero point." Director's Exhibit 92; Employer's Exhibit 4.

newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1), as supported by substantial evidence.

Dr. Levinson, therefore, stated that "the results reported as the FEV1 and forced vital capacity [of these studies] do not represent the true and complete capacities of [claimant] but are rather an underestimation." *Id*. Dr. Levinson further stated that "[t]he MVV curves [of these studies] indicate a variable and inconsistent effort so that [claimant] has not exerted a maximal and sustained effort for a period of 12 to 15 seconds as required." *Id*. Dr. Sahillioglu listed "no demonstration of respiratory effort, [and that the] reliability is not assured with this tracing" as his bases for invalidating the August 17, 1995 study. Director's Exhibit 85. Finally, Dr. Sahillioglu listed "no demonstration of respiratory effort, [and] variable breath MVV" as his bases for invalidating the December 27, 1995 study. Director's Exhibit 87.

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We disagree. Whereas Dr. Dittman opined that claimant does not suffer from a pulmonary impairment, Employer's Exhibits 2, 3, Dr. Kraynak opined that claimant is totally disabled, Claimant's Exhibit 3. The administrative law judge properly accorded determinative weight to the opinion of Dr. Dittman over the contrary opinion of Dr. Kraynak because he found Dr. Dittman's opinion to be better reasoned and documented.[7] *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); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).[8] In addition, the administrative law judge properly discounted the opinion of Dr. Kraynak because he found it to be based on invalid pulmonary function studies. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Thus, we reject claimant's argument that the administrative law judge erred by discounting the opinion of Dr. Kraynak. Claimant also argues that the administrative law judge should have accorded determinative weight to Dr. Kraynak's opinion because he is a treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Therefore, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Moreover, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish

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[7]The administrative law judge stated that "Dr. Dittman based his opinion on three physical examinations of Claimant which he conducted over seven years." Decision and Order at 9. The administrative law judge also stated that Dr. Dittman "relied upon valid, non-qualifying pulmonary function and arterial blood gas study results, and on a normal electrocardiogram." *Id*. Further, the administrative law judge stated that "Dr. Kraynak also relied upon a history of examinations and treatment, but did not provide a record of any physical examination since 1991." *Id*. In addition, the administrative law judge stated that "Dr. Kraynak relied upon a series of pulmonary function tests which are invalid." *Id*. Moreover, the administrative law judge stated that "Dr. Kraynak did not conduct an arterial blood gas study." *Id*.

[8]Claimant argues that the administrative law judge erred by relying on the medical opinion of Dr. Dittman because Dr. Dittman's opinion is based on the mistaken premise that claimant does not suffer from pneumoconiosis. However, since a diagnosis with respect to pneumoconiosis does not go to the issue of disability, we reject claimant's argument that the administrative law judge erred by relying on the medical opinion of Dr. Dittman because it is based on the mistaken premise that claimant does not suffer from pneumoconiosis. *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J, concurring and dissenting); *see also York v. Director, OWCP*, 7 BLR 1-641 (1985); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983).

a change in conditions at 20 C.F.R. §725.310.[9]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[9]The administrative law judge stated that "Claimant has conceded that there was no mistake in a determination of fact in the prior denial." Decision and Order at 4. Further, the administrative law judge stated that he "again considered the medical evidence which was previously submitted, and [found] that [the] August 25, 1994 finding that the evidence failed to establish total disability under [Section] 718.204(c) was correct." *Id*.; *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).