

BRB No. 07-0188 BLA

T. L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	DATE ISSUED: 09/28/2007
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 – Denial of Benefits (06-BLA-5288) of Administrative Law Judge Ralph A. Romano on a claim<sup>1</sup> 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties’ stipulation that claimant worked in qualifying coal mine employment for 4.05 years. Next, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but failed to establish that his pneumoconiosis arose out of coal mine

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<sup>1</sup> Claimant filed his application for benefits on March 14, 2005. Director’s Exhibit 2.

employment pursuant to 20 C.F.R. §718.203(c) and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determinations under Sections 718.203(c) and 718.204(b)(2)(i), (iv) and 718.204(c).<sup>2</sup> Claimant further argues that the administrative law judge's analysis of the pulmonary function study evidence and medical opinion evidence fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant also argues that the administrative law judge's weighing of the medical opinions of Drs. Kraynak and Mariglio is irrational and not supported by substantial evidence because the administrative law judge mischaracterized the record when reviewing those medical opinions.

In response, the Director, Office of Workers' Compensation Programs (the Director), agrees with claimant that the administrative law judge's decision cannot be affirmed and should be remanded for further fact-finding. Further, while disagreeing with claimant's contention that the administrative law judge erred in his consideration of the pulmonary function studies at Section 718.204(b)(2)(i), the Director agrees with claimant that the administrative law judge erred in discounting the opinion of Dr. Kraynak at Section 718.204(b)(2)(iv). The Director asserts that because the administrative law judge provided "inconsequential and incorrect" grounds for discounting Dr. Kraynak's opinion, his discounting of the opinion cannot be affirmed. Therefore, the Director avers that the administrative law judge's determinations that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability must be vacated and the case remanded for further consideration. Claimant has filed a reply letter, agreeing with the Director's argument that the administrative law judge's discrediting of Dr. Kraynak's opinion at Section 718.204(b)(2)(iv) cannot be affirmed and requests that the Board reverse the

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<sup>2</sup> In order to preserve the issue for appeal purposes, claimant also contends that the administrative law judge should have found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4) based on Dr. Kraynak's opinion. Claimant concedes, however, that this error was harmless inasmuch as the administrative law judge found the existence of pneumoconiosis established by x-ray evidence at 20 C.F.R. §718.202(a)(1) and that the existence of pneumoconiosis was established at Section 718.202(a) based on his consideration of all of the evidence together pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

administrative law judge's Decision and Order and enter an award of benefits in this case.<sup>3</sup>

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.<sup>4</sup> 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).

Claimant first contends that the administrative law judge erred in discrediting Dr. Kraynak's opinion that claimant's pneumoconiosis arose out of his coal mine employment under Section 718.203(c), on the ground that Dr. Kraynak failed to address claimant's employment in a steel mill when, in fact, Dr. Kraynak stated that he had reviewed forms CM-911a and CM-913, listing all of claimant's coal mine employment and steel mill employment. The Director responds asserting that the administrative law judge erred in discrediting Dr. Kraynak's opinion because claimant testified that he was not exposed to dust or fumes while employed in the steel mill. Hearing Transcript at 18; Director's Exhibit 3. In this case, however, the administrative law judge failed to consider claimant's testimony that he was *not* exposed to dust or fumes while working in the steel mill. This is error, which requires remand. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §557(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We, therefore, vacate the administrative law judge's Section 718.203(c) determination and remand the case for further consideration thereunder. On remand, the administrative law judge must reassess the credibility of Dr. Kraynak's opinion at Section 718.203(c) in light of claimant's testimony and must determine whether it constitutes competent medical evidence to satisfy claimant's burden of establishing the etiology of pneumoconiosis. See *Wisniewski v. Director, OWCP*, 929 F. 2d 952, 959, 15 BLR 2-57, 2-70 (3d Cir. 1991); *Shoup v. Director, OWCP*, 11 BLR 1-110, 1-112 (1987); *Graziani v. Director, OWCP*, 9 BLR 1-193, 1-194 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308 (1985); *Long v. Director, OWCP*, 7 BLR 1-254, 1-257 (1984).

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<sup>3</sup> We affirm the administrative law judge's finding of 4.05 years of qualifying coal mine employment, and his findings that total respiratory disability was not established by blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) or by evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii), as these findings are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 9-10.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Claimant next contends that the administrative law judge erred in finding that the pulmonary function study evidence failed to establish total respiratory disability at Section 718.204(b)(2)(i). Claimant argues that the administrative law judge failed to address Dr. Kraynak's statement that the non-qualifying pulmonary function study, dated May 19, 2005, was, in fact, invalid. Claimant further argues that the administrative law judge erred in finding that the April 10, 2006 pulmonary function study, administered by Dr. Kraynak, was non-qualifying. Claimant contends that the April 10, 2006 study should have been credited as demonstrating total respiratory disability as it was the most recent pulmonary function study of record and Dr. Kraynak, claimant's treating physician, found the results to be "abnormal." Claimant contends that the administrative law judge should not have credited the opinion of Dr. Michos, a consulting physician who found the April 10, 2006 pulmonary function study results to be invalid, since Dr. Michos failed to provide a comprehensive review of the study.

In assessing the credibility of the pulmonary function studies under Section 718.204(b)(2)(i), the administrative law judge correctly determined that the record contained two pulmonary function studies dated May 19, 2005 and April 10, 2006, which yielded non-qualifying values.<sup>5</sup> Decision and Order at 4; Director's Exhibit 12; Claimant's Exhibit 3. Contrary to claimant's argument, the administrative law judge correctly found that the April 10, 2006 test produced non-qualifying values. The administrative law judge also properly credited the opinion of Dr. Michos, the consulting physician, who found that the "abnormal" results found by Dr. Kraynak were not valid, because Dr. Michos's qualifications were superior to those of Dr. Kraynak. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); Decision and Order at 9; Claimant's Exhibit 3. Likewise, claimant is incorrect that the administrative law judge failed to address Dr. Kraynak's concerns with respect to the validity of the May 19, 2005 non-qualifying pulmonary function study, as the administrative law judge adequately discussed Dr. Kraynak's invalidation of this test,<sup>6</sup> but determined that Dr. Mariglio's statement regarding the validity of this test was entitled to greater weight because Dr. Mariglio, who was Board-certified in internal medicine, pulmonary disease, and critical care medicine, possessed greater medical expertise than Dr. Kraynak, who was only Board-eligible in family practice medicine. *See Milburn Colliery Co. v. Hicks*, 138 F.3d

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<sup>5</sup> The May 19, 2005 pulmonary function study was administered by Dr. Santarelli, on behalf of Dr. Mariglio, as a part of the latter physician's complete pulmonary evaluation of claimant on May 19, 2005. Director's Exhibits 11, 12.

<sup>6</sup> During his deposition taken on May 5, 2006, Dr. Kraynak testified that his review of the May 19, 2005 pulmonary function study revealed that this test was invalid because the flow loops were erratic, with breaks, and did not continue with a circular loop. Claimant's Exhibit 3 at 11.

524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Siegal v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (Brown, J., dissenting). Hence, the administrative law judge properly found that total respiratory disability was not established by the pulmonary function study evidence at Section 718.204(b)(2)(i), and that finding is affirmed.

Claimant additionally argues that the administrative law judge erred in finding that the medical opinion evidence failed to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge's determination that Dr. Mariglio's opinion, that claimant had no respiratory or pulmonary impairment, outweighed the contrary opinion of Dr. Kraynak, that claimant had a totally disabling respiratory impairment was irrational and not supported by the evidence of record. Claimant also contends that the administrative law judge's discussion of the evidence failed to comport with the requirements of the APA. Specifically, claimant contends that the administrative law judge erred in discrediting the opinion of Dr. Kraynak, the only physician who reviewed all the evidence of record and rendered a clear, detailed, and well-reasoned report, on the ground that Dr. Kraynak's total disability assessment was based on non-qualifying pulmonary function studies. The Director agrees with claimant. The Director also avers that the administrative law judge erred in rejecting Dr. Kraynak's opinion on the basis that he did not conduct an arterial blood gas study since Dr. Kraynak had reviewed the blood gas study associated with Dr. Mariglio's examination in rendering his opinion that claimant was totally disabled. Consequently, the Director asserts that the administrative law judge's reasons for rejecting Dr. Kraynak's opinion are flawed and, therefore, requests that the Board vacate the administrative law judge's Decision and Order denying benefits and remand the case for further consideration.

We agree with claimant and the Director that the administrative law judge's reasons for discounting Dr. Kraynak's opinion at Section 718.204(b)(2)(iv) were erroneous. The administrative law judge rejected Dr. Kraynak's opinion that claimant was totally disabled because the physician failed to explain his opinion in light of the non-qualifying pulmonary function study accompanying his examination and because he, unlike Dr. Mariglio, did not conduct arterial blood gas tests. Contrary to the administrative law judge's determination, however, Dr. Kraynak discussed both pulmonary function tests of record during his deposition and clearly explained his belief that, in light of the heavy manual labor required of claimant's usual coal mine employment, the values yielded on the May 19, 2005 pulmonary function study, even though they were non-qualifying, were sufficient to show that claimant could not return to his usual coal mine work. Dr. Kraynak explained that the presence of a mild restrictive defect, as demonstrated by the May 19, 2005 pulmonary function study, would cause a totally disabling respiratory or pulmonary impairment in light of the strenuous nature of claimant's usual coal mine work. Claimant's Exhibit 3 at 8-11. Furthermore, while the

administrative law judge is correct that Dr. Kraynak did not administer arterial blood gas studies as a part of his pulmonary evaluation of claimant, Dr. Kraynak reviewed the blood gas study conducted by Dr. Mariglio and opined that the test results, which yielded non-qualifying values, did not alter his opinion that claimant was totally disabled. Claimant's Exhibit 3 at 12. Accordingly, the administrative law judge erred by finding that Dr. Kraynak "failed to explain his opinion in light of the non-qualifying pulmonary function study he performed" and "did not have the benefit of blood gas testing, while Dr. Mariglio did." Decision and Order at 8. Hence, we vacate the administrative law judge's finding that the medical opinion evidence failed to establish total respiratory disability at Section 718.204(b)(2)(iv). See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (*en banc*). On remand, the administrative law judge must reassess the conflicting medical opinions of Drs. Kraynak and Mariglio and determine whether the medical opinion evidence is sufficient to demonstrate total respiratory disability under Section 718.204(b)(2)(iv). The administrative law judge must also weigh the evidence, both like and unlike, and determine whether total respiratory disability is established at Section 718.204(b). See *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Further, if reached, the administrative law judge should consider the evidence relevant to disability causation at Section 718.204(c).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge