

BRB No. 99-0270 BLA

JAMES DeANGELO)
)
 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 Denying Petition for Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (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, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Petition for Modification (97-BLA-1945) of Administrative Law Judge Ainsworth H. Brown 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 The administrative law

¹Claimant initially filed a claim for benefits on January 2, 1980, which was denied by the Department of Labor on February 5, 1981. Director's Exhibit 22. Claimant took no further action until the filing of a second claim on November 24, 1993, Director's Exhibit 1, which was denied by the district director on August 9,

judge considered only the newly submitted evidence, *i.e.*, that evidence submitted since the most recent denial of benefits, and found that it failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 2-3. The administrative law judge further concluded that there was no reason to address whether claimant was totally disabled due to coal mine dust exposure. Decision and Order at 3. Accordingly, the administrative law judge concluded that claimant failed to show a change in conditions and thus denied claimant's request for modification and benefits. On appeal claimant contends that newly submitted pulmonary function study evidence and newly submitted medical opinion evidence support a finding of total disability pursuant to Section 718.204(c)(1), (4). The Director, Office of Workers' Compensation Programs (the Director), responds and urges affirmance of the administrative law judge's Decision and Order.²

1994, Director's Exhibit 20. Administrative Law Judge Brown subsequently issued a Decision and Order denying benefits on June 5, 1995. Director's Exhibit 48. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits. Director's Exhibit 52; *DeAngelo v. Director, OWCP*, BRB No. 95-1821 BLA (Feb. 28, 1996)(unpub.). Claimant subsequently filed a request for modification with the district director, Director's Exhibit 61. After denial by the district director, Director's Exhibit 63, claimant requested a hearing, but then agreed to a decision on the record. On November 3, 1998, Judge Brown issued his Decision and Order denying claimant's request for modification from which claimant now appeals.

²The record is devoid of any newly submitted blood gas study evidence supporting a

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In considering the instant claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) rather than determining whether claimant established a basis for modification of the district director's denial of benefits on claimant's duplicate claim. See *Hess v. Director, OWCP*, 21 BLR 1-142 (1998); see generally *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Nevertheless, we hold that any error in this regard is harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), in view of the administrative law judge's affirmable finding that the newly submitted evidence failed to establish the existence of a totally disabling respiratory impairment. See discussion, *infra*.

finding of total disability or any evidence of cor pulmonale with right sided congestive heart failure. Accordingly, claimant is precluded from demonstrating a totally disabling respiratory impairment pursuant to Section 718.204(c)(2) and (3). 20 C.F.R. §718.204(c)(2), (3); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *rev'd on other grounds*, 933 F.2d 510 15 BLR 2-124 (7th Cir. 1991).

Claimant asserts that the three newly submitted qualifying pulmonary function studies,³ Director's Exhibits 54, 57; Claimant's Exhibit 4, support a finding of total disability and that the administrative law judge erred in rejecting the studies based on the reports invalidating the studies made by Drs. Levinson and Sahillioglu, Director's Exhibits 55, 59. Claimant argues that, while Drs. Levinson and Sahillioglu possess qualifications superior to those of the physician who conducted the qualifying studies, Dr. Kraynak, this factor should not affect the credibility of the qualifying studies. Claimant further asserts that Dr. Sahillioglu's discrediting of the studies, because they did not measure total lung capacity, and Dr. Levinson's discrediting of the pulmonary function study of January 20, 1997, because the initial inspiration was taken from the open atmosphere, are not proper bases for discrediting qualifying pulmonary function studies.

³A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

We reject claimant's assertions and affirm the administrative law judge's determination that the newly submitted evidence failed to demonstrate a totally disabling respiratory impairment pursuant to Section 718.204(c)(1). In considering the newly submitted pulmonary function study evidence, the administrative law judge found that, while three of the four newly submitted studies produced qualifying values, they were entitled to less weight based on the conclusions of reviewing physicians Drs. Sahillioglu and Levinson that claimant put forth poor effort on the tests. Decision and Order at 2-3. Contrary to claimant's contention, the administrative law judge could reasonably determine that these consultation reports called into question the probative value of the pulmonary function study evidence relied upon by claimant. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 n. 5, 13 BLR 2-259, 2-262 n. 5 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); see generally *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). Further, the administrative law judge, in a permissible exercise of his discretion, accorded greater weight to the consultation reports of Drs. Sahillioglu and Levinson based on their superior qualifications. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Warman v. Pittsburg and Midway Coal Mining Co.*, 4 BLR 1-601 (1982), *aff'd*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); see also *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985) (2-1 opinion with Brown, J. dissenting). Accordingly, we affirm the administrative law judge's determination that the newly submitted evidence failed to demonstrate total disability pursuant to Section 718.204(c)(2).⁴ See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

⁴Inasmuch as the administrative law judge has provided affirmable bases for discrediting the qualifying pulmonary function studies, we need not address claimant's other contentions at Section 718.204(c)(1). See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Claimant next asserts that the administrative law judge erred in rejecting the opinions of Drs. Kruk and Kraynak, that claimant was totally disabled, Director's Exhibits 37, 58; Claimant's Exhibit 3, in favor of the opinion of Dr. Rashid who reached a contrary conclusion, Director's Exhibit 66. We disagree. In finding that the newly submitted evidence failed to demonstrate a totally disabling respiratory impairment pursuant to Section 718.204(c)(4), the administrative law judge considered the newly submitted opinions of Drs. Kraynak, Kruk and Rashid. Decision and Order at 3-4. The administrative law judge, in a permissible exercise of his discretion, concluded that the credibility of the opinions of Drs. Kraynak and Kruk was "undermined" by their reliance upon invalid pulmonary function studies. Decision and Order at 3. See *Siwiec, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, we affirm the administrative law judge's determination that claimant has failed to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4) as claimant has failed to produce any credible new evidence relevant to that subsection. See *Ondecko, supra*.⁵ Inasmuch as claimant has failed to establish the presence of a totally disabling respiratory impairment we must affirm the administrative law judge's denial of benefits. See *Swarrow, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

⁵We thus need not address claimant's contentions regarding the administrative law judge's analysis of Dr. Rashid's opinion. See *Ondecko, supra*; *Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Petition for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge