

BRB No. 02-0172 BLA

WILLIAM D. JONES)
)
 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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Eugene Scalia, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0739) 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).¹ In the initial Decision and Order, Administrative Law Judge Daniel

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

F. Sutton credited claimant with fourteen years of coal mine employment. He also found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, Judge Sutton found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).² Accordingly, he denied benefits.

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Paul H. Teitler found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000). Judge Teitler, therefore, found that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Judge Teitler also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Judge Teitler, therefore, denied benefits.

Claimant subsequently filed a second request for modification. Administrative Law Judge Ainsworth H. Brown (the administrative law judge) found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Moreover, “after a de novo review of the record as a whole,” the administrative law judge found that claimant failed to prove that there was a mistake in a determination of fact or a change in conditions. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in excluding evidence from the record. Claimant further argues that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv). Claimant also contends that the administrative law judge erred in failing to properly consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The Director, Office of Workers’ Compensation Programs (the Director), responds in support of the administrative law judge’s denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 &*

²The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant initially contends that the administrative law judge erred in not admitting Claimant's Exhibits 12, 15, 16 and 19 into evidence. This evidence relates to validations of pulmonary function studies conducted on September 23, 1997, November 18, 1997, December 8, 1997 and December 17, 1998. At the hearing, the Director objected to the admission of Claimant's Exhibits 12, 15, 16 and 19, stating that:

Claimant has been before [the Office of Administrative Law Judges] before prior to this time and had had ample opportunity to submit reviews of ventilatory studies in 1997 and 1998 in prior appearances before the [a]dministrative [l]aw [j]udge, and since this is a request for modification, that those particular reviews should not be admitted at this time.

Transcript at 7.

Claimant responded that this evidence was relevant to a "mistake of fact" determination. Transcript at 7. The administrative law judge requested that claimant's counsel provide him with legal authority to support her contention that this evidence should be admitted into the record. *Id.* at 7. Claimant's counsel requested an opportunity to provide the administrative law judge with a memorandum on the issue within two weeks. *Id.* at 8. The administrative law judge agreed to reserve his ruling on the admission of this evidence. *Id.*

In his decision, the administrative law judge addressed the admissibility of this evidence, stating that:

At the hearing, Claimant requested and was granted, two weeks in which to submit a memorandum on the issue of a mistake in a determination of fact. Claimant's request was made as a result of the Director's objection to Claimant's [E]xhibits 12, 15, 16 and 19, consisting of validation reports of pulmonary functions [sic] studies conducted in 1997 and 1998, which studies were reviewed by a prior administrative law judge. (Tr. 7-8) A ruling on the admissibility of those reviews was reserved until receipt of the memorandum. No memorandum has been received on behalf of Claimant. Accordingly, the Director's objections to Claimant's [E]xhibits 12, 15, 16 and 19 are sustained and same are not admitted into evidence.

Decision and Order at 2 (footnote excluded).

Claimant argues that the administrative law judge failed to provide any basis for

excluding Claimant's Exhibits 12, 15, 16 and 19 from the record. Although the record contains the results of claimant's November 18, 1997 and December 8, 1997 pulmonary function studies, these pulmonary function studies have never been admitted into the record.³ See Director's Exhibit 45. Consequently, the administrative law judge's error, if any, in excluding Dr. Prince's validations of claimant's November 18, 1997 and December 8, 1997 pulmonary function studies is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986); Claimant's Exhibits 15, 16.

Claimant contends that the administrative law judge failed to provide a basis for excluding Dr. Matthew Kraynak's (M. Kraynak's) validation of claimant's December 17, 1998 pulmonary function study, see Claimant's Exhibit 12, and Dr. Prince's validation of claimant's September 23, 1997 pulmonary function study. See Claimant's Exhibit 19. We disagree. The administrative law judge sustained the Director's objection to the admission of this evidence. Decision and Order at 2. Claimant waited until after Judges Sutton and Teitler had issued unfavorable decisions before seeking to develop evidence regarding the validity of his December 17, 1998 and September 23, 1997 pulmonary function studies. On that basis, the Director objected to the admission of this evidence at the hearing. An administrative law judge has the discretion to limit the admission of evidence when he determines that a party has waited until after an administrative law judge has issued an unfavorable decision before

³At the October 26, 1997 hearing, Judge Sutton agreed to keep the record open for claimant to submit additional medical evidence in response to reports submitted by the Director invalidating the results of pulmonary function studies conducted on September 10, 1997 and September 23, 1997. After the hearing, claimant submitted the results of pulmonary function studies conducted on November 18, 1997 and December 8, 1997. See Director's Exhibits 38, 40. The Director objected to this evidence, arguing that because it did not address the validity of claimant's September 10, 1997 and September 23, 1997 pulmonary function studies, it was not appropriate rebuttal evidence and should be excluded. By Order dated February 9, 1998, Judge Sutton excluded the November 21, 1997 and December 8, 1997 pulmonary function studies from the record. Director's Exhibit 45.

seeking to admit additional evidence. *See generally Gill v. Director, OWCP*, 8 BLR 1-427 (1986). Consequently, we hold that the administrative law judge provided a proper basis for excluding Claimant's Exhibits 12 and 19 from the record.

We now turn our attention to the administrative law judge's consideration of claimant's second request for modification pursuant to 20 C.F.R. §725.310 (2000). The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),⁴ an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Teitler found that the evidence was insufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence is sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). In order to establish modification based on a change in conditions, the newly submitted evidence must establish total disability pursuant to 20 C.F.R. §718.204(b). *See Nataloni, supra*.

Claimant argues that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains three newly submitted pulmonary function studies conducted on December 20, 1999, June 6, 2000 and October 5, 2000. While claimant's December 20, 1999 and June 6, 2000 pulmonary function studies are qualifying, Director's Exhibit 69; Claimant's Exhibit 1; claimant's most recent pulmonary function study conducted on October 5, 2000 is non-qualifying. Director's Exhibit 78.

Claimant contends that the non-qualifying October 5, 2000 pulmonary function study is invalid. Claimant contends that the administrative law judge erred in discrediting the invalidations of claimant's October 5, 2000 pulmonary function study submitted by Drs. Simelaro and Venditto. We disagree. The administrative law judge properly discredited the invalidations of Drs. Simelaro and Venditto because they were not sufficiently explained. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9; Claimant's Exhibit 20.

Claimant also contends that the administrative law judge erred in failing to address Dr.

⁴Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

Raymond Kraynak's (R. Kraynak's) review of the October 5, 2000 pulmonary function study. In a report dated December 5, 2000, Dr. R. Kraynak questioned the results of claimant's October 5, 2000 pulmonary function study, noting that the values, significantly in excess of 100% of predicted, were a "physiologic improbability, particularly in view of the fact that [claimant] had open heart surgery." Claimant's Exhibit 18. In his summary of the medical opinion evidence, the administrative law judge noted that Dr. R. Kraynak opined that claimant's October 5, 2000 pulmonary function study showed values that were physiologically impossible to obtain. Decision and Order at 12. Although the administrative law judge did not directly address Dr. R. Kraynak's comments in his consideration of the validity of claimant's October 5, 2000 pulmonary function study, we hold that this error is harmless in light of the fact that Dr. R. Kraynak provided no explanation for his assertion that the results of claimant's October 5, 2000 pulmonary function study were "physiologically impossible." See *Larioni, supra*. We, therefore, hold that the administrative law judge properly found that claimant's October 5, 2000 pulmonary function study is valid.

In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge recognized that the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, has held that pulmonary function studies which return disparately higher values tend to be more reliable indicators of an individual's capacity than those with lower values. Decision and Order at 9 (citing *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpublished)). The Third Circuit has recognized that spuriously low values are unreliable because pulmonary function testing is effort dependent and that spurious high values are not possible. *Andruscavage, supra*. Based on the fact that pulmonary function studies are effort dependent, the administrative law judge found that claimant's most recent October 5, 2000 pulmonary function study was the "most probative." Decision and Order at 9. The administrative law judge, therefore, found that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* at 10.

Claimant does not challenge the administrative law judge's basis for finding that claimant's non-qualifying October 5, 2000 pulmonary function study is more probative than claimant's earlier non-qualifying pulmonary function studies taken on December 20, 1999 and June 6, 2000. Consequently, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).⁵

⁵Inasmuch as the administrative law judge provided a proper basis for crediting claimant's October 5, 2000 pulmonary function study, the administrative law judge's errors, if any, in his consideration of the validity of claimant's December

Because no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (b)(2)(iii), these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20, 1999 and June 6, 2000 pulmonary function studies are harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In his consideration of the newly submitted medical opinion evidence, the administrative law judge credited Dr. Rashid's opinion that claimant was not totally disabled over the contrary opinions of Drs. R. Kraynak and M. Kraynak.⁶ The administrative law judge found that Dr. Rashid's opinion was entitled to the most weight based upon Dr. Rashid's credentials and because his opinion was supported by the "clinical testing." Decision and Order at 13. The administrative law judge also questioned the opinions of Drs. R. Kraynak and M. Kraynak that claimant was totally disabled in light of their reliance upon the results of invalid pulmonary function studies. *Id.*

The administrative law judge acted within his discretion in according greater weight to Dr. Rashid's opinion based upon his credentials.⁷ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 13. The administrative law judge also properly accorded greater weight to Dr. Rashid's opinion because it was more consistent with the objective evidence. See generally *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982); Decision and Order at 13.

Claimant argues that because Dr. Rashid was unaware of the exertional

⁶The administrative law judge properly found that Dr. Swain did not address the extent of claimant's pulmonary impairment. Decision and Order at 12.

⁷Dr. Rashid is Board-certified in Internal Medicine. Director's Exhibit 79. Dr. R. Kraynak is Board-eligible in Family Medicine, Director's Exhibit 31, while Dr. M. Kraynak is Board-certified in Family Medicine. Claimant's Exhibit 14. Claimant contends that the administrative law judge erred in failing to explain why Dr. Rashid's qualifications are superior to those of Dr. M. Kraynak. Claimant's Brief at 19. We hold that the administrative law judge reasonably found that Dr. Rashid's Board-certification in Internal Medicine rendered him more qualified to express an opinion regarding claimant's pulmonary status than Dr. M. Kraynak's Board-certification in Family Medicine.

The administrative law judge identified Drs. R. Kraynak and M. Kraynak as treating physicians. Decision and Order at 13. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). However, this regulation only applies to evidence developed after January 19, 2001. See 20 C.F.R. §718.101(b).

requirements of claimant's usual coal mine employment, he did not have an adequate basis for expressing an opinion as to whether claimant retained the respiratory capacity to perform his usual coal mine work. Dr. Rashid, after characterizing claimant's October 5, 2000 pulmonary function and arterial blood gas studies as normal, opined that claimant did not suffer from any pulmonary impairment "due to mining." Director's Exhibit 78. Because Dr. Rashid found no pulmonary impairment, he was not required to address the exertional requirements of claimant's usual coal mine employment. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985) (Medical evidence, which establishes the absence of any significant pulmonary impairment, need not be discussed in terms of a miner's former job duties).

The administrative law judge questioned the opinions of Drs. R. Kraynak and M. Kraynak because they relied upon invalid pulmonary function studies to support their conclusions. Decision and Order at 13. An administrative law judge may properly discredit a physician's finding of total disability if it is based in part upon pulmonary function studies that have been invalidated. See *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge properly questioned the reliability of claimant's December 20, 1999 and June 6, 2000 pulmonary function studies in light of the disparately higher values obtained during a subsequent October 5, 2000 pulmonary function study. See *Andruscavage, supra*. Because the opinions of Drs. R. Kraynak and M. Kraynak are based in part upon the results of claimant's December 20, 1999 and June 6, 2000 pulmonary function studies, the administrative law judge properly discredited their opinions.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Nataloni, supra*.

Claimant argues that the administrative law judge erred in failing to consider all the evidence of record in finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254,

256 (1971).

In the instant case, the administrative law judge conducted a “a *de novo* review of the record as a whole” and found that there was not a mistake in a determination of fact. *See* Decision and Order at 4-6, 13-14. Upon review, we find no error in the administrative law judge’s finding. Consequently, we affirm the administrative law judge’s finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge