

BRB No. 99-0259 BLA

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| WILMER L. MAURER |) | |
| |) | |
| 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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Henry L. Solano, 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, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0292) of Administrative Law Judge Ainsworth H. Brown 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 modification of a duplicate claim,¹ and is before

¹ Claimant filed his first claim for benefits on November 29, 1988. The claim was finally denied on January 25, 1990, for failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 17. Claimant filed the instant claim on April 13, 1992. Director's Exhibit 1. After a hearing, the administrative law judge credited claimant with eight and one-quarter years of coal mine employment, and found that claimant had not established the existence of pneumoconiosis; thus benefits were denied on March 14, 1994. Director's Exhibit 28. Claimant timely requested modification on March 1, 1995. Director's

the Board for the second time. The administrative law judge found that claimant had previously established eight and one-quarter years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(c). The administrative law judge further found, however, that claimant again failed to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(c).² Accordingly, benefits were denied.

Claimant appeals, challenging the administrative law judge's findings at Section 718.204(c)(1) and (c)(4). The Director, Office of Workers' Compensation Programs responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

Exhibit 29. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(c), but that claimant had not established a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 63. Claimant appealed to this Board, which affirmed the denial of benefits. Director's Exhibit 64. *See Maurer v. Director, OWCP*, BRB No. 96-0975 BLA (Mar. 28, 1997)(unpub.). Claimant timely requested modification of the denial of benefits on September 23, 1997. Director's Exhibit 65.

²Administrative Law Judge Ainsworth Brown adjudicated both claimant's 1995 and 1997 requests for modification, and thereby considered all evidence of record relevant to claimant's burden at Section 718.204(c), and specifically incorporated his findings from his prior decisions. Decision and Order at 1; *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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 20 C.F.R. 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. *See* 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In the instant case, claimant previously established the existence of pneumoconiosis arising out of coal mine employment. *See* Director's Exhibit 63.

Initially, claimant contends that the administrative law judge's Decision and Order violates the Administrative Procedure Act's requirement that the administrative law judge state the reasons for his decision. *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). Contrary to claimant's contention, the administrative law judge has provided an adequate explanation of his findings of fact and conclusions of law. Thus, his Decision and Order complies with the requirements of the APA.³

³The basis for the administrative law judge's decision can be discerned. *See generally Markus v. Old Ben Coal Co.*, 712 F.2d 322 (7th Cir. 1983).

With respect to the issue of total disability at Section 718.204(c)(1), claimant contends that the administrative law judge erred in accepting the non-qualifying pulmonary function study of February 12, 1998 administered by Dr. Rashid, and in rejecting the qualifying pulmonary function studies of September 10, 1997 and February 25, 1998 administered by Dr. Kraynak. *See* Director's Exhibits 66, 74, 76. Specifically, claimant contends that the administrative law judge erred in crediting the invalidations of the qualifying studies over the validations rendered by physicians of similar credentials. At Section 718.204(c)(1), the administrative law judge adequately discussed the opinions of Drs. Kraynak, Ranavaya, Sahillioglu, Venditto and Simelaro concerning the validity of the pulmonary function studies. The administrative law judge stated: "Just as Dr. Ahluwalia did back in October 1995, Dr. Rashid obtained much higher values on testing in comparison with Dr. Kraynak's studies." Decision and Order at 4. In finding the pulmonary function study evidence insufficient to meet claimant's burden of proof, the administrative law judge permissibly credited the non-qualifying study because the "disparity in values...raises a huge question about the lower results..."⁴ Decision and Order at 3, n.2. *See Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1989). As the administrative law judge noted, this is particularly true where the tests were conducted only days apart, as were the pulmonary function studies on February 12, 1998 by Dr. Rashid and the studies conducted by Dr. Kraynak on February 25, 1998. *Id.* We, therefore, affirm the administrative law judge's findings at Section 718.204(c)(1) as supported by substantial evidence.

In considering the evidence at 20 C.F.R. §718.204(c)(4), claimant argues that the administrative law judge failed to consider Dr. Kraynak's medical opinion, and applied an inconsistent standard of review. The administrative law judge found:

Dr. Rashid did find objective evidence of diminished blood supply to the heart. He is a certified internist, and, as such possesses better credentials in comparison with Dr. Kraynak's. Dr. Rashid's comprehensive pulmonary

⁴ The administrative law judge did credit Dr. Sahillioglu's invalidation of the September 10, 1997 pulmonary function study based on no demonstration of inspiratory effort and poor effort. Director's Exhibit 67. As the Director, Office of Workers' Compensation Programs (the Director), points out, initial inspiration from ambient air is consistent with Appendix B of Part 718, and the Director does not endorse this portion of the invalidation, or the administrative law judge's reliance on it. Director's Brief at 7-8, n.8. However, Dr. Sahillioglu does give an alternate, valid reason for discrediting the pulmonary function study, thus any error on the administrative law judge's part is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

examination and testing provides ample support for his conclusion that there is no pulmonary disability despite the existence of disease being demonstrated on chest x-ray examination.

Decision and Order at 4. Contrary to claimant's argument, a review of the Decision and Order shows that the administrative law judge considered Dr. Kraynak's medical opinion. However, he permissibly accorded greater weight to Dr. Rashid's report based upon his superior credentials, *see Dillon v. Peabody Coal Co.*, 11BLR 1-113 (1988), and he found this "comprehensive" report to be better supported by the objective studies of record, and thus credible, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Decision and Order at 4. Consequently, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4) as this finding is supported by substantial evidence. As claimant has failed to establish total pulmonary or respiratory disability, an essential element of entitlement pursuant to Part 718, entitlement thereunder is precluded. *See Trent, supra; Perry, supra.*

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge