

BRB No. 94-2269 BLA

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| JOSEPH VINANSKIE |) | |
| |) | |
| 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 of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Helen M. Cox (Thomas S. Williamson, Jr., 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-BLA-1468) of Administrative Law Judge Ralph A. Romano 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 found no change in conditions or mistake in determination of fact established pursuant to 20 C.F.R. §725.310. Decision and Order at 2. Considering the merits of the claim, the administrative law judge found the evidence insufficient to establish the existence of

pneumoconiosis or total respiratory disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204 and, accordingly, denied benefits. Decision and Order at 2-4.

On appeal, claimant challenges the finding of no change in conditions and the denial of benefits, requesting reversal of the administrative law judge's Decision and Order. The Director,

Office of Workers' Compensation Programs (the Director), responds, urging either affirmance of the administrative law judge's Decision and Order at Section 718.204(b) or a remand for reconsideration of the evidence at Sections 718.202(a)(1) and 718.204(c)(1) and (4).¹

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

At Section 718.202(a)(1), the administrative law judge found the x-ray evidence insufficient to establish the existence of pneumoconiosis, noting that there were "more negative B-readings than positive, which tends to show that there is no disease." Decision and Order at 2. Citing *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge credited the negative readings of radiology professors Barrett and Green over the positive readings of Drs. Smith and Mathur. *Id.* Claimant contends that the administrative law judge erred in finding that there are more negative B-readings than positive, and that he committed "clear error" in finding no pneumoconiosis because there are eight positive and only four negative readings of the latest three x-rays dated Feb. 28, 1991, Jan. 27 and Sep. 21, 1993. Claimant's Brief at 4-5. The Director asserts that the record does not support the administrative law judge's conclusion that Dr. Barrett is a professor of radiology. Director's Brief at 9.

¹ We affirm as unchallenged on appeal the administrative law judge's findings regarding no mistake of fact and pursuant to Sections 718.202(a)(2)-(4) and 718.204(c)(2) and (c)(3). See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

These arguments have merit. A review of the eighteen interpretations of six films reveals that there are seven negative and seven positive interpretations by B-readers.² The record also reveals that while the administrative law judge correctly considered Dr. Greene's credentials as a radiology professor, Director's Exhibit 21, the record does not contain Dr. Barrett's credentials. Because the administrative law judge mischaracterized the evidence and his decision to credit Dr. Barrett is unsupported by the record, see *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*), we vacate the administrative law judge's finding and remand the case for reconsideration of the x-ray evidence. See *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); see also *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

At Section 718.204(c)(1), the administrative law judge found the pulmonary function studies insufficient to establish total respiratory disability because Drs. Sahillioglu and Spagnolo invalidated the only two qualifying studies, which were submitted with claimant's request for modification. Decision and Order at 2-3. Claimant alleges that the administrative law judge erred by failing to address Dr. Similaro's report validating the February 29, 1991 study, Director's Exhibit 41, and asserts that Drs. Sahillioglu and Spagnolo failed to give valid reasons for invalidating the two studies. Claimant's Brief at 5-6. The Director contends that the administrative law judge provided an inadequate rationale for discrediting the two studies because he failed to discuss Dr. Similaro's validation report or Dr. Kraynak's deposition, Claimant's Exhibit 11, in which he contests the invalidation reports. Director's Brief at 13. The Director also responds that while failure to record inspiratory effort is not a valid reason to invalidate a pulmonary function study, the reviewing doctors gave other valid grounds for invalidating the studies, but that a remand is required for the administrative law judge to weigh the conflicting evidence regarding the validity of these two studies. *Id.*

A review of the record indicates that Dr. Similaro validated the February 28, 1991 study, Director's Exhibit 41, and Dr. Kraynak addressed the invalidation reports in his deposition. Claimant's Exhibit 11. As an administrative law judge must provide a rationale for preferring the opinion of a consulting physician regarding the reliability of a pulmonary function study over that of the administering doctor, see *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985), we vacate the administrative law judge's finding and remand the case for reconsideration of the evidence at Section 718.204(c)(1); we instruct the administrative law judge to weigh the evidence

² The overall count is eleven positive and seven negative readings.

regarding the validity of the two qualifying studies in light of the applicable quality standards. See 20 C.F.R. Part 718 Appendix B(2); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); see also *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

At Section 718.204(c)(4) the administrative law judge found the medical opinion evidence insufficient to establish total respiratory disability. The administrative law judge discredited Dr. Kraynak's opinion because it was based on "non-qualifying PFTs," and Dr. Karlavage's opinion because it was inadequately explained. Decision and Order at 3. Claimant contends that the administrative law judge erred with respect to Dr. Kraynak because both pulmonary function studies he conducted were qualifying. Claimant's Brief at 5. The Director agrees, also noting that even if the administrative law judge meant to say that the pulmonary function studies were invalid, he never properly determined that they were invalid. Director's Brief 14.

We vacate the administrative law judge's discrediting of Dr. Kraynak's opinion, as he mischaracterized the pulmonary function studies, see *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Tackett, supra*, and his analysis was tainted by his earlier failure to weigh the evidence regarding the validity of the pulmonary function studies. See *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

The administrative law judge found the evidence insufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b). Decision and Order at 3, 4. Doctors Kraynak and Karlavage found claimant to be totally disabled due to pneumoconiosis. Claimant's Exhibit 5; Director's Exhibit 25. The administrative law judge discredited both doctors' opinions because he found that neither discussed claimant's smoking, asbestosis, or heart disease as possible causes of his impairment.³ Decision and Order at 3. Claimant alleges that the

³ Claimant gave smoking histories of varying lengths, but the administrative law judge made no finding as to how long claimant smoked. Claimant testified that he was exposed to asbestos in his forty-one years of non-coal mine employment with the Reading Railroad, the full-time job that he held during and after his ten years of part-time coal mine employment. Hearing Transcript at 18; Director's Exhibit 32. Dr. Cable diagnosed asbestosis based on history and the January 27, 1993 x-ray. Director's Exhibit 51. Regarding claimant's heart condition, Dr. Ahluwalia diagnosed aortic stenosis and cardiomegaly, Director's Exhibit 19, and Dr. Cable diagnosed coronary artery disease and ischemia. Director's Exhibit 51.

administrative law judge erred by rejecting Dr. Kraynak's opinion because it was "well-reasoned and well-documented as to disability and the cause of that disability." Claimant's Brief at 8. The Director responds that the administrative law judge properly rejected Dr. Kraynak's opinion for failure to discuss alternative causes of claimant's lung condition. Director's Brief at 7, 8.

A review of the record indicates that Dr. Kraynak recorded that claimant smoked one-half pack per day for eight years, quitting four years before the date of the exam in 1993. Claimant's Exhibit 5. While Dr. Kraynak did not specifically discuss this smoking history, he did consider and rule out asbestosis and coronary artery disease as possible causes of claimant's pulmonary impairment. Claimant's Exhibits 5, 11. Because the administrative law judge mischaracterized Dr. Kraynak's opinion, see *Tackett, supra*, and erred in discrediting Dr. Kraynak's opinion regarding total respiratory disability and in considering the x-ray evidence, see discussion, *supra*, we reject the Director's argument and vacate the administrative law judge's discrediting of Dr. Kraynak's opinion.⁴ Cf. *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

In finding no change in conditions, the administrative law judge failed to consider all of the newly submitted evidence, see *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), but instead analyzed only the pulmonary function studies. Decision and Order at 2. Claimant was initially denied benefits because he failed to prove the existence of pneumoconiosis or total respiratory disability, Director's Exhibit 32, and he submitted new x-rays, pulmonary function studies, and medical reports in support of modification. On remand, we instruct the administrative law judge to render a proper change in conditions analysis that includes the newly submitted x-ray⁵ and medical opinion evidence.

⁴ We affirm as unchallenged on appeal the administrative law judge's decision to accord less weight to Dr. Karlavage's opinion. See *Coen, supra*; *Skrack, supra*. Doctor Karlavage noted that claimant had "no substantial smoking history," but made no mention of asbestosis or heart disease in rendering his etiology opinion. Director's Exhibit 25.

⁵ The Sep. 21, 1993 film was read positive and negative by Drs. Barrett and Smith, who are both B-readers/board-certified radiologists. Director's Exhibit 61, Claimant's Exhibit 3. The Jan. 27, 1993 film was read as negative by Dr. Barrett, and as positive by three B-readers/board-certified radiologists and a B-reader. Director's Exhibits 53, 54; Claimant's Exhibits 2, 7, 9. The Feb. 28, 1991 film was read positive by three B-readers/board-certified radiologists and negative by Dr. Barrett and a B-reader/board-certified radiologist. Director's Exhibits 46, 47; Claimant's Exhibits 6, 8; Director's Exhibits 39; 46. The three earlier x-rays, dated

Because the administrative law judge never determined the nature of claimant's coal mine employment, we also instruct the administrative law judge to make findings regarding the exertional requirements of claimant's usual coal mine employment, see *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon* 9 BLR 1-104 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), and then compare the medical opinions with these requirements to determine whether claimant has demonstrated total respiratory disability at Section 718.204(c)(4).⁶ See *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ NANCY S.
DOLDER
Administrative Appeals Judge

Feb. 25 and Mar. 28, 1985 and May 6, 1987, were each read negative and positive by B-readers/board-certified radiologists, including Dr. Greene, a professor of radiology. Director's Exhibits 21, 24, 14, 15, 13, 19, 20.

⁶ Claimant testified at the first hearing that he worked for independent mining companies as a laborer, shovelling and loading coal. Director's Exhibit 31 at 11, 14. The record contains physician's statements of claimant's physical limitations. Director's Exhibits 19, 39; Claimant's Exhibit 5.