

BRB Nos. 04-0181 BLA
and 04-0181 BLA-A

MICHAEL L. BELLITTS)
)
 Claimant-Petitioner)
)
 v.)
)
 JEDDO HIGHLAND COAL COMPANY)
) DATE ISSUED: 11/30/2004
 and)
)
 LACKAWANNA CASUALTY COMPANY)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (02-BLA-5339) of Administrative Law Judge Janice K. Bullard rendered on subsequent claim¹ 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 the Decision and Order Denying Benefits, the administrative law judge credited claimant with twenty-nine years and two months of coal mine employment.² The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge determined that the medical evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the pulmonary function studies and medical opinion evidence when she found that claimant did not establish the presence of a totally disabling respiratory or pulmonary

¹ Claimant's initial application for black lung benefits, filed with the Social Security Administration (SSA) on October 20, 1971, was denied by SSA on March 3, 1979. Director's Exhibit 1. SSA then forwarded the claim to the Department of Labor (DOL), where it was denied on May 21, 1980. *Id.* Claimant's second application for benefits, filed on February 19, 1991, was denied on February 12, 1992. *Id.* On June 22, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3. The district director denied benefits and claimant requested a hearing, Director's Exhibits 20, 21, which was held before the administrative law judge on January 8, 2003.

² The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

impairment.³ Employer cross-appeals, contending that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence when she found that claimant established the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds to both appeals, urging that the denial of benefits be vacated and the case remanded for further consideration. The Director argues that the administrative law judge improperly resolved the conflicting x-ray evidence and failed to consider that one of the pulmonary function studies of record did not conform to the applicable quality standards. Additionally, the Director states that the record should be reopened on remand because "it appears that the Director has not satisfied his obligation to provide claimant with a complete and credible pulmonary evaluation" Director's Brief at 4.

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

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was dismissed because

³ Claimant also notes, but does not develop, arguments that the administrative law judge permitted employer to submit x-ray readings exceeding the limits of 20 C.F.R. §725.414, and that the administrative law judge's requirement that claimant withdraw pulmonary function studies exceeding the limits of 20 C.F.R. §725.414, violated claimant's due process rights. Claimant's Brief at 3, 5. Because claimant does not make specific arguments in his brief, we decline to address these issues. 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

claimant failed to attend the hearing without good cause for his absence. *See* 20 C.F.R. §725.465(a) (2000). An order of dismissal has “the same effect as a decision and order disposing of the claim on its merits” 20 C.F.R. §725.466(a). Consequently, the administrative law judge properly analyzed whether the newly submitted evidence established any element of entitlement. Decision and Order at 3, 4. The administrative law judge found that the new evidence established the existence of pneumoconiosis, thereby establishing a change in an applicable condition of entitlement.

Pursuant to 20 C.F.R. §718.202(a)(1), employer and the Director contend that the administrative law judge improperly discounted negative x-ray readings based on some readers’ notations that the x-ray film quality was of a lower category. This contention has merit. The administrative law judge considered twelve readings of three x-rays taken on October 17, 2001, January 14, 2002, and March 19, 2002. The administrative law judge found that there were six positive and six negative readings. The administrative law judge additionally found that the readings for each x-ray were “equally divided” when the readers’ radiological qualifications were considered. Decision and Order at 7. The administrative law judge broke the evidentiary tie by giving greater weight to the readings of doctors who rated the x-ray film quality higher, and less to those who rated the quality lower. This had the effect of giving more weight to the positive x-ray readings, and the administrative law judge thus concluded that the x-ray readings “support[ed] a positive finding of pneumoconiosis.” *Id.*

As the Director and employer note, however, under the applicable quality standard, a chest x-ray need only be of suitable quality for the proper classification of pneumoconiosis; the film need not be of optimal quality. 20 C.F.R. §718.102(a); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984). Here, the x-rays in question bear notations of film quality, they were not classified as unreadable, and thus were found by qualified readers to be of suitable quality for the proper classification of pneumoconiosis. Employer's Exhibits 3, 5, 7, 8, 12. Therefore, the administrative law judge did not supply a proper reason for the weight she accorded to the conflicting x-ray readings. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1215-16 (1984).

Additionally, the Director notes correctly that the administrative law judge mischaracterized Dr. Gaia’s qualifications when she weighed his positive reading of the October 17, 2001 x-ray. The record reflects that Dr. Gaia is a Board-certified radiologist only, not a Board-certified radiologist and B-reader. Director's Exhibit 12. Also, both claimant and the Director note accurately that, contrary to the administrative law judge’s finding, Dr. Navani did not read the October 17, 2001 x-ray as negative for pneumoconiosis. Dr. Navani merely rated that x-ray’s quality without classifying the x-ray for the presence or absence of pneumoconiosis. Director's Exhibit 13. Therefore, and in light of all the foregoing, we must vacate the administrative law judge’s finding

pursuant to 20 C.F.R. §718.202(a)(1) and remand this case for her to reconsider the x-ray evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge relied on her flawed analysis of the x-ray evidence when she weighed the conflicting medical opinions. We agree. The administrative law judge stated that she gave “greater weight” to Dr. Kraynak’s diagnosis of pneumoconiosis because it was “supported by the overall x-ray evidence and [was] consistent with my finding based on the x-ray evidence.” Decision and Order at 10. The administrative law judge discounted Dr. Dittman’s opinion, that claimant does not have pneumoconiosis, because she found that Dr. Dittman’s reliance on a shorter coal mine employment history than she found established was “a significant difference that could have impacted [Dr. Dittman’s] decision, especially in light of the x-ray evidence.” Decision and Order at 11. Because the administrative law judge’s rationales depended upon her finding at 20 C.F.R. §718.202(a)(1), which we herein vacate, we also vacate the administrative law judge’s finding pursuant to 20 C.F.R. §718.202(a)(4) and further remand the case for her to reconsider the medical opinions of Drs. Kraynak and Dittman. On remand, the administrative law judge must again weigh together the x-ray and medical opinion evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), claimant contends, and the Director agrees in part, that the administrative law judge failed to properly consider whether certain pulmonary function studies were in substantial compliance with the quality standards when she found that claimant is not totally disabled. The general quality standard regulation provides that “[a]ny clinical test . . . subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered.” 20 C.F.R. §718.101(b). The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of Part 718. Section 718.103 specifies, in relevant part, that “no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B of this part.” 20 C.F.R. §718.103(c).

An October 23, 2001 pulmonary function study was administered by Dr. Talati as part of the pulmonary evaluation provided to claimant by the Department of Labor.

Director's Exhibit 11. The study was non-qualifying.⁴ At claimant's request, Dr. Kraynak reviewed the study tracings and stated that the instrument was not calibrated on the day of the test as required by the quality standards. Claimant's Exhibit 24 at 10. Dr. Kraynak also noted that there were no flow-volume loops with the study. *Id.*

The administrative law judge found the October 23, 2001 pulmonary function study to be valid. The administrative law judge indicated that "Section 718.103 does not state that the instrument must be calibrated daily" Decision and Order at 13. As claimant and the Director note, however, Appendix B specifically provides that "[a] calibration check shall be performed on the instrument each day before use" App. B (2)(iv). According to the tracings of the October 23, 2001 study, the instrument's calibration was checked on October 17, 2001, six days before claimant was tested. Director's Exhibit 11. Thus, we agree with claimant and the Director that the administrative law judge should have considered whether the October 23, 2001 pulmonary function study was in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990)(holding, under the former 20 C.F.R. Part 718 regulations, that administrative law judges must apply the quality standards); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987)(same).

Additionally, the administrative law judge found that the October 23, 2001 pulmonary function study was valid because it contained one flow-volume loop.⁵ Decision and Order at 13. But as claimant and the Director point out, there must be three flow-volume loops. 20 C.F.R. §718.103(b). Thus, for this additional reason, the administrative law judge should have considered whether the October 23, 2001 pulmonary function study was in substantial compliance with the quality standards. Because the administrative law judge did not do so before accepting the test as valid evidence that claimant is not totally disabled, we vacate the administrative law judge's findings as to the October 23, 2001 pulmonary function study and instruct her to consider on remand whether the test substantially complies with the applicable quality standards. 20 C.F.R. §§718.101(b), 718.103(c).

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).

⁵ The Director, Office of Workers' Compensation Programs (the Director), states that the October 23, 2001 pulmonary function study is accompanied by two flow-volume loops, but explains that there should be six such loops because Dr. Talati conducted both pre- and post-bronchodilator testing. Director's Brief at 3 and n.3.

The pulmonary function study administered on March 19, 2002 by employer's examining physician, Dr. Dittman, was non-qualifying. Employer's Exhibit 1. Dr. Kraynak reviewed the study tracings and stated that the instrument was not calibrated on March 19, 2002. Claimant's Exhibit 24 at 12. Dr. Kraynak also stated that the tracings showed that breaks were taken and that the flow-volume loops were incomplete because they did not show the inspiratory portion of the curve. Claimant's Exhibit 24 at 13.

The administrative law judge found the March 19, 2002 pulmonary function study to be valid because "the regulations do not address the calibration of the machine." Decision and Order at 13. As previously discussed, however, the regulations require a daily calibration check. App. B (2)(iv). Claimant and the Director agree that the March 19, 2002 pulmonary function study tracings show a calibration date of March 27, 2002, eight days after claimant was tested. Employer's Exhibit 1 at 2. Although claimant and the Director disagree as to the significance of this information,⁶ it is not for the Board to determine whether the pulmonary function study is in substantial compliance with the quality standards. The administrative law judge, as fact-finder, must do so. *See* 20 C.F.R. §§718.101(b), 718.103(c); *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Mangifest*, 826 F.2d at 1327, 10 BLR at 2-233. We therefore vacate the administrative law judge's findings regarding the March 19, 2002 pulmonary function study and instruct her to consider whether the test substantially complies with the applicable quality standards. On remand, the administrative law judge should also use the quality standards as a guide to assess Dr. Kraynak's opinion that the test's flow-volume loops were incomplete. *See* App. B (1)(v)(requiring display of the entire maximum inspiration). Additionally, the administrative law judge should determine whether any statement of claimant's degree of comprehension and cooperation is disclosed on the March 19, 2002 study. Employer's Exhibit 1. Thus, on remand, the administrative law judge should consider whether the March 19, 2002 study was in substantial compliance with the applicable standard. *See* 20 C.F.R. §718.103(b)(5).

The pulmonary function study administered on September 17, 2002 by Dr. Kraynak, was qualifying. Claimant's Exhibit 7. Although Dr. Kaplan opined that this study was invalid due to inadequate effort, *see* Employer's Exhibit 13, Dr. Kraynak responded that he had personally observed claimant's effort to be excellent throughout the study. Claimant's Exhibit 34. Upon review of these conflicting opinions, the

⁶ Claimant asserts that it is clear that the March 19, 2002 pulmonary function study does not conform with the daily calibration requirement. The Director responds that it is "unclear" whether this information means that Dr. Dittman's equipment was not calibrated on March 19, 2002, the day of the test, "or whether it merely reflects that the machine was more recently calibrated prior to the printing of the test results, which was presumably done after the test was conducted." Director's Brief at 3.

administrative law judge found the study to be valid, based on the administering physician's observations. Decision and Order at 13. Substantial evidence supports the administrative law judge's permissible finding, which we therefore affirm. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149-50 (1990)(explaining that an administrative law judge is not required to credit a consulting physician's opinion regarding the reliability of a pulmonary function study over that of the administering physician).

The pulmonary function study administered on October 16, 2002 by claimant's examining physician, Dr. Kruk, was qualifying. Claimant's Exhibit 32. Dr. Kaplan reviewed the tracings and concluded that the study was invalid due to inadequate effort. Employer's Exhibit 13. Dr. Kruk responded that based on his observation, claimant's effort was good. Claimant's Exhibit 35. Upon review of these conflicting opinions, the administrative law judge found the study to be invalid. The administrative law judge indicated that she was not persuaded by Dr. Kruk's response because she found that "Dr. Kruk did not actually personally observe the study. It was administered by Dr. Matthew Kraynak." Decision and Order at 14. Claimant argues that substantial evidence does not support the finding that Dr. Kruk did not actually administer or observe the October 16, 2002 pulmonary function study, but a review of the record supports the administrative law judge's inference that Dr. Matthew Kraynak, not Dr. Kruk, administered the study. Although Dr. Kruk interpreted and signed the study, the study was reported under the heading "Matthew J. Kraynak," and the study technician was identified as "Kraynak." Claimant's Exhibit 32. On these facts, the administrative law judge's inference was not irrational. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Additionally, the administrative law judge acted within her discretion when she deferred to Dr. Kaplan's superior credentials in pulmonary medicine in crediting his opinion that the study was invalid.⁷ *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(*en banc*). Consequently, we reject claimant's allegations of error and affirm the administrative law judge's finding that the October 16, 2002 pulmonary function study was invalid.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the administrative law judge erred in discounting Dr. Kruk's opinion, that claimant is totally disabled, because the October 16, 2002 pulmonary function study upon which Dr. Kruk relied was invalid. Contrary to claimant's contention, the administrative law judge permissibly gave less weight to Dr. Kruk's opinion because it was based on an unreliable pulmonary function study. *Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267. However, review of the administrative law judge's Decision and Order reflects that her reasons for

⁷ The record indicates that Dr. Kaplan is Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibit 14, while Dr. Kruk is Board-certified in Internal Medicine only. Claimant's Exhibit 33.

crediting Dr. Dittman's opinion that claimant is not totally disabled, and for discounting Dr. Kraynak's contrary opinion that claimant is totally disabled, depended in part on the administrative law judge's findings regarding the validity of the October 23, 2001 and March 19, 2002 pulmonary function studies. Decision and Order at 16 (finding Dr. Dittman's opinion better supported by objective studies than was Dr. Kraynak's opinion). Because we have instructed the administrative law judge to reconsider whether those pulmonary function studies are in substantial compliance with the quality standards, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) and instruct her to reconsider the opinions of Drs. Kraynak and Dittman. Additionally, because the issue for the administrative law judge's determination is whether a respiratory or pulmonary impairment prevents claimant from performing his usual coal mine work, 20 C.F.R. §718.204(b)(1)(i), the administrative law judge should consider on remand the conflicting medical opinions in light of the exertional requirements of claimant's usual coal mine employment.⁸ See *Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80, 12 BLR 2-192, 2-197 (3d Cir. 1989).

Finally, the Director states that because the October 23, 2001 pulmonary function study conducted by the Department of Labor's physician, Dr. Talati, was nonconforming, the administrative law judge should reopen the record for Dr. Talati to remedy the study's defects by addressing the calibration issue and by supplying the missing flow-volume loops, if they are available. Director's Brief at 4 and n.4. The Director also notes that the administrative law judge gave no weight to Dr. Talati's opinion when considering the total disability issue, because Dr. Talati diagnosed a mild pulmonary impairment but did not address claimant's ability to perform his usual coal mine employment. Decision and Order at 15. The Director concludes that because Dr. Talati did not discuss whether claimant could perform his usual coal mine employment or identify specific physical limitations that the administrative law judge could compare with the exertional requirements of claimant's usual coal mine employment, Dr. Talati's "opinion is incomplete; he has failed to credibly address whether claimant's pulmonary impairment is totally disabling." Director's Brief at 4. The Director thus requests that the administrative law judge reopen the record for Dr. Talati to "submit a supplemental opinion addressing whether claimant's mild pulmonary impairment precludes him from performing his usual coal mine employment." *Id.* We note that the administrative law judge on remand has the discretion to reopen the record. *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989)(*en banc*).

⁸ The exertional requirements of claimant's coal mine work as a breaker operator appear in the Hearing Transcript at 43-47 and in Claimant's Exhibit 24 at 7.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge