BRB No. 00-0634 BLA

JOSEPH SMERKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
C.L.S. COAL COMPANY	)	DATE ISSUED:
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer/carrier.

Sarah M. Hurley (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0959) of Administrative Law Judge Paul H. Teitler 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] Claimant filed this duplicate claim on January 12, 1990.[2] In the initial Decision and Order, Administrative Law Judge Ainsworth H. Brown found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Judge Brown, therefore, considered claimant's 1990 claim on the merits. After crediting claimant with ten and one-half years of coal mine employment, Judge Brown found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Judge Brown further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b) (2000). However, Judge Brown found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. 718.204(c)(1)-(4) (2000). Accordingly, Judge Brown denied benefits. By Decision and Order dated January 31, 1994, the Board affirmed Judge Brown's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309, 718.203(b), 718.204(c)(2) and (c)(3) (2000) as unchallenged on appeal. *Smerko v. C.L. S. Coal Co*., BRB No. 91-1940 BLA (Jan. 31, 1994) (unpublished). The Board also affirmed Judge Brown's finding that the pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). *Id.* The Board, however, vacated Judge Brown's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(c)(4) (2000) and remanded the case for further consideration. *Id.*

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[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.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 22, 1983. Director's Exhibit 131. In a Decision and Order dated January 29, 1988, Administrative Law Judge Ainsworth H. Brown denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1983 claim.

Claimant filed a second claim on January 12, 1990. Director's Exhibit 1.

On remand, Judge Brown found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). However, Judge Brown found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Accordingly, Judge Brown denied benefits. By Decision and Order dated September 26, 1995, the Board affirmed Judge Brown's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Smerko v. C.L. S. Coal Co*., BRB No. 94-3810 BLA and 94-3810 BLA-A (Sept. 26, 1995) (unpublished). However, the Board also affirmed Judge Brown's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Id.* The Board, therefore, affirmed Judge Brown's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), Judge Brown denied claimant's request for modification. By Decision and Order dated June 26, 1998, the Board affirmed Judge Brown's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Smerko v. C.L. S. Coal Co*., BRB No. 97-1388 BLA (June 26, 1998) (unpublished). The Board, therefore, affirmed Judge Brown's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). *Id.*

Claimant subsequently filed a second request for modification. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Paul H. Teitler (the administrative law judge) denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). 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.

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 Ass'n 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 all the parties have responded.[3] Based on the briefs submitted by the parties, and our review, we hold that the

[3]Claimant, employer and the Director, Office of Workers' Compensation Programs,

disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.[4] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[5]

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all asserted that the amended regulations would not affect the outcome of this case.

[4]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

[5]Inasmuch as no party has challenged the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability. The record contains four newly submitted pulmonary function studies conducted on August 26, 1998, October 14, 1998, February 26, 1999 and September 9, 1999.[6] The pulmonary function studies conducted on August 26, 1998, October 14, 1998 and September 9, 1999 produced qualifying values. Director's Exhibits 116, 118; Claimant's Exhibit 1. The pulmonary function study conducted on February 26, 1999 produced non-qualifying values, both before and after the administration of a bronchodilator. Employer's Exhibit 1.

Drs. Sahillioglu, Levinson, Kaplan and Dittman invalidated claimant's August 26, 1998 and October 14, 1998 qualifying pulmonary function studies. Director's Exhibits 119, 124-126, 128; Employer's Exhibit 2. Drs. Levinson and Kaplan also invalidated claimant's September 9, 1999 qualifying pulmonary function study. Employer's Exhibits 3, 4. Dr. Raymond Kraynak opined that all three of these studies were valid. Claimant's Exhibit 3.

In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability, the administrative law judge found that claimant's qualifying August 26, 1998, October 14, 1998, and February 26, 1999 pulmonary function studies were invalid. Decision and Order at 7-8. The administrative law judge, therefore, found that the newly submitted pulmonary function study evidence was insufficient to establish total disability. *Id.* at 8.

Claimant contends that the administrative law judge erred in finding that the August

[6]The August 26, 1998 pulmonary function study was conducted in Dr. Matthew Kraynak's office. Director's Exhibit 116. The October 14, 1998 pulmonary function study was conducted in Dr. Kruk's office. Director's Exhibit 118. The February 26, 1999 pulmonary function study was conducted in Dr. Dittman's office. Employer's Exhibit 1. The September 9, 1999 pulmonary function study was conducted in Dr. Raymond Kraynak's office. Director's Exhibit 116.

26, 1998, October 14, 1998 and September 9, 1999 pulmonary function studies were invalid. In his consideration of claimant's August 26, 1998, October 14, 1998 and September 9, 1999 pulmonary function studies, the administrative law judge credited the invalidations of Drs. Levinson and Kaplan over Dr. Raymond Kraynak's opinion, based upon their superior qualifications.[7] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 7; Director's Exhibits 123-126; Claimant's Exhibit 3.

[7]Dr. Raymond Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 3. Drs. Levinson and Kaplan are Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 124.

Claimant argues that Drs. Levinson and Kaplan failed to provide sufficient documentation to support their invalidations. We disagree. Drs. Kaplan and Levinson clearly explained the bases for their invalidations of claimant's August 26, 1998, October 14, 1998 and September 9, 1999 pulmonary function studies.[8] Director's Exhibits 124-126;

[8]Dr. Kaplan found that claimant's August 26, 1998 pulmonary function study was not valid "due to submaximal and inconsistent effort." Director's Exhibit 124. Dr. Kaplan explained:

> The evidence supporting this assertion is seen in the forced expiratory tracings, which reveal inadequate duration of effort (less than six seconds) and excessive variation between the individual forced expiratory efforts: the FEV1 varies nearly 20%. This far exceeds the upper limit of variation specified by Part 718 of the Code of Federal Regulations. Therefore, this test is not valid and is not suitable for interpretation.

Director's Exhibit 124.

Dr. Levinson opined that claimant's August 26, 1998 pulmonary function study was "clearly an invalid pulmonary function study since the effort expended by [claimant was] judged unacceptable." Director's Exhibit 124. Dr. Levinson explained that:

> There is an excessive variability between the FEV1s of the two largest attempts. These FEV1s vary by 275 mls. exceeding the 718 Regulations indicating that the FEV1 should not vary by more than 100 mls. or 5% of the largest FEV1s. The MVV curves indicate a variable and inconsistent effort for a period of 12 seconds so that the patient has not exerted a maximal and sustained effort for 12 to 15 seconds as required.

Director's Exhibit 124.

Drs. Kaplan and Levinson also invalidated claimant's October 14, 1998 pulmonary function study. Dr. Kaplan explained that:

> [T]his test is not valid and does not conform to the requirements of Part 718 of the Code of Federal regulations. Inspection of the tracings of the Claimant's forced expiratory efforts reveals submaximal effort, as demonstrated by the short duration of the tracings. The minimal duration required by Part 718 is six seconds. Additional evidence of submaximal and inconsistent effort is provided by the fact that the actual MVV is significantly less than the expected MVV, based on the actual FEV1.0. According to the formula, FEV1.0 x 40 =

Employer's Exhibits 3, 4.

Claimant also contends that the administrative law judge erred in relying upon Dr.

> MVV, the expected MVV is 69.2 liters per minute. The actual MVV is 50 liters per minute, significantly less than the expected value, strongly suggesting that the Claimant's effort was submaximal during the MVV measurement. For these reasons, this test is not valid and is not suitable for interpretation.

Director's Exhibit 125.

Dr. Levinson explained his reasons for invaliding the study as follows:

> First, the study has been improperly performed. There is clear evidence of exhalation that has occurred before the zero point so that the results reported do not represent the true and complete capacities of [claimant] but are rather an underestimation. The MVV curves indicate a variable and inconsistent effort so that patient has not exerted a maximal and sustained effort for a period of 12 to 15 seconds as required.

Director's Exhibit 126.

Sahillioglu's invalidation of the August 26, 1998 and October 14, 1998 pulmonary function studies because the doctor invalidated the studies based upon criteria not required by the regulations. Dr. Sahillioglu questioned claimant's August 26, 1998 and October 14, 1998 pulmonary function studies in part because there was no demonstration of inspiratory effort and because the restrictive defect was not verified by a TLC determination. Director's Exhibits 119, 128. Claimant correctly notes that these criteria are not required by the regulations.

The administrative law judge, however, properly relied upon Dr. Sahillioglu's invalidations of claimant's August 26, 1998 and October 14, 1998 pulmonary function studies because the doctor also provided a valid basis for questioning their reliability. In regard to both studies, Dr. Sahillioglu noted there was less than optimal effort, cooperation and comprehension. Director's Exhibits 119, 128. Dr. Sahillioglu stated that claimant's August 26, 1998 pulmonary function study revealed "inconsistent effort" on the FVC and MVV maneuvers. Director's Exhibit 128. Similarly, Dr. Sahillioglu observed that claimant's October 14, 1998 pulmonary function study revealed "inconsistent effort" on the FVCs. Director's Exhibit 119. Inasmuch as Dr. Sahillioglu provided adequate support for his conclusion that claimant provided less than optimal effort, cooperation and comprehension on his August 26, 1998 and October 14, 1998 pulmonary function studies, the administrative law judge properly relied upon his opinion in finding that these pulmonary function studies were invalid.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i).[9]

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability. Claimant argues that the administrative law judge erred in finding the opinions of Drs. Kruk and Raymond Kraynak insufficient to establish total disability. We disagree. In finding the medical opinion evidence insufficient to establish total disability, the administrative law judge properly discredited the opinions of Drs. Kruk and Raymond Kraynak because they were based in part upon pulmonary function studies that were invalidated by better qualified consulting physicians. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 11. The administrative law judge also noted that Dr. Kruk's opinion was

[9]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).

"indefinite" regarding the extent of claimant's disability.[10] The administrative law judge also permissibly credited Dr. Dittman's opinion that claimant did not suffer from a totally disabling pulmonary impairment because he found that his opinion was better supported by the objective evidence. *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 11; Employer's Exhibits 1, 2. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish total disability, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Inasmuch as no party has challenged the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[10]Although Dr. Kruk opined that claimant was disabled due to coal workers' pneumoconiosis, the administrative law judge accurately noted that Dr. Kruk failed to indicate that claimant was "totally" disabled or that he could not return to his previous coal mine employment. Decision and Order at 10.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge