BRB No. 97-1215 BLA

FRANK T. VIVACQUA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Lynn G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Helen H. Cox (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-1876) of Administrative Law Judge Ainsworth H. Brown, 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 the instant request for

modification of his denied claim on December 15, 1995. Director's Exhibit 72.[1] In his Decision and Order, the administrative law judge found that the newly submitted

[1]The relevant procedural history of this case is as follows: Claimant filed his initial claim for Black Lung benefits with the Department of Labor (the Department) on February 26, 1981. Director's Exhibit 55. That claim was finally denied on June 9, 1981. *Id*. Claimant filed his second application for benefits with the Department on January 31, 1990. Director's Exhibit 1. On January 12, 1995, that claim was denied by Decision and Order of the Benefits Review Board. *Vivacqua v. Director, OWCP,* BRB No. 94-2648 BLA (Jan. 12, 1995)(unpub.); Director's Exhibit 71. Claimant filed the instant request for modification on December 15, 1995. Director's Exhibit 72. Claimant's request for modification was denied by the district director on January 26, 1996, Director's Exhibit 74, on May 1, 1996, Director's Exhibit 76, and again on August 2, 1996. Director's Exhibit 82. On August 28, 1996, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 83. On November 21, 1996, Administrative Law Judge Ainsworth H. Brown issued an order notifying the parties that a formal hearing was unnecessary in this matter. *See Vivacqua v. Director, OWCP,* Case No. 96-BLA-01876 (Order No. II, Nov. 21, 1996)(unpub.); Decision and Order at 3. Judge Brown issued his decision on April 29, 1997.

evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c), and therefore failed to demonstrate a change in conditions under 20 C.F.R. §725.310. Accordingly, benefits were denied. Claimant appeals, arguing that the administrative law judge erred in failing to find total disability established, contending that the administrative law judge committed reversible error in his weighing of both the pulmonary function study evidence and the medical opinion evidence. The Director, Office of Workers' Compensation Programs responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, under Section 718.204(c)(1), claimant contends that the administrative law judge erred in crediting the reviewing physician's opinion over the administering physician's opinion in finding the July 1995 pulmonary function study invalid. Claimant argues that the administrative law judge erred in relying on the relative credentials of the doctors, and in not finding that the pulmonary function study was in substantial compliance with the quality standards, as required under *Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990) and *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987), two decisions of the United States Court of Appeals for the Third Circuit, wherein jurisdiction of this case arises.

[2]The administrative law judge's findings under 20 C.F.R. §718.204(c)(2) and (c)(3) are unchallenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

We disagree. The administrative law judge may credit a reviewing physician's opinion over an administering physician's opinion as long as he provides a valid rationale for doing so. *Siegel v. Director, OWCP,* 8 BLR 1-156 (1985); *Revnack v. Director, OWCP,* 7 BLR 1-771 (1985)*; Bolyard v. Peabody Coal Co.,* 6 BLR 1-767 (1984). Contrary to claimant's contention, the administrative law judge may appropriately credit a physician based on his expertise, *see Martinez v. Clayton Coal Co*., 10 BLR 1-24 (1985); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985), and doing so does not violate the holdings in *Siwiec* or *Mangifest* as claimant contends. Contrary to claimant's argument, the administrative law judge specifically noted that the absence of a weight notation on the pulmonary function study in question would not, by itself, cause the test to fall out of substantial compliance. Decision and Order at 5; 20 C.F.R. §718.103(b)(2). Rather, the administrative law judge noted Dr. Sahillioglu's opinion that claimant's effort, as reflected on the test, was hesitant and variable. He properly credited this opinion as most persuasive, in light of the doctor's credentials. *See Martinez, supra; Wetzel, supra.* Claimant's contention that the administrative law judge erred in failing to find total disability under Section 718.204(c)(1) is therefore rejected.

Next, under Section 718.204(c)(4), claimant argues that the administrative law judge erred in discrediting Dr. Kraynak's opinion and in crediting Dr. Ahluwalia's opinion. We disagree. Initially, claimant's allegation of bias on the part of the administrative law judge against Dr. Kraynak is unsupported and therefore rejected. *See Zamora v. C. F. & I Steel Corp.,* 7 BLR 1-568 (1984). Next, notwithstanding claimant's contention that the administrative law judge failed to note Dr. Kraynak's status as claimant's treating physician, the administrative law judge properly discredited Dr. Kraynak's opinion that claimant was totally disabled by his pneumoconiosis, because it was partially based on an invalidated pulmonary function study. *See Siwiec, supra; Baker v. North American Coal Co.,* 7 BLR 1-79 (1984); discussion *supra*. Additionally, contrary to claimant's argument, Dr. Ahluwalia's opinion that claimant showed no objective evidence of any impairment is not equivocal. *Cf. Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988). Furthermore, the administrative law judge properly noted that Dr. Ahluwalia possessed superior credentials, and therefore he did not err in according his opinion determinative weight. *See Wetzel, supra.* Finally, claimant's other arguments under this subsection amount to little more than a request to re-weigh the evidence of record, a task we may not perform. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). The administrative law judge's findings under Section 718.204(c)(4) , consequently, are affirmed.

In the light of the foregoing, the administrative law judge's determination that claimant has failed to establish a change in conditions under Section 725.310 is

supported by substantial evidence, and is affirmed. *See Kovac v. BCNR Co.*, 14 BLR 1-156 (1990), *modified on recon*., 16 BLR 1-71 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge