BRB No. 00-1003 BLA

JOHN KROH, SR.	)	
	)	
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 Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Howard M. Radzely, Acting 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (00-BLA-0037) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) on a claim

[1]Claimant is John Kroh, Sr., the miner, who filed an application for benefits with the Department of Labor on September 26, 1997. Previously Administrative Law Judge Ralph R. Romano incorrectly found that this claim was abandoned, and that claimant filed material which constituted a new claim on April 16, 1998. Director's Exhibit 40; Decision and Order at 2. Administrative Law Judge Robert D. Kaplan, however, correctly found that claimant's original claim was always viable. Decision and Order at 2.

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 found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(2000), and 20 C.F.R. §718.203(2000).[2] The administrative law judge concluded, however, that the evidence

[2]The 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 they are found at 65 Fed. Reg.80,045-80, 107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the

was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000). Accordingly, the administrative law judge denied the claim.

---

challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On appeal, claimant challenges the administrative law judge's determination that the evidence fails to establish total respiratory disability at Section 718.204(c)(2000). Claimant asserts that the administrative law judge improperly weighed the pulmonary function studies of record at Section 718.204(c)(1)(2000). Claimant also challenges the administrative law judge's weighing of the medical opinions of record at Section 718.204(c)(4)(2000). The Director, Office of Workers' Compensation Programs (the Director), in response to claimant's appeal, asserts that the administrative law judge's findings are supported by substantial evidence, and accordingly, urges affirmance of the decision below.[3]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

---

[3]The parties stipulated to a finding that claimant established 35 years of qualifying coal mine employment. The Director conceded that the evidence establishes the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2000) and 718.203(2000). No party challenges the administrative law judge's findings that the evidence fails to establish total respiratory disability under Section 718.204(c)(2) or (c)(3)(2000). We therefore affirm these findings as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, claimant challenges the administrative law judge's finding that the pulmonary function study evidence fails to establish total respiratory disability at Section 718.204(c)(1)(2000). Claimant asserts that the administrative law judge erred by accepting the December 1997 non-qualifying pulmonary function study of Dr. Rashid, since claimant alleges that Dr. Rashid did not find his own study to be valid.[4] We disagree. Contrary to claimant's contention, the record reflects that Dr. Rashid included a statement of cooperation and comprehension, indicating both were "good" and certified that the results complied with the applicable regulations. Director's Exhibit 18. Dr. Raymond Kraynak (the administrative law judge refers to this physician as R. Kraynak) testified that Dr. Rashid's results were invalid. Claimant's Exhibit 25. The administrative law judge permissibly found that, as Dr. Rashid is Board-certified in internal medicine, his statement as to the validity of his test results was entitled to greater weight than that of Dr. R. Kraynak, who is Board-eligible in family medicine, on the basis of Dr. Rashid's superior credentials. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)*; Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

We reject claimant's contention that the administrative law judge violated the Administrative Procedure Act (APA) by not providing valid reasons for rejecting the tests performed by Dr. R. Kraynak in July and August of 1999. Claimant's Brief at 5-6.

[4]No party challenges the administrative law judge's finding that Dr. Ahluwalia's pulmonary function test results were not valid at Section 718.204(c)(1)(2000). We affirm this finding as unchallenged on appeal. *Coen, supra; Skrack, supra*.

The administrative law judge permissibly concluded that Dr. R. Kraynak's July 1999 pulmonary function test was not valid based upon Dr. Sahillioglu's invalidation of that test, inasmuch as Dr. Sahillioglu, who is Board- eligible in both internal medicine and pulmonary disease, has superior credentials. *Id;* Director's Exhibit 45; Claimant's Exhibits 13, 25.[5] Contrary to claimant's contentions, the administrative law judge's findings comport with the requirements of the APA: The administrative law judge relied upon the invalidation of Dr. R. Kraynak's qualifying August 1999 pulmonary function study submitted by Sahillioglu, based upon the superior credentials of Dr. Sahillioglu. Director's Exhibit 45; Claimant's Exhibits13, 25. [6] *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162(1989). Specifically, the administrative law judge, within his discretion, found Dr. Sahillioglu's opinion, that the qualifying August 1999 test was invalid, to be entitled to greater weight on the basis of his superior qualifications. *Id.* Claimant asserts that the administrative law judge failed to consider that Dr. Sahillioglu did not discuss the fact that Dr. R. Kraynak found the test to be conforming. Claimant's Brief at 6. To the contrary, Dr. Sahillioglu disagreed with Dr. R. Kraynak on this point, as he found the test to be invalid due to an inconsistent effort. Director's Exhibit 45. The administrative law judge, within his discretion, credited the former opinion. *Supra.*

At Section 718.204(c)(1), (2000), the administrative law judge also accepted Dr. Kucera's invalidation report over the qualifying results of a test performed by Dr. Matthew Kraynak (Dr. M. Kraynak) on December 1, 1999. Claimant's Exhibit 26. Dr. Kucera submitted an invalidation report stating that the test was invalid because of excessive variability for the same reasons: Dr. M. Kraynak is Board-certified in family medicine, but Dr. Kucera is Board-certified in internal medicine and pulmonary diseases. *Id;* Director's Exhibit 46. Finally, Dr. R. Kraynak submitted another qualifying pulmonary function study performed in January of 2000, which was invalidated by Dr.

---

[5] The administrative law judge rationally considered Board-eligibility in a related field to be superior to Board-eligibility in a more general, unrelated area. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[6]Claimant correctly indicates that Dr. Kucera incorrectly noted that Dr. R. Kraynak's August 1999 test did not contain three tracings, as required, when the record reflects that three tracings were submitted. Director's Exhibit 44. We decline, therefore, to affirm the administrative law judge's reliance upon Dr. Kucera's invalidation on this basis.

Sahillioglu. Director's Exhibit 47; Claimant's Exhibit 27. The administrative law judge permissibly accepted Dr. Sahillioglu's invalidation of this test based upon his superior qualifications, as cited earlier. *Worhach, supra; Martinez, supra; Wetzel, supra*. We affirm, therefore, the administrative law judge's determination that all of the pulmonary functions studies of record fail to establish total respiratory disability at Section 718.204(c)(1)(2000). *See* 20 C.F.R. §718.204(b)(1)(i).

Claimant also challenges the administrative law judge's finding that the medical opinions of record fail to establish total respiratory disability at Section 718.204(c)(4)(2000). Claimant asserts that the administrative law judge improperly weighed the medical opinions of record. Claimant argues that it was improper for the administrative law judge to credit Dr. Rashid's opinion, as Dr. Rashid was unfamiliar with claimant's job duties. The administrative law judge correctly found that Dr. Rashid concluded that claimant has no respiratory or pulmonary impairment. Director's Exhibit 20; Decision and Order at 6. However, the administrative law judge did not credit Dr. Rashid's opinion, rather he noted it could not establish total respiratory disability. *Id.* The administrative law judge then found that both Dr. M. Kraynak and Dr. Mishra, claimant's treating physician, opined that claimant was totally disabled due to pneumoconiosis. Claimant's Exhibits 21, 23; Decision and Order at 7-8. The administrative law judge found both of these opinions to be unreasoned as they relied upon invalid pulmonary function studies, and the doctors failed to explain how claimant's obesity impacted their opinions.[7] We affirm the administrative law judge's finding, as supported by substantial evidence and within his discretion as trier of fact. Decision and Order at 7-9; Claimant's Exhibit 25. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988). The administrative law judge then considered the opinion of Dr. R. Kraynak. The administrative law judge noted that it was based, in part, upon invalid pulmonary function studies and that while Dr. R. Kraynak concluded that claimant was totally disabled due to pneumoconiosis, he admitted on deposition that claimant's obesity could have had an impact upon his pulmonary capacity. Decision and Order at 7; Claimant's Exhibit 25. Claimant contends that both Drs. Mishra and M. Kraynak were aware of claimant's weight yet, despite his weight problem, concluded that he was totally disabled due to respiratory ailments. The administrative law judge, however, permissibly discounted these opinions because they failed to assess claimant's respiratory and pulmonary status in light of his well-recognized weight problem, *i.e.* his obesity. Further, the administrative law judge correctly stated that Dr. M. Kraynak did not include a report of claimant's weight in his report, and thus, did not consider how claimant's weight

[7]Dr. R. Kraynak found claimant to be 68 inches tall and 312 pounds. Claimant's Exhibit 25; Decision and Order at 7.

problem adversely affected his pulmonary health. Claimant's Exhibit 21. In contrast, the administrative law judge gave greater weight to Dr. Ahluwalia's opinion that claimant was totally disabled due to arthritis and obesity, Director's Exhibit 20, *inter alia*, because the administrative law judge noted that Dr. Ahluwalia carefully documented the correlation between claimant's decreased respiratory ability and his weight gain; Director's Exhibit 20; Decision and Order at 7; Decision and Order at 8. The administrative law judge may give greater weight to opinions he finds better supported by the objective evidence of record. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987*)*.

We reject claimant's argument that the administrative law judge substituted his own judgment for that of the physicians of record. Rather, the administrative law judge merely identified the credited evidence relied upon to support his findings, and properly articulated the positions taken in these medical reports. As the administrative law judge permissibly discredited all of the evidence supportive of a finding of total respiratory disability at Section 718.204(c)(4)(200), we affirm the administrative law judge's finding that the evidence fails to establish total respiratory disability at Section 718.204(c)(2000). *See* 20 C.F.R. §718.204(b)(1)(iv).

As the administrative law judge's findings on total disability preclude an award of benefits, we affirm the administrative law judge's denial of benefits. *See Trent, supra; Perry, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge