BRB No. 02-0871 BLA

THADDEUS E. STYKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO-HIGHLAND COAL COMPANY	)	
	)	DATE ISSUED: 07/31/2003
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

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

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

William E. Wyatt, Jr. (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-0009) of Administrative Law Judge Robert D. Kaplan 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).[1] This case involves a duplicate claim filed on October 1, 1996.[2] In the initial

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on September 24, 1987. Director=s Exhibit 35. By Decision and Order dated April 6, 1989, Administrative Law Judge Robert D. Kaplan found that the Acontradictory, but substantially equally-probative [x-ray] evidence@ was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1) (2000). *Id.* Judge Kaplan also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. '718.203(b) (2000). *Id.* Judge Kaplan, however, found that the evidence was

Decision and Order, Administrative Law Judge Ralph A. Romano, after crediting claimant with seventeen years of coal mine employment, found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(c) (2000). Director=s Exhibit 54. Judge Romano, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000). *Id.* Accordingly, Judge Romano denied benefits. *Id.*

Claimant filed an appeal with the Board. Director=s Exhibit 55. While his appeal was pending, claimant requested that the Board remand his claim to the district director so that he could pursue modification. Director=s Exhibit 59. By Order dated September 25, 1998, the Board dismissed claimant=s appeal and remanded the case to the district director for modification proceedings.[3] *Styka v. Jeddo-Highland Coal Co.*, BRB No. 98-1251 BLA (Sept. 25, 1998) (Order) (unpublished).

In a Decision and Order dated June 19, 2000, Administrative Law Judge Paul H. Teitler found that the newly submitted evidence (*i.e.*, the evidence submitted since the denial of claimant=s first claim) was insufficient to establish total disability pursuant to 20 C.F.R.

---

insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. ' 718.204(c) (2000). *Id.* Accordingly, Judge Kaplan denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1987 claim.

Claimant filed a second claim on October 1, 1996. Director=s Exhibit 1.

[3] The Board informed claimant that the case would be reinstated only if claimant requested reinstatement. *Styka v. Jeddo-Highland Coal Co.*, BRB No. 98-1251 BLA (Sept. 25, 1998) (Order) (unpublished). The Board further informed claimant that his request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 98-1251 BLA. *Id.*

'718.204(c) (2000) and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000). Accordingly, Judge Teitler denied benefits.

Claimant subsequently filed a second request for modification on April 9, 2001. Administrative Law Judge Robert D. Kaplan (the administrative law judge) found that the newly submitted evidence (*i.e.*, the evidence submitted since the denial of claimant=s first claim) was insufficient to establish total disability pursuant to 20 C.F.R. '718.204(b)[4] and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in failing to make specific findings as to whether there was a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. '725.310 (2000). Claimant also argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(i) and (iv). Employer responds in support of the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Claimant argues that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(i). The record contains two newly submitted pulmonary function studies conducted on March 8, 2001 and July 27, 2001. Claimant=s March 8, 2001 pulmonary function study produced qualifying values both before and after the administration of a bronchodilator. Director=s Exhibit 88. While claimant=s pulmonary function study conducted on July 27, 2001 produced non-qualifying values before the

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found at 20 C.F.R. '718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

administration of a bronchodilator, it produced qualifying post-bronchodilator values. Employer=s Exhibit 3.

Claimant contends that the administrative law judge erred in finding that the qualifying March 8, 2001 pulmonary function study was not in substantial compliance with the quality standards. *See* Decision and Order at 5. Dr. Levinson invalidated claimant=s March 8, 2001 pulmonary function study, finding that claimant provided less than optimal effort, cooperation and comprehension. Employer=s Exhibit 1. Dr. Levinson explained, *inter alia*, that claimant=s FEV1 values, both before and after administration of a bronchodilator, showed excessive variability.[5] *Id.* Drs. Matthew Kraynak (M. Kraynak) and

[5] In his review of claimant=s March 8, 2001 pulmonary function study, Dr. Levinson stated that:

> In my professional opinion this is clearly an invalid pulmonary function study since the patient effort is judged unacceptable on both the pre and post bronchodilator attempts. On the pre-bronchodilator attempt there is a variation of the FEV1s measured at 300mls. which exceeds the 718 Regulations indicating that the FEV1 should not vary by more than 100mls. or 5% of the largest FEV1. On the post-bronchodilator attempt the variation of the FEV1s is not measured at 600mls, again this greatly exceeds the 718 Regulations. This indicates that the patient effort is unacceptable and the present study does not represent the true and complete capacities of [claimant]. The MVV curves indicate a variable and inconsistent effort so that the patient has not exerted a maximal and sustained effort for 12 to 15

Raymond Kraynak (R. Kraynak) disagreed with Dr. Levinson=s assessment of the study, and opined that claimant=s March 8, 2001 pulmonary function study was valid. Claimant=s Exhibits 1, 2. The administrative law judge, however, credited Dr. Levinson=s assessment of claimant=s March 8, 2001 pulmonary function study over that of Drs. M. Kraynak and R. Kraynak based upon Dr. Levinson=s superior qualifications.[6] Decision and Order at 5. An administrative law judge may properly question the validity of a pulmonary function study that is invalidated by a better qualified physician. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Because it is based upon substantial evidence, we affirm the administrative law judge=s finding that claimant=s May 8, 2001 pulmonary function study is not in substantial compliance with the Part 718 quality standards.

Claimant also contends that the administrative law judge erred in his consideration of claimant=s July 27, 2001 pulmonary function study. In his consideration of claimant=s July 27, 2001 pulmonary function study, the administrative law judge stated:

> I note that although the July 27, 2001 PFT pre-bronchodilator results are not qualifying, they are abnormal since they were below 80% of normal values. However, Dr. Dittman stated that these result [sic] must be considered in light of Claimant=s Areduced effort for the testing.@ Dr. Simelaro checked the box indicating that this PFT was Aacceptable,@ but did not comment on the adequacy of Claimant=s efforts. Therefore, I credit Dr. Dittman=s opinion over that of Dr. Simelaro. I also credit Dr. Dittman=s opinion on Claimant=s efforts over that of Dr. Kraynak since Dr. Dittman possesses superior credentials. *See Scott*, 14 BLR at 1-40. Based on the opinion of Dr. Dittman, I find the probative value of Claimant=s July 27, 2001 PFT is greatly reduced.

---

seconds as required.

Employer=s Exhibit 1.

[6] Dr. Levinson is Board-certified in internal medicine and pulmonary disease. Employer=s Exhibit 2. Dr. Matthew Kraynak is Board-certified in family medicine. Director=s Exhibit 85. Dr. Raymond Kraynak is Board-eligible in family medicine. *Id.*

Decision and Order at 9.

The administrative law judge erred in crediting Dr. Dittman=s assessment of claimant=s July 27, 2001 pulmonary function study over that of Dr. Simelaro because Dr. Simelaro Adid not comment on the adequacy of [c]laimant=s efforts.@ By characterizing claimant=s July 27, 2001 pulmonary function study as Aacceptable,@ Dr. Simelaro implicitly found that claimant=s effort on the study was sufficient to produce valid results.[7] *See* Claimant=s Exhibit 3.

Claimant also accurately notes that the administrative law judge, in an earlier part of his decision, found that claimant=s July 27, 2001 pulmonary function study was in substantial compliance with the Part 718 regulations. In making this determination, the administrative law judge credited Dr. Simelaro=s opinion that the study was acceptable. *See* Decision and Order at 5. However, the administrative law judge subsequently credited Dr. Dittman=s assessment of the study over that of Dr. Simelaro. The administrative law judge failed to reconcile these conflicting findings. In light of the above-referenced errors, we vacate the administrative law judge=s findings regarding claimant=s July 27, 2001 pulmonary function study and remand the case to the administrative law judge for reconsideration of whether the newly submitted pulmonary function study evidence is sufficient to establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(i).

Claimant next argues that the administrative law judge erred in his consideration of the newly submitted medical opinion evidence at 20 C.F.R. '718.204(b)(2)(iv). Drs. M. Kraynak and R. Kraynak opined that claimant was totally disabled. Director=s Exhibit 94; Claimant=s Exhibit 1. However, Dr. Dittman opined that claimant was capable, from a pulmonary standpoint, of performing his previous coal mine employment. Employer=s Exhibit 5 at 19. The administrative law judge credited Dr. Dittman=s opinion, that claimant was not disabled from a pulmonary standpoint, over the contrary opinions of Drs. M. Kraynak and R. Kraynak. Decision and Order at 9-10.

Claimant contends that the administrative law judge erred in his consideration of Dr. M. Kraynak=s opinion. We disagree. The administrative law judge properly discredited Dr. M. Kraynak=s finding of total disability because it was based in part upon the non-

[7] The form completed by Dr. Simelaro is entitled AValidation of Pulmonary Function and Arterial Blood Gas Studies.@ It allows a physician to indicate that a pulmonary function study is Aacceptable@ or Anot acceptable.@ The form provides space for an explanation only when a physician finds a study Anot acceptable.@

conforming March 8, 2001 pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order 9; Director=s Exhibit 94. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge=s finding.

Claimant also contends that the administrative law judge erred in his consideration of Dr. Simelaro=s opinion. At the March 12, 2002 hearing, Administrative Law Judge Ainsworth H. Brown permitted claimant an opportunity to submit a post-hearing review of claimant=s July 27, 2001 pulmonary function study.
[8] Transcript at 5-6. Claimant subsequently submitted, *inter alia*, Dr. Simelaro=s assessment of claimant=s July 27, 2001 pulmonary function study, and it was admitted into the record.
[9] Decision and Order at 3.

---

[8] Administrative Law Judge Ainsworth H. Brown conducted the hearing. After Judge Brown=s death, the case was assigned to Judge Kaplan (the administrative law judge).

[9] Based upon his review of claimant=s July 27, 2001 pulmonary function study, Dr. Simelaro opined that:

> Due to mild to moderate obstructive pattern that display=s [sic] on this patient=s PFT, it is safe to assume that he would have difficulty in doing his present job as a coal miner. In this case, he would have shortness of breath with moving excessive weights of 100 lbs or more. Also, dyspnea would result in him using the shovel and crawling up the boom.

In summary, I feel that this patient would suffer dyspnea in performing his job as an oiler on the shovel.

Claimant=s Exhibit 3.

In his consideration of Dr. Simelaro=s report, the administrative law judge stated that:

> [Judge] Brown allowed Claimant to submit a review of [the July 27, 2001 pulmonary function] study for purposes of determining its validity only. Thus, I believe Dr. Simelaro=s opinion is outside the scope of [Judge] Brown=s ruling. Regardless, his opinion is entitled to little, if any, weight since it is based only on the results of the PFT.

Decision and Order at 9 n.9.

The administrative law judge properly found that claimant was allowed to submit Dr. Simelaro=s report for the sole purpose of addressing the validity of claimant=s July 27, 2001 pulmonary function study. Consequently, the administrative law judge permissibly limited his consideration of Dr. Simelaro=s opinion to the issue of the validity of claimant=s July 27, 2001 pulmonary function study.

Claimant next contends that the administrative law judge erred in discrediting Dr. R. Kraynak=s opinion that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge discredited Dr. R. Kraynak=s opinion because it was based in part upon claimant=s July 27, 2001 pulmonary function study, a study that the administrative law judge found was entitled to Alittle weight due to [claimant=s] poor efforts.@ Decision and Order at 9-10. However, in light of our decision to vacate the administrative law judge=s basis for discrediting claimant=s July 27, 2001 pulmonary function study, the administrative law judge=s basis for discrediting Dr. R. Kraynak=s opinion cannot stand. We, therefore, vacate the administrative law judge=s finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b)(2)(iv), and remand the case for further consideration.

On remand, the administrative law judge should initially consider whether the newly submitted evidence (i.e., the evidence submitted subsequent to Judge Teitler=s denial of benefits, rather than the evidence submitted since the denial of claimant=s first claim) is sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b), and therefore, sufficient to establish a change in conditions pursuant to 20 C.F.R. ' 725.310 (2000).[10] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14

[10] The administrative law judge reviewed Administrative Law Judge Paul H. Teitler=s previous findings. The administrative law judge agreed with Judge Teitler=s finding that the newly submitted evidence before Judge Teitler was insufficient to establish total disability. *See* Decision and Order at 6, 10. Inasmuch as no party challenges the administrative law judge=s finding, we affirm the administrative law judge=s implicit finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R.

BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

If the newly submitted evidence (*i.e*. the evidence submitted subsequent to Judge Teitler=s denial of benefits) is insufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b), the administrative law judge should consider whether there was a mistake in determination of fact pursuant to 20 C.F.R. ' 725.310 (2000).

Should the administrative law judge find that claimant has established modification pursuant to 20 C.F.R. ' 725.310 (2000), the administrative law judge must next consider whether all of the evidence submitted subsequent to the denial of claimant=s 1987 claim is sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b), thereby establishing a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000). *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Should the administrative law judge, on remand, find the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000), he must consider claimant's 1995 claim on the merits, based on a weighing of all the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

' 725.310 (2000) as of Judge Teitler=s June 19, 2000 Decision and Order.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge

_____

PETER A. GABAUER, JR.
Administrative Appeals Judge