BRB No. 00-0618 BLA

HENRY J. NEGHERBON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Edward Waldman (Judith E. Kramer, Acting 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-548) of Administrative Law Judge Ralph A. Romano 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] The administrative law judge found that claimant established twenty years of coal mine employment and applied the regulations found at 20 C.F.R. Part 718.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Claimant filed his initial claim for benefits on July 31, 1984. In his Decision and Order on October 2, 1987, Administrative Law Judge James W. Kerr found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but found that claimant failed to establish total disability and denied benefits. Director's Exhibit 37. Claimant appealed, and in *Negherbon v. Director, OWCP*, BRB No. 87-3194 BLA (Dec. 29, 1988)(unpub.), the Board affirmed Judge Kerr's denial of benefits. Claimant filed a second application for benefits on October 26, 1989. Administrative Law Judge Robert D. Kaplan found that the parties stipulated to twenty years of coal mine employment and that claimant established the existence of pneumoconiosis, but that claimant failed to establish total disability, and consequently found that claimant failed to establish a material change in conditions and denied benefits. Director's Exhibit 46. Claimant appealed, and in *Negherbon v. Director, OWCP*, BRB No. 97-0968 BLA (Mar. 26, 1998)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 52. Claimant filed a request for modification on October 27, 1998 and submitted new evidence. Director's Exhibit 55. Administrative Law Judge Ralph A. Romano (the administrative law judge), found that claimant failed to establish total disability, and therefore found that claimant failed to establish a change in conditions or a mistake in determination of fact pursuant to *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find total disability due to coal workers' pneumoconiosis established. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both claimant and the Director have responded.[2] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[2] Claimant and the Director, in briefs submitted in response to the Board's order, have both asserted that the regulations at issue in the lawsuit do not affect the outcome of this case.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

Claimant contends that the administrative law judge erred in failing to find that the newly submitted pulmonary function studies and medical opinion evidence is sufficient to establish total disability. Specifically, claimant contends that the pulmonary function studies performed on September 9, 1998 (Director's Exhibit 44) and February 9, 1999 (Director's Exhibit 64) by Dr. Kraynak are sufficient to establish total disability and that the administrative law judge erred in rejecting these qualifying studies based upon the invalidation reports submitted by Dr. Ranavaya which were lacking sufficient rationale to support Dr. Ranavaya's opinion. In addition, claimant contends that the most recent opinion submitted by Dr. Green, that claimant's total disability was due to heart disease, was of little probative value because Dr. Green failed to diagnose the existence of pneumoconiosis and was not aware that that finding had been made. Thus, claimant contends that Dr. Kraynak's previously submitted opinion is sufficient to establish totally disabling coal workers' pneumoconiosis.

The newly submitted evidence consists of three pulmonary function studies, of which two yielded qualifying results, a single non-qualifying blood gas study, and a medical opinion from Dr. Green, who found that claimant has coronary artery disease due to arteriosclerotic heart disease and opined that claimant cannot perform his last coal mine job due to heart disease. Director's Exhibits 44, 61, 62, 64, 66. In evaluating the newly submitted evidence, the administrative law judge correctly noted that both qualifying pulmonary function studies, conducted by Dr. Kraynak, were reread as invalid by Dr. Ranavaya due to less than optimal effort on claimant's part. Director's Exhibits 44, 64; Decision and Order at 5. In addition, the administrative law judge noted that the study conducted by Dr. Green "produced values significantly higher than those obtained by Dr. Kraynak, even with what Dr. Green found to be only 'fair' effort." Decision and Order at 6. Accordingly, because pulmonary function studies are effort dependent, the administrative law judge accorded greater weight to the non-qualifying pulmonary function study conducted by Dr. Green. Because the administrative law judge acted rationally in his evaluation of the pulmonary function studies, we affirm his finding that claimant failed to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 20259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *see also Prater v. Hite Preparation Co.*, 829 F.3d 1363, 10

BLR 2-297 (6th Cir. 1987).[3]

Claimant next contends that the administrative law judge erred in crediting the opinion of Dr. Green that claimant was disabled due to heart disease, not a pulmonary impairment. The administrative law judge found that Dr. Green's opinion, which was supported by "conforming objective laboratory data" and which found claimant disabled as a result of his heart disease, not a pulmonary disability, to be insufficient to establish a totally disabling respiratory impairment. This was proper. Decision and Order at 7; Director's Exhibit 66; 20 C.F.R. §718.204(b)(2)(iv); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *modified on recon*. 20 BLR 1-64 (1996); *see Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring.); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996). We therefore affirm the administrative law judge's finding that the newly submitted evidence fails to establish a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(i)-(iv).

[3] We affirm the administrative law judge's finding that the non-qualifying blood gas study fails to establish total disability, and that the record is devoid of any evidence of cor pulmonale with right sided congestive heart failure, as unchallenged on appeal. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Director's Exhibit 61.

Although the administrative law judge did not specifically review and discuss all the evidence, both old and new, in determining whether modification was established as required by *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), we conclude that the error is harmless as the administrative law judge reviewed and incorporated by reference the prior administrative law judge's decisions which fully discussed the evidence and found that it failed to establish total disability. Decision and Order at 5; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, upon reviewing the prior decisions, the administrative law judge found that no mistake in a determination of fact had been made. Decision and Order at 5. We, therefore, affirm the administrative law judge's denial of benefits. Moreover, because we affirm the administrative law judge's finding that Dr. Green's opinion cannot establish a totally disabling respiratory impairment, at 20 C.F.R. §718.204(b)(2)(iv), we need not address claimant's contention that Dr. Green's opinion is of little probative value because Dr. Green was not aware that claimant had been found to have pneumoconiosis as that finding is relevant to causation not total disability. *See* 20 C.F.R. §718.204(b), (c); *Carson, supra*. Additionally, we reject claimant's contention that because Dr. Green's opinion is not reliable, the administrative law judge must rely on the previously submitted opinion of Dr. Kraynak that claimant is totally disabled.[4]

[4] Dr. Kraynak found total disability due to pneumoconiosis. Director's Exhibit 20. However, the Board affirmed Administrative Law Judge Kaplan's accordance of less weight to Dr. Kraynak's opinion as it was based on pulmonary function studies that were determined to be invalid, that Dr. Kraynak was not aware of claimant's 1996 stroke, and that Dr. Green possessed superior qualifications to those of Dr. Kraynak. Board's slip op. at 5 (Mar. 26, 1998); Director's Exhibits 43, 52.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge