

BRB No. 05-0102 BLA

DONALD G. HENTZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 09/20/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Howard M. Radzely, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6305) of Administrative Law Judge Janice K. Bullard 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 noted that the instant claim is a subsequent claim.¹ The administrative law judge reviewed all of the newly

¹ Claimant’s initial claim for benefits, filed on September 16, 1996, was denied by Administrative Law Judge Robert D. Kaplan in a Decision and Order Denying Benefits issued on December 22, 1998. Judge Kaplan credited claimant with ten years of coal

developed evidence regarding disability and found that it does not demonstrate disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).² The administrative law judge stated “considering all the current medical evidence together with the prior medical evidence of record, I find that Claimant has not established that he is totally disabled.” Decision and Order at 9. Consequently, the administrative law judge found that claimant did not establish that one of the applicable conditions of entitlement had changed since the denial of his prior claim. Decision and Order at 9.

On appeal, claimant asserts that the administrative law judge erred in her analysis of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of

mine employment and noted that the Director, Office of Workers’ Compensation Programs, had conceded that the presence of pneumoconiosis arising out of coal mine employment had been established. The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. On September 7, 1999, claimant filed a request for modification. After modification was denied by the district director, claimant requested a formal hearing before an administrative law judge. In a letter to Administrative Law Judge Ainsworth H. Brown dated August 24, 2000, claimant’s counsel requested that the “hearing...be canceled and an Order be issued allowing him to withdraw his claim.” On August 31, 2000, Judge Brown issued an Order of Dismissal wherein he stated “the request for hearing is DISMISSED and the scheduled hearing is CANCELED.” Order of Dismissal at 1. Director’s Exhibit 1. At the hearing, the administrative law judge discussed Judge Brown’s Order and noted that claimant’s request was treated as a dismissal of the requested hearing, rather than a withdrawal of the claim. Hearing Transcript at 9-10. However, in her Decision and Order, the administrative law judge summarized Judge Brown’s Order, stating “Judge Brown dismissed the claim pursuant to Claimant’s request for permission to withdraw his claim.” Decision and Order at 3. Claimant filed the instant claim on August 15, 2002. Director’s Exhibit 3. The administrative law judge treated the instant claim as a subsequent claim. Decision and Order at 3-4. The parties do not challenge the administrative law judge’s consideration of this claim as a subsequent claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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.

Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred in weighing the opinions of Drs. Kraynak and Prince, and urging the Board to remand³ the case to the administrative law judge for further consideration. Moreover, the Director states that he is aware of the deficiencies in Dr. Amin's report and asks the Board to instruct the administrative law judge to remand the case to the district director for the Director to remedy the flaws in claimant's pulmonary evaluation, in accordance with 30 U.S.C. §923(b), if the administrative law judge again denies benefits on remand.

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

The instant claim constitutes a subsequent claim, pursuant to 20 C.F.R. §725.309. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are those conditions upon which the prior denial was based. 20 C.F.R. §725.309(d)(2). Because the basis for the denial of benefits in the prior claim was claimant's failure to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c) (2000),⁴ in order for the instant claim to be considered on the merits, claimant must first establish that he has become totally disabled since the denial of the prior claim. 20 C.F.R. §725.309; *White*, 23 BLR 1-1.

In finding the medical opinion evidence insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Kraynak, Rao and Bredlau.⁵ The administrative law judge considered

³ We affirm the administrative law judge's determination that the newly submitted evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found 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).

⁵ Dr. Kraynak, who is claimant's treating physician and is Board-eligible in Family Practice, stated that, based on his examinations of claimant and his review of

Dr. Kraynak's opinion, and noted that it was based partly on an October 23, 2003 pulmonary function study which is not in the record and which the administrative law judge found "therefore has no probative value." Decision and Order at 8. The administrative law judge also noted that Dr. Kraynak had considered the pulmonary function study and blood gas study administered by Dr. Massin, which Dr. Kraynak stated were supportive of his opinion regarding disability. The administrative law judge noted that Dr. Massin's pulmonary function study and blood gas study did not produce qualifying results, and found that "they are not evidence of total disability." *Id.* The administrative law judge determined that "Because Dr. Kraynak's opinion is based at least partly on these studies, I find it flawed." *Id.* The administrative law judge further stated:

Dr. Kraynak's medical opinion letters and deposition testimony do not offer significant detail and discussion on the issue of total disability. It appears that the physician relied heavily on pulmonary studies either not in the record, or studies that did not produce qualifying values under the regulations. Dr. Kraynak's opinion was at least partially based on physical examination and observation made while

claimant's coal mine employment forms, pulmonary function study and blood gas study results, he believed that claimant is totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibit 2 at 15; Claimant's Exhibit 4. Dr. Rao examined claimant, and considered the results of a pulmonary function study and a blood gas study. Dr. Rao opined that claimant is severely impaired from doing any coal mine job, and he stated that 100% of claimant's impairment is due to his coronary artery disease. Director's Exhibits 21, 26. Dr. Massin examined claimant, considered the results of a pulmonary function study, a blood gas study and an EKG. (The record is unclear as to whether the opinion described herein is authored by a Dr. "Massin" or a Dr. "Amin." *See discussion infra* at 6.) Dr. Massin's handwriting is difficult to read, but it appears that he diagnosed a moderate restriction with a mild decrease in diffusing capacity. He also opined that there was no obstruction. Director's Exhibit 13. Dr. Bredlau, claimant's cardiologist, indicated that he did not feel qualified to offer an opinion regarding the degree of claimant's disability due to pneumoconiosis. However, he stated that he did not believe that claimant's complaints of shortness of breath were related to his cardiac condition. Claimant's Exhibit 1. The record also contains the report of Dr. Prince who is Board-certified in Internal Medicine and Pulmonary Disease. Dr. Prince considered the January 7, 2003 pulmonary function study and opined that the degree of claimant's impairment is severe enough to prevent him from returning to his last coal mine employment, "as an underground laborer...[which] requires him to stoop, bend, lift and carry weights up to 85 pounds." Claimant's Exhibit 5.

Claimant was under his care. However, that fact alone does not cure the defects in his medical opinion....Accordingly, I conclude that Dr. Kraynak's opinion is entitled to no weight and does not support a finding of total disability.

Decision and Order at 8.⁶

We agree with claimant and the Director that the administrative law judge erred in according no weight to Dr. Kraynak's opinion because the physician based his opinion of total disability on objective tests which did not yield qualifying values. The regulations provide that "Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section...total disability may nevertheless be found if a physician exercising reasoned medical judgment...concludes that a miner's respiratory or pulmonary condition prevents" claimant from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-294 (1984); *Baize v. Director, OWCP*, 6 BLR 1-730 (1984). Consequently, we vacate the administrative law judge's finding that Dr. Kraynak's opinion is entitled to no weight at Section 718.204(b)(2)(iv) and remand for further consideration as to the weight to be given Dr. Kraynak's opinion.

Regarding Dr. Prince's opinion, claimant contends that the administrative law judge erred by dismissing his opinion solely because the pulmonary function study he considered did not yield qualifying results. The administrative law judge did not comment on Dr. Prince's opinion in her analysis of the medical opinion evidence at Section 718.204(b)(2)(iv). However, in evaluating the pulmonary function study evidence at Section 718.204(b)(2)(i), the administrative law judge stated that "Since this study did not produce qualifying values under the regulations, it does not support a finding of total disability." Decision and Order at 6. On remand, the administrative law judge must determine whether Dr. Prince's opinion constitutes a reasoned medical judgment which should be considered at Section 718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(iv); Claimant's Exhibit 5; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). If the administrative law judge determines that Dr. Prince's report constitutes a reasoned medical judgment, she should consider Dr. Prince's opinion in her evaluation of the evidence pursuant to Section 718.204(b)(2)(iv).

⁶ Because none of the parties challenge the administrative law judge's finding that Dr. Rao's opinion is "entitled to no weight on the issue of total disability," Decision and Order at 9, *see* Claimant's Brief at 12; Director's Brief at 8, n.4, the Board affirms this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant asserts that the administrative law judge erred by failing to consider “Dr. Massin’s” opinion, which claimant suggests supports Dr. Kraynak’s disability opinion. In his response brief, the Director concedes that there are deficiencies in “Dr. Amin’s” opinion. The Director states “If the ALJ again denies benefits on remand, then the Board should instruct her to further remand the case to the district director in order for the Director to remedy the flaws in [claimant’s] pulmonary evaluation in accordance with 30 U.S.C. §923(b).” Director’s Brief at 10.

It is unclear which physician authored the report contained in Director’s Exhibit 13. In her analysis of the evidence at Section 718.204(b)(2)(iv), the administrative law judge did not refer to medical opinions by either Dr. Amin or Dr. Massin. Because the administrative law judge has not considered all of the relevant evidence, on remand, the administrative law judge must determine who authored the report contained in Director’s Exhibit 13, and the administrative law judge must then consider this opinion in her evaluation of the evidence. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Consequently, we vacate the administrative law judge’s findings at Section 718.204(b)(2)(iv), based on the newly submitted evidence and remand the case to the administrative law judge to further consider the newly submitted evidence at this subsection, and determine whether it establishes a change in an applicable condition of entitlement pursuant to Section 725.309. If the administrative law judge finds that claimant has established this change, the administrative law judge must then consider all of the evidence of record on the merits to determine whether claimant has established each of the elements of entitlement pursuant to 20 C.F.R. Part 718.⁷

⁷ The Director concedes that there are deficiencies in “Dr. Amin’s” report, and requests that the case be remanded to the district director to have the flaws in this report remedied if the administrative law judge denies benefits on remand. The Director may renew his request for remand of this case for compliance with 30 U.S.C. §923(b) while the case is before the administrative law judge, if he considers it appropriate.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge