

BRB No. 89-0492 BLA

JOSEPH S. BARTOS)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

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

Michelle S. Gerdano (David S. Fortney, Solicitor of Labor; 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, the United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (87-BLA-0124) of Administrative Law Judge Frank D. Marden 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 reviewed the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

merits of this duplicate claim pursuant to the provisions of 20 C.F.R. Part 718, and credited claimant with twelve years of qualifying coal mine employment as stipulated to by the parties. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203(b), but failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Section 718.204(c)(1) and (c)(4). Claimant additionally maintains that the administrative law judge should have excluded Dr. Cander's invalidation report from the record pursuant to 20 C.F.R. §725.456(b)(2). The Director, Office of Workers'

Compensation Programs, responds, urging affirmance.¹

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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987).

Turning first to the procedural issue, claimant contends that the administrative

¹ The administrative law judge's findings pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(c)(2) and (c)(3), and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

law judge erred in admitting Dr. Cander's invalidation report into the record over claimant's objection that this report was submitted in violation of the "twenty-day" rule pursuant to Section 725.465(b)(2). See Director's Exhibit 41. We disagree. The administrative law judge is afforded broad discretion in addressing procedural matters. See Morgan v. Director, OWCP, 8 BLR 1-491 (1986). The administrative law judge determined at the hearing on May 10, 1988, that the Director did not receive the objective evidence contained in Claimant's Exhibit 1, until March 1, 1988, and that the Director obtained Dr. Cander's report and submitted it to claimant within a reasonable period of time, i.e. the Director mailed the report on April 29, 1988, and claimant received the report on May 3, 1988. The administrative law judge permissibly found that the Director was entitled to respond to claimant's evidence in order to ensure a full and fair development of the case. Hearing Transcript at 5-11; see generally Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-153 (1989); Thomas v. Director, OWCP, 9 BLR 1-239 (1987). Additionally, the administrative law judge properly allowed claimant an additional thirty days within which to obtain his expert's response to Dr. Cander's report pursuant to Section 725.456(b)(3). Decision and Order at 2; Hearing Transcript at 11; Claimant's Exhibit 6; see Baggett v. Island Creek Coal Co., 6 BLR 1-1311 (1984). We therefore hold that substantial evidence supports the administrative law judge's decision to admit Dr. Cander's report into the record pursuant to Section 725.456(b)(2).

Turning to the issue of total disability, claimant contends that the

administrative law judge erred in weighing the pulmonary function study evidence of record pursuant to Section 718.204(c)(1). We disagree. The administrative law judge noted that the record contained four non-qualifying and two qualifying pulmonary function studies.² Although claimant maintains that a "true doubt" situation existed which should have been resolved in his favor, the administrative law judge did not find that the conflicting evidence was equally probative. Therefore, the "true doubt" rule was inapplicable. See Stanford v. Director, OWCP, 7 BLR 1-541 (1984). Contrary to claimant's arguments, the administrative law judge permissibly found that the weight of the pulmonary function study evidence failed to establish total disability pursuant to Section 718.204(c)(1), as the most recent test of March 16, 1988, which was non-qualifying, was the most probative indicator of claimant's current pulmonary status.³ Decision and Order at 9, 10; Director's Exhibit 40. See generally Sexton v. Southern Ohio Coal Co., 7 BLR 1-411 (1984); Keen v. Jewell Ridge Coal Corp., 6 BLR 1-454 (1983). The administrative law judge's findings

² A "qualifying" pulmonary function study or blood gas 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

³ The administrative law judge additionally considered the consultative reports of physicians who reviewed the tracings of the qualifying pulmonary function studies. See Revnack v. Director, OWCP, 7 BLR 1-771 (1985). The administrative law judge determined that the study performed on December 15, 1986 was valid, but permissibly credited Dr. Cander's invalidation of the March 17, 1987 study over the validation of that test by Dr. Kraynak, based on Dr. Cander's superior qualifications. Decision and Order at 9, 10. See Scott v. Mason Coal Co., 14 BLR 1-37 (1990)(en

pursuant to Section 718.204(c)(1) are supported by substantial evidence and are hereby affirmed.

banc); Street v. Consolidation Coal Co., 7 BLR 1-65 (1984).

Finally, claimant contends that the administrative law judge, in finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4), erred in evaluating the uncontradicted opinion of Dr. Kraynak, claimant's treating physician. We agree. The administrative law judge determined that the opinion of Dr. Kraynak was not well-reasoned,⁴ as the physician relied on claimant's subjective complaints as well as nonqualifying or unacceptable pulmonary function studies and blood gas studies, but provided no other basis for finding that claimant was totally disabled. Decision and Order at 11. A review of the record, however, indicates that Dr. Kraynak obtained medical and employment histories, examined claimant approximately every three to four months since December 15, 1986, and reviewed all of the objective studies of record. See Claimant's Exhibits 1, 3, 4, 6. The Board has held that a physician's opinion based on factors other than objective tests, such as history, symptoms and physical examination, is sufficient to support a finding of total disability. See generally Marsiglio v. Director, OWCP, 8 BLR 1-190 (1985). Further, the results of non-qualifying pulmonary function studies and blood gas studies are relevant to the overall evaluation of claimant's condition where the values are indicative of reduced pulmonary function; thus an administrative law judge may

⁴ Contrary to claimant's argument, it was not per se irrational for the administrative law judge to credit Dr. Kraynak's opinion on the issue of the existence of pneumoconiosis, but to find the opinion unreasoned on the issue of total disability, as the underlying documentation in support of the physician's conclusions differed for each separate element of entitlement.

not reject a physician's conclusion of total disability solely because the objective tests relied upon are non-qualifying. See 20 C.F.R. §718.204(c)(4); Marsiglio, supra; Fuller v. Gibraltar Coal Corp., 6 BLR 1-1291 (1984). We also note that Dr. Kraynak relied in part on the qualifying pulmonary function study of December 15, 1986, which the administrative law judge determined was valid and acceptable. Decision and Order at 9; Claimant's Exhibit 1. Consequently, we must vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case for the administrative law judge to re-evaluate the opinion of Dr. Kraynak and reweigh all of the probative evidence of record thereunder. If, on remand, the administrative law judge finds that claimant has established a totally disabling respiratory impairment pursuant to Section 718.204(c), see Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987), Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), then the administrative law judge must determine whether this impairment was due to pneumoconiosis pursuant to Section 718.204(b). See Bonessa v. United States Steel Corp., 884 F.2d 76, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

DAVID A. CLARKE, JR.
Administrative Law Judge