BRB No. 98-0893 BLA

EDWARD J. CHAPMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO-HIGHLAND 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 on Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Edward J. Chapman, Kulpmont, Pennsylvania, *pro se*.

James E. Pocius (Marshall, Dennehey, Warner, Coleman and Goggin), Scranton, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (96-BLA-0537) of Administrative Law Judge Ainsworth H. Brown 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge found the newly submitted evidence insufficient

to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[1] Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.202(a)(1)-(4). However, the Board vacated the administrative law judge's finding at 20 C.F.R. §725.309, and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider whether the newly submitted evidence is sufficient to establish total disability. Further, the Board instructed the administrative law judge that if the newly submitted evidence is sufficient to establish total disability, and, therefore, a material change in conditions, he must consider the entire record to determine whether claimant established entitlement to benefits. *Chapman v. Jeddo-Highland Coal Co.*, BRB No. 97-0345 BLA (Nov. 26, 1997)(unpub.).

[1]Claimant filed his initial claim with the Social Security Administration (SSA) on June 5, 1973. Director's Exhibit 50. After several administrative denials by the SSA, the case was transferred to the Department of Labor (DOL), which denied benefits on July 14, 1980. *Id*. The basis of the DOL's denial was claimant's failure to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim on November 7, 1988. Director's Exhibit 49. This claim was denied by the DOL on April 11, 1989 and August 7, 1989 based on claimant's failure to establish a material change in conditions. *Id*. While the case was pending before the Office of Administrative Law Judges, claimant filed a request to withdraw his claim. *Id*. Administrative Law Judge David W. Di Nardi issued an Order Allowing Withdrawal of Claim in July 1991. *Id*. Claimant filed his most recent claim on December 7, 1994. Director's Exhibit 1.

On remand, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 and, thus, he again denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order on Remand if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability.[2] The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has adopted the standard that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in

[2]As previously noted, the Board affirmed the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). However, inasmuch as the administrative law judge did not render a finding at 718.204(c), the Board remanded the case to the administrative law judge to consider whether the newly submitted evidence is sufficient to establish total disability. In his decision, the administrative law judge stated that "while I fully accept the mandate of the Board in saying that I should evaluate the question of disability despite the affirmation of my finding on disease that would seem to preclude entitlement I will proceed with the academic exercise to determine whether [claimant] has...a total respiratory disability." Decision and Order on Remand at 2.

assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Initially, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). Of the eleven newly submitted pulmonary function studies of record, eight studies yielded non-qualifying[3] values, Director's Exhibits 16, 30, 34, 49; Employer's Exhibit 5, and three studies by Dr. Kraynak yielded qualifying values, Director's Exhibits 11, 13, 15, 41, 49. The administrative law judge observed that "[t]here was significant controversy over the validity of the pulmonary function testing done by Dr. Kraynak and the test done by Dr. Kruk."[4] Decision and Order on Remand at 5. Dr. Levinson opined that the pulmonary function studies administered by Dr. Kraynak on September 7, 1988, November 2, 1994 and August 3, 1995 are invalid. Director's Exhibits 15, 42, 49. Similarly, Dr. Kaplan opined that the pulmonary function studies administered by Dr. Kraynak on November 2, 1994 and August 3, 1995 are invalid. Director's Exhibits 11, 42. In addition, Dr. Spagnolo opined that the pulmonary function study administered by Dr. Kraynak on August 3, 1995 is invalid. Director's Exhibit 41.[5] The administrative law judge properly accorded greater weight to the opinions of Drs. Kaplan, Levinson and Spagnolo than to Dr. Kraynak, the administering physician, because he found their opinions to be better reasoned.[6] *See Clark v.*

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[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[4]The pulmonary function study administered by Dr. Kruk on January 31, 1989 yielded non-qualifying values. Director's Exhibit 49.

[5]The administrative law judge stated that "[a]side from the aforementioned discussion of the validity or lack thereof of certain of the pulmonary function test results there are other opinions in the record." Decision and Order on Remand at 4. The administrative law judge observed that "Dr. Michos thought one of the earlier studies was valid but ought to be repeated to make sure." *Id*. The administrative law judge also observed that "Dr. Simelaro believed that the September 1988 results were valid, but subsequent testing showing higher values tends to validate the opinions questioning the validity of the Kraynak and Kruk results." *Id*.

[6]With regard to Dr. Kraynak, the administrative law judge stated that Dr. Kraynak's "rationale respecting Dr. Kaplan was primarily ad hominem." Decision

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, since the administrative law judge properly discredited the only newly submitted qualifying pulmonary function studies of record which could support a finding of total disability, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting).

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and Order on Remand at 4. The administrative law judge further stated that Dr. Kraynak "suggested that because Dr. Levinson's critique was different for the testing that there was a conflict between the two experts, and his observation of the tracing disagreed with Dr. Levinson's view as to back extrapolation and the appearance of the MVV parameter." *Id*. However, with regard to Drs. Kaplan, Levinson and Spagnolo, the administrative law judge stated that "[t]he reasons set forth by the doctors who invalidated the test results appear to be compelling, especially in view of the results secured by Dr. Green on two occasions as well as Drs. Dittman and Levinson, both of whom provided testimonial opinions of a lack of a respiratory disability within the context of reviewing most of the other pertinent evidence." *Id*. at 5.

With regard to 20 C.F.R. §718.204(c)(2), while the administrative law judge did not separately consider the newly submitted arterial blood gas studies of record, the record contains six newly submitted arterial blood gas studies. Whereas the arterial blood gas studies dated December 23, 1988, July 26, 1989, November 16, 1990, December 28, 1994 and May 5, 1995 yielded non-qualifying values, Director's Exhibits 18, 30, 49; Employer's Exhibit 5, the arterial blood gas study administered by Dr. Levinson on May 18, 1995 yielded qualifying values,[7] Director's Exhibit 34. Although Dr. Levinson initially relied, in part, on the qualifying values produced by the May 18, 1995 arterial blood gas study to conclude that claimant suffered from a disabling pulmonary impairment, as the administrative law judge properly noted, Dr. Levinson subsequently opined that claimant did not suffer from a disabling pulmonary impairment after reviewing other medical evidence.[8] Director's Exhibit

[7]Dr. Sahillioglu opined that the May 18, 1995 arterial blood gas study administered by Dr. Levinson is valid. Director's Exhibit 40.

[8]In his deposition, Dr. Levinson stated that "[s]ubsequent to my examination, I had the opportunity to review additional medical information, which I've indicated today, and especially the [report] of Dr. Dittman that was done on 5-5-95." Employer's Exhibit 6 at 29-30. Dr. Levinson also stated that "[b]ased upon my review of the information provided by Dr. Dittman and especially in view of the perfectly normal pulmonary function and the normal rest and exercise blood gas, I would have to reconsider that opinion that I gave in my report." *Id*. at 30. Dr. Levinson further stated that "[b]ased upon those studies I don't feel that [claimant] would have a disability and actually he would demonstrate the retention of capacity to perform work similar to his prior work in the anthracite industry, at least from a pulmonary standpoint." *Id*.

34; Employer's Exhibit 6. Hence, since Dr. Levinson implicitly found that other medical evidence in the record calls into question the reliability of the May 18, 1995 study, which is the only newly submitted arterial blood gas study of record that could support a finding of total disability, *see Fuller, supra*, we hold that the administrative law judge's failure to separately consider the newly submitted evidence at 20 C.F.R. §718.204(c)(2) is harmless error, as a finding of total disability at Section 718.204(c)(2) is precluded. Moreover, since there is no evidence of cor pulmonale with right sided congestive heart failure, we hold as a matter of law that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

Finally, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Drs. Dittman, Green and Levinson opined that claimant is not totally disabled,[9] Director's Exhibits 17, 30; Employer's Exhibits 5, 6, Drs. Kraynak and Kruk opined that claimant is totally disabled, Director's Exhibit 49; Claimant's Exhibit 24.[10] The administrative law judge properly accorded determinative weight to the opinions of Drs. Dittman, Green and Levinson over the contrary opinions of Drs. Kraynak and Kruk because he found that the opinions of Drs. Dittman, Green and Levinson corroborate each other.[11] *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-

[9]Dr. Dittman opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 30; Employer's Exhibit 5. Dr. Green opined that claimant can perform his last job. Director's Exhibit 17. The record contains Dr. Levinson's June 28, 1995 report and March 17, 1996 deposition. Director's Exhibit 34; Employer's Exhibit 6. The administrative law judge accurately stated that "[i]nitially, the doctor concluded that the Claimant demonstrated a disabling pulmonary condition based on the results of pulmonary function and arterial blood gas results, but after reviewing other data including Dr. Dittman's results taking place prior to his examination he modified his conclusion that there was not a respiratory disability in his deposition testimony." Decision and Order on Remand at 3. The administrative law judge found that "Dr. Levinson provided a well reasoned basis for changing his opinion during the course of his deposition." *Id*. at 5.

[10]The administrative law judge correctly stated that Dr. Heffelfinger "diagnosed chronic bronchitis." Decision and Order on Remand at 3. The administrative law judge also correctly stated that Dr. Heffelfinger did not render an "assessment as to the effect of the ventilatory abnormality on the Claimant's ability to perform his last coal mine work." *Id*.

[11]The administrative law judge stated that "I note the overall consistency of the opinions of Drs. Green, Levinson, and Dittman as having collectively more probative

16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Therefore, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c), we hold that substantial evidence supports the administrative law judge's conclusion that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Swarrow, supra*. Therefore, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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value than that offered by Dr. Kraynak and supported by the single evaluation by Dr. Kruk." Decision and Order on Remand at 5.