

BRB No 00-0718 BLA

IRVIN F. REIGLE)	
)	
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-Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (99-BLA-0589) of Administrative Law Judge Ralph A. Romano rendered 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

his application for benefits on September 3, 1998. Director's Exhibit 1. The district director denied benefits and claimant requested a hearing, which was held on September 14, 1999. Director's Exhibits 13, 14. The administrative law judge in his Decision and Order accepted the parties' stipulation to 10.78 years of coal mine employment, found that the weight of the medical evidence weighed together established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202(a), 718.203(b), see *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), but concluded that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. § 718.204. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the pulmonary function and medical opinion evidence when he found that claimant is not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. However, in the event that the denial is not affirmed, the Director argues that the administrative law judge abused his discretion in denying the Director's motion to submit a review of a pulmonary function study submitted by claimant exactly upon the twenty-day deadline.^{}

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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 March 2, 2001, to which the parties have responded. Both Claimant and the Director state that none of the regulations at issue in the lawsuit affects the outcome of this case. Based upon 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 with the adjudication of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(b)(2)(i), [\[3\]](#) claimant contends that the administrative law judge erred in crediting the non-qualifying [\[4\]](#) pulmonary function studies of October 14, 1998 and April 26, 1999 over the qualifying study of August 11, 1999 to find that total disability was not established. Claimant's contention lacks merit. In weighing these studies, the administrative law judge took into account Dr. Raymond J. Kraynak's opinion that the October 14, 1998, non-qualifying test was "technically invalid." [\[5\]](#) Claimant's Exhibit 4. The administrative law judge reasonably considered, however, that pulmonary function studies "are effort dependent," and noted correctly that the October 14, 1998 study "produced the highest values" in the record. Decision and Order at 8; Director's Exhibit 7; see *Anderson v. Youghioghney & Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984)(because pulmonary function studies are effort dependent, a non-qualifying study revealing sub-optimal cooperation may still be a valid measure of the lack of respiratory disability). The administrative law judge permissibly found that the two non-qualifying studies outweighed the August 11, 1999 study, noting that they "were performed within a year of Dr. Kraynak's qualifying study. . . ." Decision and Order at 8. Because the administrative law judge properly weighed the pulmonary function studies, we affirm his finding that the weight of the pulmonary function studies did not establish total disability.

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge did not weigh the medical opinions in light of the exertional requirements of claimant's usual coal mine employment. This contention has merit.

A miner is considered totally disabled when "a pulmonary or respiratory impairment . . . prevents or prevented the miner: . . . [f]rom performing his or her usual coal mine work." 20 C.F.R. §718.204(b)(1)(i). An administrative law judge considering the medical opinions pursuant to Section 718.204(b)(2)(iv) may infer total disability by comparing a physician's assessment of respiratory limitations with the physical requirements of claimant's usual coal mine employment. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-

48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). ?Even a ?mild? respiratory impairment may preclude the performance of the miner?s usual duties, depending on the exertional requirements of the miner?s usual coal mine employment.? *Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR (6th Cir. 2000).

Claimant indicated that his job as a general laborer involved ?[d]rilling, loading holes, firing, dressing face, timbering, working in gangway and breast work, scooping coal.? Director's Exhibit 3. Claimant described the physical activity required as standing for four hours per day, crawling various distances for four hours per day, and lifting and carrying up to 150 pounds various distances and times per day. *Id.* At the hearing, claimant testified that he had to crawl and climb, and that he carried timbers weighing 100 to 200 pounds. Tr. at 23-24.

Dr. Michael Green concluded that despite having mild chronic airflow obstruction, claimant ?can perform last coal mine job [listed] in section B1a? of the examination form. Director's Exhibit 8 at 4. In that section of the form, however, Dr. Green merely listed ?drilled rock, miner.? Director's Exhibit 8 at 1. Dr. Bruce M. Romanic, claimant?s treating physician, opined that claimant?s impairment prevents him from performing his ?past customary coal mine employment or similarly arduous work.? Claimant's Exhibit 1 at 2. Dr. Kraynak concluded that claimant ?would not be able to return to his last coal mine employment, or any similarly arduous work.? Claimant's Exhibit 2 at 4.

On this record, we agree with claimant that the administrative law judge should have discussed claimant?s usual coal mine employment and determined whether Dr. Green was familiar with the exertional requirements of that job before crediting Dr. Green?s opinion that claimant retains the respiratory capacity to perform his usual coal mine employment. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989)(a physician?s opinion is not probative of whether claimant can perform his usual coal mine employment unless there is some indication that the physician knows the exertional requirements of claimant?s job); *accord Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-22 (4th Cir. 1991); *Cornett, supra*. Therefore, we vacate the administrative law judge?s finding and remand this case for him to determine the exertional requirements of claimant?s usual coal mine employment and to assess the medical opinions with reference to those requirements. [\[6\]](#F6) See *Gonzales, supra*; *Budash, supra*. On remand, the administrative law judge should fully explain his relative weighing of the medical opinions. *See Wensel v. Director, OWCP*, 888 F.2d 14, 16, 13 BLR 2-88, 2-91-92 (3d Cir. 1989). In his current

Decision and Order, we are unable to discern why he found that Dr. Romanic's disability opinion was not documented and reasoned, and there is no indication of the weight accorded to Dr. Kraynak's opinion that claimant is totally disabled. See Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Because we must remand this case, we now turn to the administrative law judge's denial of the Director's motion to respond to the August 11, 1999 pulmonary function study submitted by claimant exactly twenty days before the hearing, the deadline for the timely submission of evidence. See 20 C.F.R. §725.456(b)(2). The sole basis for the administrative law judge's ruling was "I don't see how I can do that without writing out of the regulations the 20 day rule" Tr. at 7-8. The administrative law judge did not consider that where a party would be denied a reasonable opportunity to present its case fully if precluded from submitting evidence in response to evidence submitted just prior to or upon the twenty-day deadline, the party's due process rights as incorporated into the APA would be violated. See *North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987)(*en banc*). Because the administrative law judge must reweigh the medical opinions regarding disability, the validity of the August 11, 1999 pulmonary function study may again be at issue to the extent it was relied upon by Dr. Kraynak. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-

233 (3d Cir. 1987). Accordingly, the administrative law judge should reconsider the Director's motion on remand. [\[7\]](#) [RF7](#)

If the administrative law judge on remand finds that claimant is totally disabled, the administrative law judge must then determine whether pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); see *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989)(pneumoconiosis must be a substantial contributor).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judgeⁱ

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Footnotes.

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.

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2) We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§ 718.202(a), 718.203(b), and that total disability was not established by the blood gas study evidence pursuant to 20 C.F.R. § 718.204(b)(2)(ii).

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3) The regulation applied by the administrative law judge has been restructured. The methods of proving total disability considered by the administrative law judge under Section 718.204(c)(1)-(4) are now set forth at Section 718.204(b)(2)(i)-(iv). 20 C.F.R. § 718.204(b).

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4) A qualifying pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. See 20 C.F.R. § 718.204(b)(2)(i).

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5) Dr. Kraynak stated that the study was not properly performed and reflected inconsistent effort. Claimant's Exhibit 4. The record indicates that claimant's effort and cooperation were recorded as "Good" on this study. Director's Exhibit 7. The administering physician, Dr. Michael Green, interpreted the study results as reflecting mild airway obstruction with small airways disease. *Id.*

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6) The Director argues that Dr. Green's notation demonstrates his knowledge that the job was a strenuous one. Director's Brief at 4 n.1. It will be for the administrative law judge on remand to make any such determination based on all the facts presented.

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7) We understand the Director to be requesting the opportunity to obtain an expert review of the pulmonary function study tracings, not another pulmonary function study.

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