

BRB No. 14-0188 BLA

WILLIAM RAYMOND REINER)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/16/2014
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Michael J. Rutledge (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2009-BLA-5640) of Administrative Law Judge Lystra A. Harris denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This claim, filed on July 30, 2008, is before the Board for the second time.

In the initial Decision and Order, Administrative Law Judge Ralph A. Romano found that claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, Judge Romano denied benefits.

Pursuant to claimant's appeal, the Board vacated Judge Romano's determination that a qualifying pulmonary function study performed in September 2009 was invalid.¹ *Reiner v. Director, OWCP*, BRB No. 11-0718 BLA (July 25, 2012) (unpub.). The Board, therefore, vacated Judge Romano's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* Because that finding influenced Judge Romano's credibility determinations regarding the medical opinion evidence, the Board also vacated his finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

On remand, due to Judge Romano's unavailability, the case was reassigned, without objection, to Administrative Law Judge Lystra A. Harris (the administrative law judge). In a Decision and Order on Remand dated February 12, 2014, the administrative law judge found that the September 2009 pulmonary function study was valid, but determined that the weight of the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Furthermore, the administrative law judge found that the medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). In response, the Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge erred in determining that the September 24, 2009 pulmonary function study is valid. However, even if the administrative law judge properly found that the September 24, 2009 pulmonary function study is valid, the Director argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ The Board affirmed Administrative Law Judge Ralph A. Romano's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Reiner v. Director, OWCP*, BRB No. 11-0718 BLA (July 25, 2012) (unpub.).

² Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 20 C.F.R. Part 718 in a miner’s claim, a 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 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 initially contends that the administrative law judge erred in finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains three pulmonary function studies conducted on October 17, 2008, February 27, 2009, and September 24, 2009. The October 17, 2008 pulmonary function study produced non-qualifying values,³ both before and after the administration of a bronchodilator.⁴ Director’s Exhibit 14. The February 27, 2009 pulmonary function study also produced non-qualifying values.⁵ Director’s Exhibit 16. Finally, the September 24, 2009 pulmonary function study produced qualifying values.⁶ Claimant’s Exhibit 2.

As instructed by the Board, the administrative law judge, on remand, reassessed the opinions of Drs. Kraynak, Simelaro, and Spagnolo regarding the validity of the September 24, 2009 qualifying pulmonary function study. While Drs. Kraynak and Simelaro opined that the study is valid, Claimant’s Exhibits 2, 4, Dr. Spagnolo provided eight reasons in support of his opinion that the study is invalid. Director’s Exhibit 28.

³ A qualifying pulmonary function study yields values that are equal to or less than the values specified 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(b)(2)(i).

⁴ The Board affirmed Judge Romano’s determination that the October 17, 2008 pulmonary function study is valid. *Reiner v. Director, OWCP*, BRB No. 11-0718 BLA (July 25, 2012) (unpub.). *Id.*

⁵ The administrative law judge accurately noted that Judge Romano previously determined that the February 27, 2009 study is invalid. Decision and Order on Remand at 4.

⁶ The pulmonary function studies, conducted on February 27, 2009 and September 24, 2009, included no post-bronchodilator results.

The administrative law judge found that the opinions of Drs. Simelaro and Spagnolo were entitled to the greatest weight, based upon their superior qualifications. Decision and Order on Remand at 5. The administrative law judge then found that the September 24, 2009 pulmonary function study, on balance, is valid:

I base my determination on Dr. Simelaro's opinion, which is supported by Dr. Kraynak's opinion. I also note that Dr. Spagnolo's opinion, while entitled to weight based on his impressive qualifications and his alternative reasons for finding the test invalid, contains an error in asserting that Dr. Kraynak did not reference predicted values when they are included with the test results. Weighing all three opinions, I find that the test is valid.

Decision and Order on Remand at 6.

Having found that the September 24, 2009 pulmonary function study is valid, the administrative law judge next considered whether the weight of the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Although the administrative law judge recognized that the February 27, 2009 study is invalid, she accorded "some weight" to the non-qualifying study, observing that "pulmonary function studies are effort dependent, such that spuriously low values are possible but spuriously high values are not." Decision and Order on Remand at 6. Weighing all of the pulmonary function study evidence together, the administrative law judge found that:

[T]he evidence does not carry the Claimant's burden to establish total disability by a preponderance of the evidence. The [October 1978 and September 2009] tests are slightly less than one year apart. The February test, performed in the interim, although invalid was also non-qualifying. I decline to attach greater weight to the results of the most recent test because the Claimant produced non-qualifying results on more than one test within just one year. Thus, I find that, at best, the evidence is in equipoise. Because the Claimant bears the burden to establish total disability, I find that the pulmonary function test evidence does not establish the Claimant's total disability.

Decision and Order on Remand at 6.

Claimant argues that the administrative law judge failed to adequately explain her determination that total disability was not established by the "latest, valid, qualifying [September 2009] pulmonary function test." Claimant's Brief at 5-7. Claimant also argues that the administrative law judge erred by effectively requiring that all or most of the pulmonary function studies be valid and qualifying to support a finding of total

disability. *Id.* at 6. The Director contends that the administrative law judge failed to adequately explain why the most recent pulmonary function study conducted on September 24, 2009 was not entitled to the most weight. Director's Brief at 4-5. The contentions of error have no merit.

Although the administrative law judge may credit the most recent medical evidence, she is not required to do so. See *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766, 1-769 (1985). In this case, the administrative law judge acknowledged that the September 24, 2009 qualifying pulmonary function study is the most recent study of record, but permissibly declined to accord it more weight than the three non-qualifying tests performed within the preceding year.⁷ See *Burns v. Director, OWCP*, 7 BLR 1-597, 1-600 (1984); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309, 1-312 (1984); Decision and Order on Remand at 6. Contrary to claimant's contention, the administrative law judge's finding, that the pulmonary function study evidence was in equipoise at best, did not depend simply on the number of non-qualifying studies, but on her recognition that claimant produced multiple non-qualifying tests "within just one year" of the sole qualifying test.⁸ Decision and Order on Remand at 6. We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).⁹

⁷ Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), challenges the administrative law judge decision to accord "some weight" to the non-qualifying pre-bronchodilator results from the invalidated February 27, 2009 study. We, therefore, affirm that determination. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ We disagree with the Director's contention that the administrative law judge was required to consider whether all of the pulmonary function studies, taken together, demonstrated a progression of claimant's disease that would compel her to give probative weight to the most recent study. Director's Brief at 5. The Director cites no authority in support of such a requirement, and cites no physician testimony that the pulmonary function study evidence in this case demonstrated such a progression.

⁹ In light of our affirmance of the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), we need not address the Director's argument that the administrative law judge erred in finding that the only qualifying pulmonary function study of record, the September 24, 2009 study, is valid. See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Next, claimant argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Kraynak and Dittman. Dr. Kraynak opined that claimant is totally disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 4 at 14-15. Conversely, Dr. Dittman opined that claimant does not suffer from a pulmonary impairment. Director's Exhibit 14.

In considering whether Dr. Kraynak's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge observed that Dr. Kraynak opined that the non-qualifying pulmonary function study results obtained on October 17, 2008 were invalid, a determination which the administrative law judge noted was contrary to that made by Judge Romano, and ultimately affirmed by the Board. Decision and Order on Remand at 9. The administrative law judge further noted that Dr. Kraynak did not address the significance of the non-qualifying results from the February 27, 2009 pulmonary function study, a study which the administrative found had some probative value despite the fact that it was invalidated. *Id.* Because Dr. Kraynak "did not account for the non-qualifying test results and variability of results when diagnosing a totally disabling respiratory or pulmonary impairment," the administrative law judge found that the doctor's opinion was "conclusory and not well-reasoned." *Id.* The administrative law judge found that Dr. Dittman "did not have the benefit of reviewing later pulmonary function study results." *Id.* The administrative law judge, therefore, found that Dr. Dittman's opinion, that claimant does not suffer from a pulmonary impairment, was entitled to "some weight, but not full weight." *Id.* The administrative law judge, therefore, found that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that the administrative law judge erred in finding that Dr. Kraynak's opinion is insufficient to establish that claimant suffers from a totally disabling pulmonary impairment. We disagree. The administrative law judge permissibly determined that Dr. Kraynak's opinion, that claimant is totally disabled from a pulmonary standpoint, was not sufficiently reasoned, because the doctor failed to address the significance of the non-qualifying pulmonary function study evidence.¹⁰ *See Mancía v.*

¹⁰ Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as claimant's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as claimant's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but

Director, OWCP, 130 F.3d 579, 588, 21 BLR 2-215, 2-233-34 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).¹¹

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.¹² See *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

permissibly found that his opinion was not well-reasoned. Decision and Order on Remand at 7-9; 20 C.F.R. §718.104(d); see *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

¹¹ Because Dr. Kraynak's opinion is the only opinion supportive of a finding of a totally disabling respiratory or pulmonary impairment, we need not address claimant's contentions of error regarding the administrative law judge's consideration of Dr. Dittman's opinion. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

¹² Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge