

BRB No. 99-1097 BLA

PATRICIA ANN VARNER)	
(Administratrix of the Estate of)	
VIRGIL McKINLEY SPILLER))	
)	
Claimant-)	DATE ISSUED:
Petitioner)	
)	
v.)	
)	
)	
DIRECTOR, OFFICE OF)	
WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	DECISION AND ORDER

Respondent

Appeal of the Decision and Order on Second Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Sarah M. Hurley (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand - Denial of Benefits (94-BLA-0936) of Administrative Law Judge Robert L. Hillyard 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 fifth time. This case has a long and detailed procedural history as outlined in the Board's prior Decision and Order, *Varner v. Director, OWCP*, BRB No. 98-0886 BLA (Mar. 23, 1999)(unpub.). In his current Decision and Order, the administrative law judge found the October 13, 1982 pulmonary function study to be a valid and qualifying study and, thus, sufficient, absent contrary probative evidence, to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). However, in weighing the contrary probative evidence of record, pursuant to *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*), the administrative law judge found the preponderance of the medical evidence of record insufficient to establish that the miner was totally disabled from a respiratory or pulmonary standpoint. Consequently, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) and, thus, further found that claimant failed to establish invocation of the presumption set forth at 20 C.F.R. §718.305. Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in weighing the contrary probative evidence under *Shedlock*, inasmuch as the administrative law judge applied a mechanical, numerical weighing of the medical evidence. The Director, Office of Workers' Compensation Programs (the Director), in a Motion to Remand, which the Board accepts as his response brief, requests that the Board vacate the administrative law judge's denial of benefits and remand the case for reconsideration of the October 13, 1982 pulmonary function study. In addition, the Director contends that based on his weighing of this pulmonary function study, the administrative law judge's weighing of the medical opinion evidence is erroneous. In her Reply Brief, claimant concurs with the Director's request to remand this case to the administrative law judge for reweighing of the medical opinion evidence pursuant to Section 718.204(c) and *Shedlock*. However, claimant urges affirmance of the administrative law judge's weighing of the October 13, 1982 pulmonary function study and argues that the Board not remand for reconsideration of that study.

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).

In challenging the administrative law judge's finding that the October 13,

1982 pulmonary function study was valid and, thus, sufficient to establish total disability pursuant to Section 718.204(c)(1), the Director contends that the administrative law judge improperly found that this study was in substantial compliance with the quality standards. In particular, the Director contends that the administrative law judge improperly credited the October 13, 1982 study inasmuch as Dr. Long, who reviewed the study, opined that the study was invalid because the tracings showed excessive variability, in that there was greater than five percent (5%) variation in the two largest FEV₁ maneuvers. See Director's Motion to Remand at 5-6; Director's Exhibit 13. Therefore, the Director contends that the October 13, 1982 pulmonary function study is invalid and the administrative law judge erred in crediting this study. We disagree.

The administrative law judge, in compliance with the Board's prior remand order, weighed all of the opinions relevant to the validity of the October 13, 1982 pulmonary function study and rationally explained his reasons for finding this study was in substantial compliance with the regulations. See Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In reaching his decision, the administrative law judge considered the assessment of Dr. Long, that this study was not valid due to the greater than 5% variation in the two best FEV₁ tracings, as well as the assessments of the administering physician, Dr. Hessel, who opined that the miner's cooperation and comprehension were good, and Dr. Cohen, who opined that it was a valid study because the miner's cooperation was good. Director's Exhibits 13, 38. The administrative law judge weighed these opinions and found that the sole basis for invalidation was Dr. Long's assessment of excessive variability in the tracings, resulting in inconsistent effort, whereas Dr. Hessel, the administering physician, opined at the time of the test, that the miner's cooperation and comprehension was good, resulting in good effort, and, therefore, the administrative law judge found that this study was in substantial compliance with the regulations. Decision and Order at 4; Director's Exhibits 13, 38. Inasmuch as the Board has held that conformity with the quality standards set forth at 20 C.F.R. 718.103 is not mandatory, and pulmonary function studies cannot be excluded by the administrative law judge on this basis alone, we hold that the administrative law judge reasonably exercised his discretion as trier-of-fact in finding that the October 13, 1982 study was a valid study inasmuch as it was in substantial compliance with the regulations. Decision and Order at 4; Director's Exhibits 13, 38; 20 C.F.R. §718.103; 20 C.F.R. Part 718, Appendix B ¶2(ii)(G); see *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986); see also *Owens v.*

Jewell Smokeless Coal Corp., 14 BLR 1-47 (1990); *cf. Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Moreover, inasmuch as there are no further challenges to the administrative law judge's weighing of the pulmonary function study evidence, we affirm his finding that this study is sufficient to establish total disability pursuant to Section 718.204(c)(1).

However, in light of our affirmance, *infra*, of the administrative law judge's finding that the October 13, 1982 pulmonary function study was a valid pulmonary function study and the Director's concession that, if the October 13, 1982 study was valid, the medical opinion of Dr. Spagnolo, that the miner was not totally disabled, is compromised and would not be entitled to probative weight, see Director's Motion to Remand at 5, we vacate the administrative law judge's weighing of the medical opinion evidence and remand the case to the administrative law judge for further consideration of this evidence. On remand, the administrative law judge must reconsider the medical opinion evidence pursuant to Section 718.204(c) as well as his weighing of the contrary probative evidence under *Shedlock*, in light of the Director's concession that Dr. Spagnolo's opinion of no total disability is not entitled to probative weight. *Shedlock, supra; see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

If, on remand, the administrative law judge finds that the medical evidence, as a whole, is sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c), claimant, therefore, has established invocation of the rebuttable presumption of pneumoconiosis pursuant to Section 718.305. 20 C.F.R. §718.305(a), (c); *DeFore, supra; Trent, supra; Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). The administrative law judge must then weigh the relevant evidence to determine whether the Director has established rebuttal of the Section 718.305 presumption, by establishing that the miner did not have pneumoconiosis or that his total respiratory disability did not arise out of his coal mine employment. 20 C.F.R. §718.305(d); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpub.); *DeFore, supra; Tanner, supra*.

Accordingly, the administrative law judge's Decision and Order on Second Remand - Denial of Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with the opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge