

BRB No. 04-0280 BLA

FRANK OZARK)
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 Claimant)
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 v.)
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 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 11/30/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

George E. Mihalchick (Lenahan & Dempsey, P.C.), Scranton,
Pennsylvania, for claimant.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5045) of Administrative Law Judge Janice K. Bullard 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). This case involves a subsequent claim filed January 10, 2002. *See* 20 C.F.R. §725.309(d). The administrative law judge initially noted that claimant's prior claim was denied on December 27, 2000 by the district director based on claimant's failure to establish any element of entitlement. Director's Exhibit 2. The administrative law judge then determined that, as the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment, claimant thereby established a change in an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R. §725.309(d).¹ On the merits of the claim, the administrative law judge found that

¹ The administrative law judge accepted the parties' stipulation to eight years of coal mine employment. Decision and Order at 5-6. This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's last

the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in crediting the invalidations of the pulmonary function studies, in discrediting the medical opinions which rely on the pulmonary function studies, and in not according additional weight to the opinion of claimant's treating physician, Dr. Levinson. The Director has not filed a response brief in this appeal.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure to establish 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*).

Claimant argues that the administrative law judge erred in crediting invalidations rendered by a consulting physician of the qualifying pulmonary function studies, over the administering physicians' opinions. The administrative law judge found that the more recent pulmonary function study evidence consisted of thirteen individual tests, five of which were qualifying.² Director's Exhibits 10, 31; Claimant's Exhibits 1-4. The administrative law judge found that these five qualifying tests were undermined by claimant's "questionable cooperation." Decision and Order at 9. A review of the record shows that in four tests conducted in Dr. Levinson's presence, "fair" cooperation was noted. Claimant's Exhibits 1, 3. Dr. Michos invalidated the results of the tests by Dr. Levinson on a Department of Labor (DOL) form, checking boxes for insufficient tracings, less than optimal effort, comprehension/cooperation, suboptimal flow loops. Director's Exhibits 33-36. By report dated May 22, 2003, Dr. Levinson responded to Dr.

coal mine employment occurred in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

² The five qualifying tests are two dated August 3, 2000 by Dr. Levinson, one dated February 26, 2002 by Dr. Corazza, and two dated September 12, 2002 by Dr. Levinson. Director's Exhibit 10; Claimant's Exhibits 1, 3.

Michos's invalidation, stating that Dr. Michos did not address what he considered suboptimal about claimant's effort, and opining that Dr. Michos's invalidations were not in accordance with the regulations at Part 718. Claimant's Exhibit 9. Dr. Levinson, while noting that he characterized claimant's effort as fair on the tests conducted on August 3, 2000 and September 12, 2002, specifically asserted that claimant's effort was nevertheless sufficient "...to permit evaluation and review of these pulmonary function studies for the purpose of assessing and substantiating the level of [claimant's] disability." *Id.* The administrative law judge then summarily indicated that Dr. Michos's opinion was better reasoned than Dr. Levinson's. Decision and Order at 9.

Claimant correctly argues that the administrative law judge erred in weighing the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Specifically, the record shows that Dr. Michos did not provide any explanation for his findings; he merely checked boxes on a pre-printed form, whereas Dr. Levinson wrote a report explaining his reasons for crediting those pulmonary function studies wherein he characterized claimant's effort as "fair." Since the administrative law judge only summarily credited Dr. Michos's invalidations of the August 3, 2000 and September 12, 2002 pulmonary function studies, the administrative law judge's weighing of this evidence cannot be affirmed. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Rather, the administrative law judge must explain her rationale for preferring invalidations rendered by consulting physicians over conflicting reports rendered by the administering physicians. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting).

Similarly, claimant asserts that the administrative law judge must address the fact that on the pulmonary function study performed by Dr. Corazza on February 26, 2002, a technician noted that claimant did not "...appear to perform to maximum ability." Director's Exhibit 10. Dr. Corazza did not address the technician's comment on performance. Thus, on remand, the administrative law judge must discuss her rationale for preferring the technician's opinion over that of the physician. *Siegel*, 8 BLR at 1-157. Additionally, the administrative law judge should consider that some of the pulmonary function studies were developed after January 19, 2001 and are therefore subject to the quality standards of the new regulations.³ *See* 20 C.F.R. §§718.101, 718.103; *Director*,

³ The quality standards require that a pulmonary function study be accompanied by three tracings of the flow-volume loop and that the instrument be calibrated daily. 20 C.F.R. §718.103(b); App. B (2)(iv). The flow-volume loop must display "the entire maximum inspiration and the entire maximum forced expiration." App. B (1)(v). All tests must be in "substantial compliance" with their applicable quality standards. 20 C.F.R. §718.101. If a pulmonary function study is not conducted or reported in

OWCP v. Mangifest, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); Director's Exhibit 10; Claimant's Exhibit 1.

Claimant next asserts that the administrative law judge erred in according less weight to the medical opinions of Drs. Levinson and Corazza, who relied on the qualifying pulmonary function studies that were subsequently invalidated. *See* 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge credited the opinion of Dr. Talati, that claimant has no pulmonary impairment, over the contrary opinions of Drs. Corazza and Levinson, who opined that claimant has a totally disabling respiratory impairment, because she found Dr. Talati's opinion better reasoned and documented and much more consistent with the credible, valid clinical test results. Director's Exhibit 30; Decision and Order at 13. Dr. Corazza found claimant totally disabled due to bronchospasms, which the administrative law judge found indicated that "Dr. Corazza apparently relied on the pulmonary function study results in making his disability determination." Director's Exhibit 7; Decision and Order at 13. The administrative law judge found Dr. Levinson's opinion entitled to less weight, because it was not well-reasoned, determining that the doctor's conclusions about the severity of claimant's impairment were not supported by the "reliable" pulmonary function studies. Decision and Order at 13. Inasmuch as we herein hold that the administrative law judge must reconsider the weight and credibility of the pulmonary function study evidence, the administrative law judge should also reconsider her findings with respect to the effect of the pulmonary function studies on the medical opinion evidence.

Finally, claimant asserts that the administrative law judge erred by not according additional weight to Dr. Levinson's opinion based on his status as claimant's treating physician. Dr. Levinson stated that he had been treating claimant since March of 2000, and saw him "every couple months" or nineteen times in three years. Claimant's Exhibit 8, p. 24; *see* 20 C.F.R. §718.104(d). Dr. Levinson indicated that he was familiar with claimant's medical history, smoking history, coal mine employment history, and that during his treatment of claimant there was "almost always, or always" some chest abnormality on every examination of claimant. *Id.* Dr. Levinson had reviewed claimant's pulmonary function studies taken over some twenty years, and found that they indicated a declining pulmonary function and a worsening pulmonary condition. *Id.* Dr. Levinson also conducted pulmonary function studies on at least four occasions, and other tests, as well. Claimant's Exhibits 1-4, 8. The administrative law judge declined to give Dr. Levinson's opinion added weight because "the record does not provide sufficient evidence regarding the extent of his treatment, and other record evidence contradicts Dr. Levinson's opinions." Decision and Order at 13.

compliance with the standards, it does not "constitute evidence of the presence or absence of a respiratory or pulmonary impairment...." 20 C.F.R. §718.103(c).

The administrative law judge's weighing of Dr. Levinson's opinion at Section 718.204(b)(2)(iv) cannot be affirmed. There is evidence in the record documenting Dr. Levinson's treatment of claimant, which the administrative law judge did not address. *See* 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); Claimant's Exhibits 1-4, 8. Moreover, the fact that the record contains evidence contradicting one physician's opinion does not render that physician's opinion unreliable. As the administrative law judge did not address all relevant evidence, we further remand the case. APA, *supra*.

Based on the foregoing, we vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i) and (iv).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge