

BRB No. 99-0260 BLA

JOSEPH K. KORZENASKIE)	
)	
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 Denying Benefits Upon Remand From the Benefits Review Board of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand From the Benefits Review Board (96-BLA-0787) of Administrative Law Judge Ainsworth H. Brown 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). Claimant filed the instant duplicate claim on September 11, 1995.¹ In a Decision and Order dated April 9, 1997, the administrative law judge credited

¹Claimant filed an initial claim for benefits on June 30, 1973 which was denied by the Social Security Administration, and was finally denied by the Department of Labor on April 9, 1980. Director's Exhibit 19. Claimant did not take any further action in pursuit of benefits until filing a second claim on September 13, 1984. *Id.* In a Decision and Order dated March 29, 1988, Administrative Law Judge Joel R. Williams denied benefits upon finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). *Id.* Claimant did not take any further

claimant with twelve years of coal mine employment and considered the claim under the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis by x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge thus concluded that a material change in conditions was established under 20 C.F.R. §725.309. The administrative law judge further found that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c), and that there was insufficient evidence to rebut the presumption. The administrative law judge further found, however, that the evidence of record was insufficient to establish total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. Claimant appealed. The Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, and findings under Sections 725.309, 718.202(a)(1), and 718.204(c)(2) and (c)(3).² *Korzenaskie v. Director, OWCP*, BRB No. 97-1106 BLA (Mar. 19, 1998)(unpublished). The Board vacated the administrative law judge's findings at Section 718.204(c)(1) and (c)(4), however. *Id.* With regard to Section 718.204(c)(1), the Board noted that the administrative law judge erred in failing to find that the pre-bronchodilator values from an October 9, 1995 pulmonary function study were, in fact, qualifying values. *Id.* at 3. Although the Board held that this error was harmless because the administrative law judge properly relied upon Dr. Michos's invalidation of that study based upon Dr. Michos's superior qualifications and because Dr. Green, who administered the October 1995 study, stated that the miner did not exert optimal effort, the Board agreed with claimant and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge's mischaracterization of the October 1995 study as non-qualifying affected the administrative law judge's weighing of the September 9, 1996, qualifying pulmonary function study. *Id.* The Board thus remanded the case for the administrative law judge to explain which values from the October 9, 1995 study – *i.e.*, the pre-bronchodilator or post-bronchodilator values – he finds more probative, and to reconsider the September 9, 1996 study. *Id.* The Board further instructed the administrative law judge to consider the impact of his reconsideration of the pulmonary function study evidence on his evaluation of the medical opinions of Drs. Green and Kraynak under Section 718.204(c)(4). *Id.*

On remand, the administrative law judge found the non-qualifying, post-bronchodilator values in the October 9, 1995 study more credible than the qualifying, pre-bronchodilator values in that study. The administrative law judge further found that the qualifying results from the September 9, 1996 pulmonary function study had diminished probative value inasmuch as they were

action until filing the instant duplicate claim on September 11, 1995. Director's Exhibit 1.

²The Board did not address at that time the administrative law judge's finding at 20 C.F.R. §718.203(c), but we now affirm that finding as unchallenged in both the prior and the present appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 1997 Decision and Order at 6.

even lower than the less credible pre-bronchodilator values from the October 9, 1995 study. The administrative then discounted Dr. Kraynak's opinion that claimant is totally disabled, and accorded greater weight to the contrary opinion of Dr. Green under Section 718.204(c)(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings with respect to the October 1995 and September 1996 pulmonary function studies, as well as the administrative law judge's rejection of Dr. Kraynak's medical opinion. The Director responds in support of the administrative law judge's denial of benefits on remand.

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. 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).

On appeal, claimant contends that the administrative law judge erred in discounting the pre-bronchodilator, qualifying values on the October 9, 1995 pulmonary function study and in according more weight to the post-bronchodilator, non-qualifying values from this same study. Claimant's contention lacks merit. In remanding this case, the Board instructed the administrative law judge to explain which values from the October 9, 1995 study – *i.e.*, the qualifying pre-bronchodilator or non-qualifying post-bronchodilator values – he finds more probative, and to reconsider the September 9, 1996 study since the administrative law judge's prior mischaracterization of the pre-bronchodilator values from the October 1995 study as non-qualifying affected the administrative law judge's consideration of the September 1996 study.³ *Korzenaskie v. Director, OWCP*, BRB No. 97-1106 BLA (Mar. 19, 1998)(unpublished), slip op. at 3. Pursuant to the Board's instruction, the administrative law judge correctly noted that Dr. Green, who administered the study, indicated that the October 9, 1995 test as a whole exhibits “most likely a suboptimal effort and an underestimate of true parameters.” Decision and Order on Remand at 1; Director's Exhibit 6. The administrative law judge rationally assigned “more credence” to the higher, post-bronchodilator values in light of Dr. Green's assessment that the spirometry as a whole showed suboptimal effort. *See generally Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); Decision and Order on Remand at 1; Director's Exhibit 6.

³The Board noted that the administrative law judge in his prior decision used the October 9, 1995 study to find the September 9, 1996 study insufficient to establish total disability on the basis that the October 9, 1995 study, which was found to be invalid for suboptimal effort, but still produced values exceeding those set forth in the regulations, was conducted only approximately a year earlier. *Korzenaskie v. Director, OWCP*, BRB No. 97-1106 BLA (Mar. 19, 1998)(unpublished), slip op. at 3.

Claimant also contends that the administrative law judge improperly considered the September 6, 1996 pulmonary function study because he provided no basis for discounting it. This contention lacks merit. The administrative law judge, reasonably and within his discretion, found that the qualifying results from the September 9, 1996 study were of “diminished probative value” in light of the fact that the results were even lower than the qualifying results from the October 9, 1995 study, which, as discussed *supra*, the administrative law judge properly found lacked probative value. *See Baker v. North American Coal Co.*, 7 BLR 1-79 (1984); Decision and Order on Remand at 2; Claimant’s Exhibit 28.

Claimant also contends that the administrative law judge erred in discounting Dr. Kraynak’s opinion. We disagree. The administrative law judge properly discounted Dr. Kraynak’s opinion that claimant is totally disabled because Dr. Kraynak relied upon unreliable pulmonary function study results from his September 6, 1996 study. *See generally Hutchins v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 2; Claimant’s Exhibits 21, 29. Furthermore, the administrative law judge properly concluded that Dr. Kraynak’s opinion was undermined because Dr. Kraynak failed to consider the non-qualifying results on the October 9, 1995 pulmonary function study and Dr. Green’s evaluation of that study as involving suboptimal effort. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens, supra*; Decision and Order on Remand at 2. Contrary to claimant’s contention that it was clear that Dr. Kraynak testified that he considered the non-qualifying results of the October 9, 1995 study, the administrative law judge’s opposite finding is supported by substantial evidence. Dr. Kraynak testified that he considered the pre-bronchodilator, qualifying results of the October 9, 1995 study, but Dr. Kraynak did not even refer in his testimony to the non-qualifying values or Dr. Green’s assessment of the study, much less otherwise indicate that he considered them. Claimant’s Exhibit at 10. Accordingly, we affirm the administrative law judge’s determination on remand that Dr. Green’s opinion that claimant is not totally disabled is entitled to greater weight than Dr. Kraynak’s opinion under Section 718.204(c)(4). We, therefore, affirm the administrative law judge’s finding that the evidence was insufficient to establish total disability under Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Remand From the Benefits Review Board is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge