BRB No. 09-0684 BLA

ROBERT P. HORAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLASCHAK COAL CORPORATION	)	
	)	
and	)	DATE ISSUED: 07/27/2010
	)	
SOMERSET CASUALTY INSURANCE 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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti LLP), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2006-BLA-05406) of Administrative Law Judge Janice K. Bullard rendered on a claim filed on November 22, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at

30 U.S.C. §§921(c)(4) and 932(*l*)).[1] Director's Exhibit 2. This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and found that the evidence of record established nineteen years of coal mine employment. The administrative law judge accepted the parties' stipulation that claimant established the existence of pneumoconiosis arising out coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). In addition, the administrative law judge found that because claimant did not establish total disability, claimant could not prove that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appealed to the Board and argued that the administrative law judge erred in finding the pulmonary function study (PFS) and medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). The Board affirmed, as unchallenged on appeal, the administrative law judge's findings of nineteen years of coal mine employment, and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). *R.H.* [*Horan*] *v. Blaschak Coal Corp.*, slip op. at 2, BRB No. 07-0971 BLA (Sept. 22, 2008)(unpub.). Because neither party challenged the administrative law judge's weighing of the June 16, 2006 qualifying PFS under 20 C.F.R. §718.204(b)(2)(i), the Board also affirmed her finding that this study was valid.[2] *Id*. at 5. With respect to the non-qualifying study obtained on July 27, 2005, the Board noted that the administrative law judge acknowledged Dr. Kraynak's opinion, that the test was nonconforming, but affirmed her finding that the study was valid, based on the opinion of Dr. Talati, who has superior qualifications. *Id*. The Board vacated, however, the administrative law judge's finding that the March 9, 2005 qualifying PFS was not valid, and her finding that the valid PFS evidence is in equipoise. *Id*. at 6. The

[1] By Order dated April 8, 2010, the Board gave the parties the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. *Horan v. Blaschak Coal Corp*., BRB No. 09-0684 BLA (Apr. 8, 2010)(unpub. Order). The Director, Office of Workers' Compensation (the Director), has responded and states that the amendments do not apply, as the claim at issue in this case was filed before January 1, 2005. Claimant and employer have not responded. We concur with the Director's position and hold that Section 1556 does not apply to this claim, filed on November 22, 2004. Director's Exhibit 2.

[2] A "qualifying" pulmonary function study (PFS) yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Board instructed the administrative law judge to reconsider the validity of the PFS performed on March 9, 2005 and then reconsider whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

The Board also vacated the administrative law judge's finding, under to 20 C.F.R. §718.204(b)(2)(iv), that Dr. Kraynak's opinion is insufficient to establish total disability and instructed her to consider Dr. Kraynak's deposition testimony, in conjunction with his written medical opinion, giving proper deference to his opinion as claimant's treating physician, if warranted. *Horan*, slip op. at 7-8. The Board held that if, on remand, the administrative law judge found the evidence sufficient to establish total disability, she must then determine whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*. at 8.

On remand, the administrative law judge found that the March 9, 2005 pulmonary function test was not a reliable indicator of claimant's respiratory abilities, and that Dr. Kraynak's deposition offered no new evidence suggesting that his opinion is well-reasoned or well-documented. Decision and Order on Remand at 6. The administrative law judge found, therefore, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the PFS and the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response in claimant's appeal, unless specifically requested to do so by the Board.

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.[3] 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[3] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the last ten years of claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 5.

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*).

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains PFSs obtained on March 9, 2005, July 27, 2005, and June 16, 2006. Director's Exhibits 8, 9; Claimant's Exhibit 1. The June 16, 2006 PFS, which did not include a post-bronchodilator test, produced qualifying values. Claimant's Exhibit 1. The July 27, 2005 PFS reflected nonqualifying results both before and after the administration of bronchodilators. Director's Exhibit 9.

The March 9, 2005 PFS, the validity of which was at issue on remand, produced qualifying values both before and after the administration of bronchodilator medication. Director's Exhibit 8. Dr. Talati obtained this PFS in conjunction with his examination of claimant on March 9, 2005. *Id*. On the computer printout of the test results, claimant's effort was described as "sub[-]optimal." *Id*. Similarly, on the computer-generated analysis of the results, the post-bronchodilator FEV1 values were described as "significantly decreased, indicating the possibility of sub-optimal patient effort and/or adverse reaction to continued bronchodilator therapy." *Id*. Dr. Talati signed the computer-generated report and indicated, in a handwritten note, that claimant exerted "sub-optimal effort as per graph and tech note." *Id*. In the report of his examination of claimant, Dr. Talati stated that he could not precisely determine the degree of claimant's pulmonary impairment due to claimant's sub-optimal effort on the PFS and that a repeat PFS was necessary. *Id*. Dr. Kraynak reviewed the March 9, 2005 PFS and testified at his deposition:

> The tracings, in my opinion, showed good effort throughout. They are very reproducible, very uniform. And when you look at the [pre-bronchodilator] FEV1, there are three attempts. Each attempt was 54 percent of predicted. So you can't get better than that. The values were 2.11, 2.13, [and] 2.11. The forced vital capacity was 70 percent, 67 percent, [and] 67 percent. They're very close in proximity to each other and, again, are very reproducible and would show good effort . . . It would be almost impossible for this gentleman to blow 54% on three occasions without giving good effort.

Claimant's Exhibit 2 at 10.

In accordance with the Board's instructions, the administrative law judge reconsidered the validity of the March 9, 2005 PFS on remand and found:

> Dr. Kraynak opined that the fact that the three highest-value trials achieved such similar results argues in favor of validity. [Claimant's Exhibit 2 at 10]. It is true that the three pre-bronchodilator results presented were nearly identical. [Director's Exhibit] 8. That said, Dr. Kraynak possesses

> inferior credentials to Dr. Talati, and had no access to the technician who may have administered the test . . . .
>
> I also agree that the record is unclear as to whether Dr. Talati witnessed the testing on March 9; indeed, it appears that he did not. However, Dr. Talati had access to the technician who administered the test. Here as well, Dr. Talati's superior qualifications lend credence to his findings over those of Dr. Kraynak.
>
> Upon further review, there also is an additional reason to credit the belief of Dr. Talati that [c]laimant did not use his best effort: the much improved results that were obtained on July 27, 2005, in a test ordered by Dr. Talati. The Board has affirmed my finding that these results were valid. [*R.H.* [*Horan*] *v. Blaschak Coal Corp.*, slip op. at 5, BRB No. 07-0971 BLA (Sept. 22, 2008)].

Decision and Order on Remand at 4.

Claimant contends that the administrative law judge erred in finding that the qualifying March 9, 2005 PFS was invalid, based on Dr. Talati's superior qualifications and his access to the technician who administered the test. Claimant also argues that the administrative law judge erred in relying on the non-qualifying July 27, 2005 PFS, that claimant continues to maintain is nonconforming. Claimant also alleges that the administrative law judge "mechanically credit[ed]" this study and ignored the fact that a later valid qualifying PFS, i.e., the June 16, 2006 study, "could logically yield low values given the progressive nature of pneumoconiosis." Claimant's Brief at 15.

After review of the administrative law judge's findings, and claimant's arguments on appeal, we affirm the administrative law judge's determination that the March 9, 2005 PFS was invalid. In this case, the administrative law judge was required, in her role as fact-finder, to determine which of two conflicting opinions regarding whether claimant's effort on the March 9, 2005 PFS was sufficient to produce valid results was more persuasive. We hold that the administrative law judge acted within her discretion in giving more weight to Dr. Talati's opinion, based on his review of the tracings and the technician's note, that claimant's effort was sub-optimal, in light of Dr. Talati's superior qualifications.[4] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 4; Director's Exhibit 8. Because the administrative law judge provided a valid rationale for

[4] Dr. Talati is Board-certified in internal medicine and pulmonary disease. Dr. Kraynak testified at his deposition that he is Board-eligible in family medicine. Claimant's Exhibit 2 at 4.

her finding, we decline to address claimant's allegations of error regarding the alternative rationales set forth by the administrative law judge.[5] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We affirm, therefore, the administrative law judge's findings that the March 9, 2005 PFS was invalid and that the valid PFSs of record were in equipoise. Accordingly, we affirm the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Regarding 20 C.F.R. §718.204(b)(2)(iv), in the Board's prior Decision and Order, the administrative law judge was instructed to reconsider her finding that Dr. Kraynak's opinion was insufficient to establish total disability in light of his deposition testimony. On remand, the administrative law judge set forth the portion of the deposition in which Dr. Kraynak responded to claimant's counsel's question as to whether he had an opinion on the issue of total disability by stating "[i]t is my opinion that [claimant] is totally and permanently disabled due to coal workers' pneumoconiosis he contracted during his employment in the anthracite coal industry." Decision and Order on Remand at 5, quoting Claimant's Exhibit 2 at 14. The administrative law judge found:

> Dr. Kraynak did not discuss in the deposition *why* he concluded that [c]laimant is disabled any more than he did in his written report. In fact, his oral statement contains less reasoning than his written statement, which refers to [c]laimant's "history of having worked in the anthracite coal industry in excess of twenty years, the complaints with which he has presented, his diagnostic testing and my physical examination." [Claimant's Exhibit 2 at 4]. Dr. Kraynak presented no additional treatment records through the deposition, and made conclusions regarding the pulmonary function testing that are at odds with my findings on that issue, including findings that were upheld by the Board. Accordingly, the deposition offers no new evidence that suggests that Dr. Kraynak's opinion is well-reasoned or well-documented.

Decision and Order on Remand at 5-6 (emphasis in original). Based upon this finding, the administrative law judge concluded that total disability was not established at 20 C.F.R. §718.202(a)(4). *Id*. at 6.

[5] We also decline to revisit our prior holding affirming the administrative law judge's determination that the nonqualifying PFS obtained by Dr. Talati on July 27, 2005 was valid, as we are not persuaded that the law of the case doctrine is inapplicable, or that an exception has been demonstrated. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*).

Claimant contends that the administrative law judge erred in finding that the opinion of Dr. Kraynak, claimant's treating physician for twenty years, was not well-reasoned and well-documented. Claimant also alleges that the administrative law judge erred in determining that Dr. Kraynak did not present additional treatment records and that his conclusions regarding the PFS evidence are at odds with her findings at Section 718.204(b)(2)(i). Claimant's arguments are without merit.

Rendering credibility determinations and deciding whether a doctor's opinion is sufficiently reasoned and documented fall within the purview of the administrative law judge, as fact-finder. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002). In the present case, the administrative law judge acted within her discretion in finding that Dr. Kraynak's opinion was not adequately reasoned and, therefore, was insufficient to establish total disability, despite Dr. Kraynak's status as claimant's treating physician.[6] *See* 20 C.F.R. §718.104(d)(5). The administrative law judge rationally determined that the credibility of Dr. Kraynak's diagnosis of a totally disabling impairment was undermined by his reliance upon conclusions regarding the validity of the PFSs obtained on March 9 and July 25, 2005, that conflicted with the administrative law judge's rational findings. *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; Decision and Order on Remand at 5-6; Director's Exhibit 9; Claimant's Exhibit 2. Because the administrative law judge provided a valid rationale for her finding, we decline to address claimant's allegations of error regarding the alternative rationales set forth by the administrative law judge. *See Kozele*, 6 BLR at 1-382 n.4. We affirm, therefore, the administrative law judge's determination that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's determination that claimant failed to prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

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[6] The regulation at 20 C.F.R. §718.104(d)(5) provides:

> In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

20 C.F.R. §718.104(d)(5).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge