

BRB No. 98-1115 BLA

ALBERT REIBSANE)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION AND ORDER

Appeal of the Decision and Order upon Modification Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Dorothy L. Page (Henry L. Solano, 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 upon Modification (97-BLA-1580) 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). In this request for modification of an administrative law judge's Decision and Order denying benefits, the administrative law judge found that claimant alleged only a change in conditions. 20 C.F.R. §725.310. Although the administrative law judge noted that claimant previously established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), the administrative law judge found

that, based on the newly submitted evidence, claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied claimant's modification request.

Claimant appeals, asserting that the administrative law judge erred in analyzing the pulmonary function studies and medical opinion evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.¹

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 applicable 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).

On appeal, pursuant to Section 718.204(c)(1), claimant asserts that the administrative law judge erred in crediting the invalidation reports of the reviewing physicians over the qualifying studies performed by Dr. Kraynak. Claimant specifically contends that Dr. Levinson's invalidation report was conclusory and that Dr. Sahillioglu placed greater restrictions on the performance of a pulmonary function study than those contained in the Part 718 regulations. We reject claimant's contentions.

In characterizing the five newly submitted pulmonary function studies, the administrative law judge properly found that four of the five pulmonary function studies produced qualifying results. 20 C.F.R. §718.204(c)(1). The administrative law judge noted, however, that the four qualifying studies were invalidated by either Dr. Sahillioglu or Dr. Levinson, see Director's Exhibits 56, 57, 59, 66, 68; Claimant's

¹ We affirm as unchallenged the administrative law judge's finding that claimant failed to demonstrate a mistake in a determination of fact pursuant to Section 725.310 and his finding that total disability was not demonstrated pursuant to Section 718.204(c)(2)-(3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Exhibits 1, 2. In crediting the invalidation reports of Drs. Sahillioglu and Levinson over the findings by Dr. Kraynak, the administrative law judge permissibly found that their explanations were more convincing, see *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993), as they provided several valid reasons for invalidating these studies: noting claimant's less than optimal effort; no demonstration of inspiratory effort; and hesitancy and inconsistency. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-22- (3d Cir. 1987). The administrative law judge was further persuaded by Dr. Kraynak's failure to adequately explain the difference between his most recent test and the non-qualifying study performed just five days before by Dr. Rashid, see Director's Exhibit 67. Since the pulmonary function studies are effort-dependent, the administrative law judge found that "the higher values (found on Dr. Rashid's pulmonary function study). . . raises serious doubts about the validity of Dr. Kraynak's studies," Decision and Order at 5. *Id.* Finally, the administrative law judge, within his purview as fact-finder, permissibly accorded greater weight to Dr. Levinson's opinion because of his superior qualifications as a Board-certified internist. See *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds*, 14 BLR 1-37 (1990)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, we affirm as rational and supported by substantial evidence the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1). See *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in according greater weight to Dr. Rashid's opinion when Dr. Kraynak was both the treating physician and also had based his opinion on the majority of the medical evidence. We reject claimant's contentions. An administrative law judge may properly accord greater weight to a treating physician, but is not required to do so. See *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, although the administrative law judge properly noted that Dr. Kraynak was the miner's treating physician, he permissibly found that Dr. Rashid's opinion and findings upon physical examination were more persuasive and more credible, and properly accorded his opinion greater weight on this basis. See *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 251, 12 BLR 2-121 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); see also *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984). As

claimant has failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge properly found that claimant failed to establish a change in conditions, and, therefore, found that modification was not warranted. See 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge