BRB No. 02-0466 BLA

LOYD G. HORNE	)	
	)	
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.

Michael J. Rutledge (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-0499) 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] Claimant filed a claim for benefits on July 26, 1997. In a Decision and Order dated February 3, 1999, the administrative law judge credited claimant with ten

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

years of coal mine employment and considered the claim under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge further found, however, that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits. Claimant appealed. The Board affirmed the administrative law judge's decision denying benefits. *Horne v. Director, OWCP*, BRB No. 99-0511 BLA (Feb. 3, 2000)(unpublished).

Subsequently, claimant filed a request for modification, and the claim was forwarded to the administrative law judge, who held a hearing on October 2, 2001. In his Decision and Order dated March 20, 2002, stating that he was reviewing and incorporating his findings from his previous Decision and Order with respect to the previously submitted evidence, the administrative law judge concluded that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[2] The administrative law judge determined that claimant failed to establish, therefore, a change in conditions pursuant to Section 725.310 (2000). Consequently, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's decision not to admit into the record a medical report from Dr. Prince, as well as the administrative law judge's findings with respect to the pulmonary function study and medical opinion evidence under Section 718.204(b)(2)(i) and (iv). Claimant also contends that the administrative law judge failed to adequately consider whether a mistake in a determination of fact was established pursuant to Section 725.310 (2000). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to remand the case to the administrative law judge for reconsideration under Sections 718.204(b) and 725.310 (2000). Claimant has filed a reply brief in which he states that a reversal of the administrative law judge's denial of benefits is warranted rather than a remand of the case.

The Board's scope of review is defined by statute. The administrative law judge's

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), 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) (2000), is now found at 20 C.F.R. §718.204(c).

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).

As a preliminary matter, claimant contends that the administrative law judge erred in refusing to admit into the record a medical report from Dr. Prince, dated September 25, 2001, thereby depriving him of his due process right to a full and fair hearing. Claimant's contention lacks merit. The Director submitted a medical report from Dr. Green, which claimant received twenty-two days before the hearing, held on October 1, 2001.[3] In response to Dr. Green's report, claimant obtained a report from Dr. Kraynak, dated September 14, 2001, and submitted it, prior to the hearing. Subsequently, claimant obtained a medical report from Dr. Prince and, at the hearing, sought to have Dr. Prince's report admitted into the record as rebuttal evidence to Dr. Green's report. Hearing Transcript at 5-7. The Director objected at the hearing to the admission of Dr. Prince's report because the Director had no prior knowledge of the report's existence, and the report from Dr. Kraynak had already been submitted by claimant in response to Dr. Green's report. Claimant argues that he should have been allowed to select at the hearing which of the two reports he could submit as rebuttal evidence, especially because he did not receive Dr. Green's report until twenty-two days prior to the hearing. Contrary to claimant's contention, however, the administrative law judge acted within his discretion by admitting Dr. Kraynak's report and excluding Dr. Prince's report. Hearing Transcript at 7. An administrative law judge has broad discretion over procedural matters. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 49 (1990). The administrative law judge's exclusion of Dr. Prince's report was reasonable since claimant had obtained Dr. Kraynak's report first and had already submitted it. Hearing Transcript at 7. We reject, therefore, claimant's contention that the administrative law judge violated his right to due process in deciding not to admit Dr. Prince's September 25, 2001 report at the hearing.

[3]The Director's submission of Dr. Green's report was timely inasmuch as the regulations prescribe that evidence must be exchanged with the parties within twenty days of a hearing. *See* 20 C.F.R. §725.456(b)(2) (2000).

Claimant next challenges the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability under Section 718.204(b)(2)(i). There are three newly submitted pulmonary function studies associated with claimant's request for modification – studies administered on October 26, 2000, April 16, 2001, and September 7, 2001. Director's Exhibits 42, 50; Claimant's Exhibit 6. Claimant contends that the administrative law judge improperly rejected the qualifying,[4] October 26, 2000 study by crediting Dr. Sherman's opinion that the study was invalid, an opinion which claimant argues is conclusory. Claimant further argues that the administrative law judge should have credited instead Dr. Kraynak's opinion that the October 26, 2000 study was valid on the basis that Dr. Kraynak was the physician who administered the test. Claimant's contention lacks merit. Dr. Sherman explained that claimant exhibited variable effort in his October 26, 2000 testing, and that the variable effort indicated that the study was invalid due to less than optimal effort, cooperation and comprehension. Director's Exhibit 42. In contrast, Dr. Kraynak stated that there was good effort, cooperation and comprehension throughout the testing and that the study was, therefore, valid. Claimant's Exhibit 1. Contrary to claimant's contention, the administrative law judge properly credited Dr. Sherman's opinion over Dr. Kraynak's opinion in this regard in view of the relative qualifications of the two physicians.[5] *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 6, 10; Director's Exhibit 42; Claimant's Exhibit 1.

[4]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(ii). A "non-qualifying" test yields values which exceed the requisite table values.

[5]The administrative law judge correctly stated that Dr. Sherman is Board-certified in internal medicine, pulmonary disease and critical care medicine, while Dr. Kraynak is Board-eligible in family medicine. Decision and Order at 6, 8; Director's Exhibits 28, 43.

Claimant also contends that the administrative law judge erred in rejecting as invalid the September 7, 2001 pulmonary function study by crediting Dr. Sherman's opinion that the study was invalid over Dr. Prince's contrary opinion regarding the study's validity. The administrative law judge discounted Dr. Prince's validation of the study because Dr. Prince did not address all of the issues raised in Dr. Sherman's report[6] invalidating the study. Decision and Order at 10. Claimant asserts that, in rejecting Dr. Prince's opinion on that basis, the administrative law judge provided a disparate and inconsistent standard of review to claimant's evidence. Claimant argues that, moreover, the administrative law judge should have determined that Dr. Prince's validation of the study was detailed and well-reasoned, and that Dr. Sherman's invalidation of the study was conclusory and inadequately explained. In further support of Dr. Prince's opinion, claimant contends that Dr. Prince is the more highly qualified pulmonologist. Claimant's contentions lack merit. Drs. Prince and Sherman are equally qualified pulmonologists, Board-certified in internal medicine, pulmonary disease and critical care medicine. Director's Exhibit 42; Claimant's Exhibit 9. To the extent that the administrative law judge may have improperly discounted Dr. Prince's validation of the study on grounds that Dr. Prince did not respond to all of the issues raised in Dr. Sherman's invalidation of the study,[7] such error was harmless. The administrative law judge otherwise reasonably found that, given the conflicting opinions of these two highly-qualified physicians

[6]The administrative law judge stated that Dr. Green reviewed the September 7, 2001 pulmonary function study when, in fact, it was Dr. Sherman who reviewed the study and found it to be invalid. Decision and Order at 6, 10; Director's Exhibit 53. Claimant argues that this misstatement constitutes a mischaracterization of the record, which, in itself, would require remand. We disagree. It is evident from a review of the record and the administrative law judge's discussion of the pulmonary function study evidence, however, that the administrative law judge's reference to Dr. Green was a typographical error. Decision and Order at 6, 10; Director's Exhibit 53. The record reflects that Dr. Green never reviewed the study, and that it was Dr. Sherman who found it invalid. Director's Exhibit 53.

[7]Dr. Sherman stated that the September 7, 2001 pulmonary function study was invalid on account of less than optimal effort, cooperation and comprehension on claimant's part. Director's Exhibit 53. Dr. Sherman explained that claimant exhibited variable effort and that the studies were not reproducible. *Id*. Dr. Prince stated:

> Although I would agree with Dr. Sherman that there is some variation in effort, the 2 largest FEV1's [are] less than 5% of the FEV1 or 100ml thus making the study acceptable. The start of expiration is acceptable and expiration is of adequate duration.

Claimant's Exhibit 9.

with regard to the validity of the results of the September 7, 2001 study, the results of the study were equivocal. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Furthermore, there is no merit to claimant's contention that the administrative law judge should have accorded greater weight to Dr. Kraynak's validation of the September 7, 2001 study over Dr. Sherman's invalidation of the study. Just as the administrative law judge properly credited Dr. Sherman's opinion over Dr. Kraynak's opinion with regard to the validity of the October 26, 2000 pulmonary function study in view of the relative qualifications of the two physicians, as discussed *supra*, the administrative law judge was not required to credit Dr. Kraynak's validation simply because Dr. Kraynak administered the study. *See Roberts, supra*.

We agree with claimant and the Director, however, that the administrative law judge did not adequately explain how he determined that the pulmonary function study administered on April 16, 2001 by Dr. Green failed to produce qualifying results. Decision and Order at 10; Director's Exhibit 50. Claimant was seventy-two years old when the April 16, 2001 study was administered. Director's Exhibit 50. Although the regulations only provide table values for miners up to seventy-one years of age, *see* 20 C.F.R. Part 718, Appendix B, the regulations do not prohibit an administrative law judge from finding by extrapolation appropriate table values for miners older than seventy-one years of age. The administrative law judge should explain, however, his process for finding whether the pulmonary function study is qualifying under the regulations. *See Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA at 7, n.7 (Dec. 20, 1996)(unpublished). Thus, inasmuch as the administrative law judge merely found that the results of the April 16, 2001 pulmonary function study were "non-qualifying," but did not explain how he came to that conclusion, we vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability under Section 718.204(b)(2)(i), and remand the case for the administrative law judge to reconsider the April 16, 2001 pulmonary function study and explain his process for finding the study to be qualifying or non-qualifying.[8]

Claimant also contends that the administrative law judge improperly found the newly

[8]Claimant also argues that the administrative law judge erred in failing to weigh the qualifying pulmonary function study administered on April 30, 1998. This study was submitted into evidence prior to claimant's present request for modification. As discussed *infra*, we herein vacate the administrative law judge's summary finding that claimant failed to establish a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). In considering the mistake in a determination of fact issue on remand, the administrative law judge must weigh the April 30, 1998 pulmonary function study in reconsidering the evidence of record.

submitted medical opinion evidence insufficient to establish total disability under Section 718.204(b)(2)(iv). In his Motion to Remand, the Director agrees with claimant's contentions, and urges the Board to vacate the administrative law judge's finding under Section 718.204(b)(2)(iv).

The newly submitted medical opinion evidence consists of the opinions of three physicians – Drs. Green, Kraynak and Simelaro. Dr. Green examined claimant on May 1, 2001,[9] diagnosed chronic airflow obstruction, and stated that he could not exclude a diagnosis of coal workers' pneumoconiosis. Dr. Green also stated that claimant was able to perform his last coal mine employment driving a truck. Director's Exhibit 50. In a supplemental report dated August 11, 2001, Dr. Green stated that he did not believe claimant is totally disabled due to chronic airflow obstruction, but opined further, "I do expect that he does have a moderate degree of airflow obstruction and is therefore impaired in terms of vigorous physical labor." Director's Exhibit 51. The administrative law judge found Dr. Green's opinion to be worthy of the greatest weight. Decision and Order at 11. The administrative law judge stated that Dr. Green's opinion is well supported by his findings, as well as by the blood gas study evidence of record and the pulmonary function study he administered. *Id*. The administrative law judge also stated he took into account Dr. Green's excellent credentials, the fact that Dr. Green had examined claimant on more than one occasion, and the thoroughness of the doctor's examinations and reports. *Id*.

[9]Dr. Green also examined claimant on October 14, 1997, prior to claimant's request for modification. Dr. Green stated then that claimant was able to perform his last coal mine employment job as a truck driver. Director's Exhibit 8.

