

BRB No. 06-0226 BLA

GARRY L. SWANK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
FKZ COAL, INCORPORATED)	DATE ISSUED: 11/30/2006
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-BLA-5301) of Administrative Law Judge Paul H. Teitler 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). The administrative law judge credited claimant with seventeen years and three months of qualifying coal mine employment, and adjudicated this claim, filed on July 31, 2003, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings regarding the length of claimant's coal mine employment, his weighing of the evidence on the issue of total respiratory disability at Section 718.204(b)(2)(i), (ii) and (iv), and his failure to make separate disability causation findings at Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.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 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).

Claimant initially maintains that his testimony, in conjunction with the documentary evidence of record, establishes that claimant worked over thirty years in coal mine employment between 1964 and 1999. Claimant argues that the administrative law judge, citing *Gilliam v. G & O Coal Co.*, 7 BLR 1-59 (1984), acknowledged that a calculation of coal mine employment may be based on a claimant's testimony where it is uncontradicted and credible, and he credited claimant's testimony that the period of self-employment reflected in the Social Security Administration (SSA) records between 1984 and 1994 constituted qualifying coal mine work, yet provided no reason for discounting claimant's testimony regarding other periods of coal mine work which were not documented in the SSA records. *See* Decision and Order at 3-4. Since the administrative law judge discredited Dr. Kraynak's opinion in part because the physician relied on an inflated coal mine employment history, claimant asserts that any error in calculating said employment is not harmless. Claimant's arguments have merit. The administrative law judge did not explain why he discounted claimant's testimony regarding periods of coal mine employment undocumented in the SSA records, and the record also contains documentary evidence which the administrative law judge did not specifically consider and weigh.² As the administrative law judge may not reject relevant evidence without

¹ The administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Corp.*, 6 BLR 1-710 (1983).

² The record includes a 1977 wage and tax statement from Bush Coal Company, as well as the miner's 1977 Form 1040, which both list earnings of \$10,058 from Bush Coal. Director's Exhibits 6, 8. The Social Security Administration records also reflect earnings from "Bush Earl" in the amounts of \$760 in the last quarter of 1976, \$10,058 for the four quarters of 1977, and \$95 in an unspecified quarter of 1978. Director's Exhibit 9.

explanation, we vacate his findings regarding the length of claimant's coal mine employment, and remand this case for the administrative law judge to address all relevant evidence and provide a sufficient rationale for his credibility determinations. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-1100 (1984).

Turning to the merits, claimant contends that the administrative law judge erred in finding that the pulmonary functions studies of record were insufficient to establish total respiratory disability at Section 718.204(b)(2)(i). Specifically, claimant maintains that the validity of the two most recent qualifying pulmonary function studies of record is unchallenged, and that the administrative law judge improperly accorded greater weight to Dr. Galgon's non-qualifying pulmonary function study without weighing the evidence of record which challenged its validity.³ Claimant's arguments have merit. Although the administrative law judge acknowledged claimant's submission of an invalidation report authored by Drs. Venditto and Simelaro,⁴ *see* Decision and Order at 8 n. 1, he did not weigh the report, along with Dr. Kraynak's testimony challenging the technical reliability of the test, against Dr. Galgon's testimony defending the validity of his test. *See* Dr. Kraynak's Deposition at 14; Dr. Galgon's Deposition at 24-26, 39. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), and instruct him on remand to weigh the conflicting evidence to determine the validity of Dr. Galgon's test, and to reassess the pulmonary function studies of record thereunder. *See generally Robinette v. Director, OWCP*, 9 BLR 1-154 (1986); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

Claimant next challenges the administrative law judge's weighing of the two blood gas studies of record at Section 718.204(b)(2)(ii). In evaluating this evidence, the administrative law judge determined that Dr. Galgon's more recent non-qualifying test was entitled to greater weight than Dr. Santarelli's qualifying test because Dr. Galgon utilized two machines and additionally obtained post-exercise values, which showed that

³ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁴ Pursuant to the administrative law judge's Order issued on March 3, 2005, which allowed claimant an extension of time to file a review of the October 12, 2004 pulmonary function test, claimant submitted a review of the test by Drs. Venditto and Simelaro on June 10, 2005. By letter dated June 13, 2005, employer objected to the inclusion of a review by two doctors into the record, and indicated that it would agree to the admission of a single opinion; however, the record does not reflect an evidentiary ruling in this regard by the administrative law judge.

claimant's results normalized with exercise. Decision and Order at 8. Claimant correctly asserts, however, that the administrative law judge failed to acknowledge that Dr. Santarelli's test was validated by Dr. Michos, *see* Director's Exhibit 19, or that Dr. Kraynak disputed the reliability of Dr. Galgon's test and the conclusions drawn therefrom, *see* Dr. Kraynak's Deposition at 13-14, 17-18, 20, 26, 32. Moreover, while Dr. Galgon defended the validity of his test and testified to the usual procedures in administering such tests, claimant accurately notes that Dr. Galgon admitted that the report did not show the duration and type of exercise administered, or the pulse rate at the time the blood sample was drawn, or whether the machines were calibrated and standardized before the study was performed. *See* Dr. Galgon's Deposition at 29-32, 39-42, 46-47. As the administrative law judge did not consider this conflicting evidence, and as the regulations mandate substantial compliance with the standards for the administration of clinical tests, *see* 20 C.F.R. §718.101(b), we vacate his findings pursuant to Section 718.204(b)(2)(ii) for a reassessment of the evidence on remand. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring); *see generally Mangifest v. Director, OWCP*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).⁵

Because the administrative law judge's weighing of the objective evidence on remand could affect his credibility determinations with regard to the medical opinions of record, we also vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv). *See generally Siwiec*, 894 F.2d 635, 13 BLR 2-259. Further, we agree with claimant's argument that the administrative law judge selectively analyzed Dr. Kraynak's deposition testimony, provided invalid reasons at Section 718.204(b)(2)(iv) for discrediting the opinions of Drs. Kraynak and Santarelli, and failed to separately adjudicate the issues of total respiratory disability and disability causation.

In evaluating the medical opinions of record, the administrative law judge discounted Dr. Santarelli's report on the ground that it did not conclusively determine what caused claimant's respiratory impairment, and listed obesity as a separate non-cardiopulmonary diagnosis. Decision and Order at 9. However, as Dr. Santarelli diagnosed a moderate to severe respiratory impairment,⁶ and stated that claimant was unable to perform his last coal mine employment, Director's Exhibit 17, the

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁶ Dr. Santarelli indicated that coal dust, smoking, and possible underlying coronary artery disease all contributed to claimant's respiratory impairment. Director's Exhibit 17.

administrative law judge was required to first determine whether the opinion was sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv), and then to consider its sufficiency to establish disability causation at Section 718.204(c), if reached. *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Similarly, in reviewing the opinions of Drs. Galgon and Kaplan, the administrative law judge determined that the physicians attributed claimant's small airways obstruction to smoking and opined that claimant was not totally disabled due to pneumoconiosis, Decision and Order at 9, but the administrative law judge failed to consider whether the opinions were sufficient to establish total respiratory disability. Consequently, the administrative law judge must reassess these opinions on remand. *Id.*

With regard to Dr. Kraynak, the administrative law judge concluded that the physician's opinion of total disability was "invalidated" by the inconsistencies between his report and his deposition testimony, noting that Dr. Kraynak initially diagnosed pneumoconiosis which caused claimant's small airways obstruction, but later testified that claimant's smoking history alone could cause such obstruction, plus the administrative law judge found that the physician relied on inaccurate smoking and coal mine employment histories. Decision and Order at 9. Claimant correctly maintains, however, that Dr. Kraynak was asked at his deposition to assume a smoking history of one to one and one-half packs per day from the time claimant was a teenager until one or two years ago, and to assume a coal mine employment history of 8.96 years, thus Dr. Kraynak considered both the lowest and highest possible coal mine employment and smoking histories. Dr. Kraynak then agreed that smoking contributed to claimant's small airways obstruction, and stated that, without any coal dust exposure, a 39 to 57 pack year smoking history could potentially cause the level of small airways obstruction found in claimant, but the physician still concluded that claimant's coal dust exposure contributed to the obstructive defect and was the sole cause of claimant's primarily restrictive disability. *See Dr. Kraynak's Deposition* at 7-8, 15-16, 19, 24-25, 30. As the administrative law judge misconstrued Dr. Kraynak's testimony, *see generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), he is directed to reevaluate the opinion on remand, and to apply the provisions at 20 C.F.R. §718.104(d) in view of Dr. Kraynak's status as claimant's treating physician.

After weighing the evidence in each category at Section 718.204(b)(2)(i)-(iv) on remand, the administrative law judge must weigh the evidence of record together, like and unlike, and determine whether it is sufficient to establish total respiratory disability, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); and, if it is, the administrative law judge must then consider all relevant evidence in determining whether claimant's disability is due to pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c); *see also Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and this 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

BETTY JEAN HALL
Administrative Appeals Judge