Claimant contends, and the Director agrees, that the administrative law judge erred in finding Dr. Green's report well-reasoned without providing an adequate basis for that conclusion. This contention has merit. Dr. Green's report reflects that Dr. Green did not have an understanding of the actual duties involved in claimant's last coal mining job. Dr. Green stated in his supplemental report that he had no details of claimant's employment available for his review. Director's Exhibit 51. In addition, as claimant argues, Dr. Green's indication that claimant was exposed to wood dust and fumes is unsupported by the record. The administrative law judge did not discuss these factors or adequately consider what bearing they had on whether Dr. Green's examinations and reports were thorough, and on whether the doctor's opinion was well-reasoned and documented. Decision and Order 11. Moreover, the parties correctly contend that the administrative law judge erred in failing to compare the exertional requirements of claimant's last coal mine employment[10] to Dr. Green's indication that claimant is unable to perform vigorous physical labor. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 11; Director's Exhibit 51; Hearing Transcript at 11-13. Accordingly, we vacate the administrative law judge's findings with respect to Dr. Green's opinion under Section 718.204(b)(2)(iv). On remand, the administrative law judge must compare the exertional requirements of claimant's last coal mine employment as a truck driver with Dr. Green's assessment that claimant is "impaired in terms of vigorous physical labor." The administrative law judge must also fully explain his reasons for his conclusion as to whether Dr. Green's opinion is well-reasoned and documented. *See Clark v. Karst-Robbins Coal Corp.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant and the Director also contend that the administrative law judge improperly discounted the opinions of Drs. Kraynak and Simelaro, who opined that claimant is totally disabled. We agree. The administrative law judge rejected Dr. Kraynak's opinion as not well-reasoned or well-documented. Decision and Order at 11-12; Director's Exhibit 45; Claimant's Exhibit 5. The administrative law judge did not provide a discussion of his reasons for these conclusions, other than to state that Dr. Kraynak's opinion is not supported by reliable clinical testing. Decision and Order at 11. While the administrative law judge properly found Dr. Kraynak's October 26, 2000 and September 7, 2001 pulmonary function studies to be invalid, the administrative law judge failed to consider that Dr. Kraynak

[10]At the hearing on October 1, 2001, claimant testified that in his last coal mine job, he "did a lot of things," including working upstairs on the bull shaker pushing rocks before the crusher, and repairing machinery. Hearing Transcript at 11. Claimant testified that he would often have to carry seventy to eighty pound bags of magnetite, a cleaning agent, and that he would have to do a lot of climbing and lifting in changing tires and performing maintenance on the truck. *Id.* at 11-12. Claimant also testified that when he hauled coal, driving a truck, his duties included putting a one-hundred twenty pound tarp on the truck, and using a pick or bar inside the truck bed to extract remnant coal. *Id*. at 12-13.

reviewed other clinical testing, including Dr. Green's valid, qualifying pulmonary function study administered on April 16, 2001. The administrative law judge must reconsider Dr. Kraynak's opinion on remand and provide a more thorough explanation as to whether the opinion is well-reasoned and documented. *See Clark, supra*.

Similarly, the administrative law judge rejected Dr. Simelaro's opinion that claimant is totally disabled as not well-reasoned and documented without providing an adequate discussion of the doctor's full opinion. The administrative law judge discounted Dr. Simelaro's opinion upon finding that "Dr. Simelaro relie[d] heavily upon the pulmonary function testing, much of which was found to be invalid." Decision and Order at 12; Claimant's Exhibit 2. The administrative law judge also stated that Dr. Simelaro did not appear to have considered any other aspect of claimant's medical record apart from chest x-ray readings and pulmonary function studies. *Id*. The administrative law judge thus did not consider that Dr. Simelaro reviewed all of the medical evidence of record in rendering his opinion. Furthermore, the administrative law judge inconsistently ignored Dr. Simelaro's qualifications as a Board-certified pulmonary specialist, Claimant's Exhibit 3, in weighing the doctor's opinion against Dr. Green's opinion, which the administrative law judge credited, in part, based upon Dr. Green's credentials. *See Roberts, supra*; Decision and Order at 11. Accordingly, we vacate the administrative law judge's decision to discount the opinions of Drs. Kraynak and Simelaro under Section 718.204(b)(2)(iv). On remand the administrative law judge must reconsider the relative merits of these opinions as compared to Dr. Green's opinion in determining whether the newly submitted medical opinion evidence is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). If the administrative law judge finds the newly submitted evidence on remand sufficient to establish total disability pursuant to either Section 718.204(b)(2)(i) or Section 718.204(b)(2)(iv), he must then weigh all of the newly submitted, relevant evidence, like and unlike, pursuant to Section 718.204(b)(2)(i)-(iv) to determine whether it establishes total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Finally, claimant and the Director contend that the administrative law judge failed to adequately explain his basis for finding no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). We agree. The fact finder has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). The administrative law judge summarily found that a mistake in a determination of fact was not established. Decision and Order at 5. The administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C.

§557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We vacate, therefore, the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact. In reconsidering this issue on remand, the administrative law judge must fully discuss the evidence of record and provide a reasoned analysis which comports with the APA. *See O'Keeffe, supra*.

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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge