BRB No. 02-0438 BLA

JOHN J. ABROMITIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	DATE
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	ISSUED:_____
	)	
	)	
Respondent	)	
		DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Eugene Scalia, Acting 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[1] appeals the Decision and Order on Remand (00-BLA-0242) of Administrative Law Judge Paul H. Teitler denying benefits on modification of a miner's duplicate 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 second time. Initially, the administrative law judge credited the miner with "in excess of ten years" of coal mine employment. September 11, 2000 Decision and Order at 5. The administrative law judge noted that the parties stipulated that the miner has pneumoconiosis arising out of coal mine employment. September 11, 2000 Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). September 11, 2000 Decision and Order at 5-8. Therefore, the administrative law judge found that claimant failed to establish a material change in conditions. September 11, 2000 Decision and Order at 8. Accordingly, benefits were denied.

[1]Claimant is John J. Abromitis, the miner, who filed his second claim for benefits on March 17, 1998. Director's Exhibit 1. Administrative Law Judge Paul H. Teitler denied benefits on May 11, 1999. Claimant requested modification, the district director denied this request, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 37, 42, 43. Claimant's previous claim for benefits, filed on February 28, 1980, was finally denied on June 11, 1981 because claimant failed to establish that his pneumoconiosis arose out of his coal mine employment and that he is totally disabled due to pneumoconiosis. Director's Exhibits 45-1, 45-17, 45-19.

[2]The Department of Labor 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.

[3]Specifically, the administrative law judge found, after considering all of the evidence, that claimant failed to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310 (2000) and a material change in conditions. September 11, 2000 Decision and Order at 8.

In response to claimant's appeal, the Board initially held that claimant has established a material change in conditions by proving one of the elements of entitlement previously adjudicated against him based on the concession of the Director, Office of Workers' Compensation Programs (the Director), regarding total respiratory disability. *See Abromitis v. Director, OWCP*, BRB No. 01-0108 BLA (Nov. 9, 2001)(unpub.). Additionally, the Board rejected claimant's assertions regarding the administrative law judge's admittance of Dr. Green's December 22, 1998 report into the record because claimant failed to raise this issue earlier in the proceedings. *Id.* Furthermore, the Board vacated the administrative law judge's finding that claimant failed to establish total respiratory disability due to pneumoconiosis and remanded this case for the administrative law judge to reconsider the relevant evidence regarding this issue. *Id.*

On remand, the administrative law judge found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). February 25, 2002 Decision and Order on Remand at 6. Accordingly, benefits were denied.

In his current appeal to the Board, claimant again asserts that the administrative law judge erred in allowing the record to remain open for the submission of Dr. Green's 1998 report. Claimant's Brief at 14-16. Claimant also contends that the administrative law judge erred in rejecting the pulmonary function study and medical opinion evidence on the issue of total respiratory disability in his September 11, 2000 Decision and Order. Claimant's Brief at 16-27. Additionally, claimant asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c). Claimant's Brief at 27-38. Lastly, claimant contends that the administrative law judge's finding regarding claimant's smoking history is without support from the record. Claimant's Brief at 31-32. The Director responds, urging affirmance of the administrative law judge's denial of benefits on remand. Claimant has filed a reply brief.

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[4]In reconsidering the evidence pursuant to 20 C.F.R. §718.204(c) on remand, the Board specifically instructed the administrative law judge to consider Dr. Ranavaya's opinion and to reconsider his determination regarding claimant's smoking history. *See Abromitis v. Director, OWCP*, BRB No. 01-0108 BLA (Nov. 9, 2001)(unpub.). The Board also held that it was unreasonable for the administrative law judge to discredit the opinions of Drs. Matthew Kraynak and Raymond Kraynak because these physicians relied on an inaccurate smoking history and because these physicians failed to note claimant's amputated finger tip in their reports. *See Abromitis, supra.*

[5]We will not address claimant's contentions that the administrative law judge erred in considering the evidence regarding total respiratory disability. On remand, the administrative law judge noted that the Board accepted the Director's concession of total respiratory disability. February 25, 2002 Decision and Order on Remand at 2 n.2. Therefore, the administrative law judge only considered the cause of claimant's total respiratory disability on remand. *Id.* at 4-6.

Claimant first asserts that the administrative law judge erred in allowing the record to remain open for the Director to submit the December 22, 1998 opinion of Dr. Green without first determining whether good cause existed for "the Director's dilatory claim development in this matter." Claimant's Brief at 14-16. Claimant specifically alleges that he should be able to challenge the administrative law judge's admittance of Dr. Green's 1998 report as a mistake in fact in this modification proceeding. Claimant's Brief at 15-16. The Board addressed this issue in its November 9, 2001 Decision and Order in claimant's previous appeal and held that because "claimant failed to raise the issue regarding the administrative law judge's admittance of Dr. Green's report earlier in the proceedings," he could not do so for the first time on appeal. *See Abromitis, supra.* We adhere to our previous holding regarding this issue because claimant has not set forth any valid exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

Claimant next asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c) on remand. Claimant's Brief at 27-38. Prior to reconsidering the evidence to determine the cause of claimant's disability, the administrative law judge addressed the evidence on claimant's smoking history. February 25, 2002 Decision and Order on Remand at 3-4

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[6]On May 11, 1999, the administrative law judge issued his first Decision and Order denying benefits in this case. Director's Exhibit 36. After the administrative law judge rendered his decision in this matter, claimant did not request reconsideration of the administrative law judge's decision to allow the Director to submit Dr. Green's medical opinion. Additionally, claimant did not appeal the administrative law judge's decision or specifically discuss this aspect of the administrative law judge's decision in his August 23, 1999 request for modification. Claimant waited until his 2000 appeal to the Board to assert that the administrative law judge erred in admitting Dr. Green's opinion at the January 7, 1999 hearing.

[7]Furthermore, any error the administrative law judge may have made in admitting Dr. Green's 1998 opinion is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as Dr. Green's 1998 opinion is not probative regarding the cause of claimant's total respiratory disability. Director's Exhibit 34.

Previously, in its November 9, 2001 Decision and Order, the Board vacated the administrative law judge's determination regarding claimant's smoking history. *See Abromitis, supra*. The administrative law judge determined claimant's smoking history to be three-quarters of a pack per day for thirty-five years, based on the notation made by Dr. Singzon in his opinion. September 11, 2000 Decision and Order at 7. The administrative law judge reasoned that "the smoking history recorded by Dr. Singzon [is] the most credible as it was given prior to the commencement of this litigation." *Id.* Additionally, the administrative law judge found claimant's testimony regarding his smoking to be "questionable at best." *Id.* In remanding this case, the Board instructed the administrative law judge to reconsider whether the smoking history provided by claimant to Dr. Singzon represents the most accurate picture of claimant's smoking history because it does not take into account claimant's smoking history since 1981, the date of Dr. Singzon's report. *See Abromitis, supra*.

On remand, the administrative law judge thoroughly reconsidered all the relevant evidence regarding claimant's smoking history. February 25, 2002 Decision and Order on Remand 3-4. The administrative law judge initially noted that claimant's numerous statements and testimony regarding his smoking history varied over the years and, therefore, again found his statements and testimony on this matter to be "questionable at best." February 25, 2002 Decision and Order on Remand at 4. Regarding the period prior to 1981, the administrative law judge continued to find "most credible" claimant's statement to Dr. Singzon that he smoked three-quarters of a pack per day for thirty-five years. *Id.* Considering the varied statements claimant made regarding the period after 1981, the administrative law judge found the statements claimant made to Drs. Matthew Kraynak and Raymond Kraynak "that he quit two years ago to be most persuasive." *Id.* The administrative law judge reasoned that claimant's statement to Dr. Singzon:

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[8]The administrative law judge noted that claimant's:

> various statements and testimony include a smoking history of less than one year, 8 to 10 years, 15 years, 20 years, 33 years, or 35 years. Claimant also stated he stopped smoking as early as 1961, or around 1985 or around 1990 or in 1996. Claimant's testimony regarding the amount he smoked also varied from a pack a week, three-quarters of a pack a day, to a pack a day.

February 25, 2002 Decision and Order on Remand at 4.

[9]In their 1998 opinions, both Drs. M. Kraynak and R. Kraynak noted that claimant had a smoking history of one pack per day for fifteen years and that claimant quit smoking two years earlier. Director's Exhibits 11, 26.

> indicates he smoked beyond the time of his examination by Dr. Singzon in 1981 (which included no statement that he had quit smoking). It is apparent, therefore, he quit sometime between 1981 and 1996, thus, I do not credit [claimant's] statements which indicated he quit prior to 1981. Based on Claimant's varying statements regarding his smoking habit, it is difficult to ascertain more specifically when he did quit. However, I find his most accurate statements would be those made closest to the time he actually quit smoking. Therefore, based on the statements made to [Drs. M. Kraynak and R. Kraynak] in 1998 that he quit two years earlier, I find Claimant's smoking history also includes 15 years of 1 pack a day smoking from 1981 thorough [sic] 1996.

Id. Accordingly, the administrative law judge concluded that the evidence establishes a total smoking history of fifty years, specifically, thirty-five years at three-quarter packs per day and fifteen years at one pack per day. *Id.*

Claimant contends that the administrative law judge's finding regarding claimant's smoking history on remand is without support from the record because claimant did not testify to a fifty year smoking history and no physician noted a fifty year smoking history in his report. Claimant's Brief at 31-32; Claimant's Reply Brief at 1-2. Although claimant did not testify or report to a physician that he smoked for fifty years, the administrative law judge rendered such a finding by crediting the statements claimant made separately to Dr. Singzon and to Drs. M. Kraynak and R. Kraynak regarding his smoking history, which total fifty pack years. Therefore, contrary to claimant's contention, on remand the administrative law judge rationally determined, *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), claimant's smoking history to be fifty [pack-] years based on claimant's own statements. *See* discussion, *supra*; February 25, 2002 Decision and Order on Remand at 4.

[10]The administrative law judge did not specifically find a smoking history of fifty "pack-years", but found "a total of fifty years of smoking." February 25, 2002 Decision and Order on Remand at 4. However, the administrative law judge's finding of fifty years of smoking is essentially a finding of fifty pack-years of smoking because a pack-year is defined as "one package of cigarettes consumed per day per year." *In re Simon Litigation*, F.R.D. , 2002 WL 31375510 (E.D.N.Y., Sep.19, 2002)(No. 00-CV-5332, 00-CV-2340, 98-CV-3287, 00-CV-4632, 99-CV-1988).

[11]Claimant alternatively asserts that the difference between fifty and thirty-five years of smoking is "a distinction without a difference." Claimant's Brief at 32; Claimant's Reply Brief at 3. Because claimant has provided no basis to support his contention that the difference between fifty and thirty-five years of smoking is insignificant, we reject claimant's assertion.

The administrative law judge on remand next discussed whether claimant's total respiratory disability was due to pneumoconiosis. In reconsidering the medical opinion evidence to determine whether claimant is totally disabled due to pneumoconiosis, the administrative law judge found the opinions of Drs. M. Kraynak and R. Kraynak, who opined that claimant is totally disabled due to coal workers' pneumoconiosis, to be "not well reasoned nor well supported." February 25, 2002 Decision and Order on Remand at 4. In doing so, the administrative law judge noted that Drs. M. Kraynak and R. Kraynak considered a thirty-five year smoking history, but "dismissed this history without any discussion or basis for their conclusions." *Id.* Specifically, the administrative law judge noted that:

> neither physician included any discussion of the basis for their conclusion that the pulmonary changes present were due to pneumoconiosis, other than Dr. R. Kraynak noting a history of 7.64 years of coal mine employment is sufficient to explain the presence of coal workers' pneumoconiosis and disability. This statement is in stark contrast to his statement that a 35 year smoking history is not significant. With no further explanation for these conclusions, I do not find [their] statements regarding the etiology of Claimant's disability to be persuasive.

[12]The administrative law judge noted that "Dr. R. Kraynak stated a 35 year smoking history is not significant, while Dr. M. Kraynak simply stated such a history would not change his opinion." February 25, 2002 Decision and Order on Remand at 4.

Id. at 5. The administrative law judge found that the conclusions of both Drs. M. Kraynak and R. Kraynak "lack[ed] any reasoned discussion of the affects [sic] of 35 years of smoking (actually 50 years as noted above) as opposed to 10 years of coal mine employment in their findings but rather include only conclusory statements that this smoking history had no impact on Claimant's condition." *Id.* at 4-5. Accordingly, the administrative law judge properly found the opinions of Drs. M. Kraynak and R. Kraynak to be insufficiently reasoned and, therefore, fail to establish that claimant's total respiratory disability is due to pneumoconiosis. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

[13]Contrary to claimant's contention, an administrative law judge is not required to give greater weight to a physician's conclusory opinion based on his status as treating physician as "the mere statement of a conclusion by a physician, without any explanation of the basis for that statement, does not take the place of the required reasoning." *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The administrative law judge on remand also discredited the opinions of Drs. M. Kraynak and R. Kraynak for other reasons. First, the administrative law judge noted that these physicians failed to include in their physical findings in their reports that claimant had an amputation of his right index finger. February 25, 2002 Decision and Order on Remand at 5. Second, the administrative law judge stated that both Drs. M. Kraynak and R. Kraynak relied on invalidated pulmonary function study evidence in reaching their conclusions. *Id.* Finally, the administrative law judge noted "while Dr. R. Kraynak stated the changes on [a] blood gas study taken on April, 1998 indicated pulmonary changes due to pneumoconiosis," this physician did not discuss the results of the blood gas studies "taken on November, 1998 and February, 2000, which were quite different from the results he reported." *Id.* Claimant challenges the administrative law judge's additional discrediting of the opinions of Drs. M. Kraynak and R. Kraynak on these bases. Claimant's Brief at 33-35. However, the administrative law judge properly discredited the opinions of Drs. M. Kraynak and R. Kraynak because both physicians failed to fully explain their reasoning regarding the etiology of claimant's disability in relation to claimant's smoking and coal mine employment histories. *See* discussion*, supra*. Therefore, we deem harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), any error the administrative law judge may have made in further discrediting the opinions of Drs. M. Kraynak and R. Kraynak on the bases discussed above, inasmuch as the administrative law judge has provided valid alternative reasons for discrediting these opinions, *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[14]The Board held in its November 9, 2001 decision that "the administrative law judge's determination that these opinions are less reliable, because Drs. M. Kraynak and R. Kraynak failed to note claimant's amputated finger tip, is unreasonable when considering the credibility of these physicians' opinions on the issue of claimant's respiratory system. *See Abromitis, supra*. The administrative law judge responded to the Board's holding by stating that "[w]hile this may have no relationship to Claimant's pulmonary condition, this omission indicates neither physician conducted a thorough examination of Claimant." February 25, 2002 Decision and Order on Remand at 3, 5.

Because an administrative law judge has broad discretion in assessing the evidence of record to determine whether a party has met his burden of proof, *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 5 BLR 2-130 (7th Cir. 1983)(administrative law judge is not bound to accept opinion or theory of any given medical officer, but weighs evidence and draws his own inferences); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we hold that the administrative law judge on remand properly found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(c). *See Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Because we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability due to pneumoconiosis, see 20 C.F.R. §718.204(c), a requisite element of entitlement under Part 718, see Trent v. Director, OWCP, 11 BLR 1-26 (1987); Perry, supra, we also affirm his denial of benefits on remand.

[15]Because the administrative law judge properly rejected the only medical opinions in the record which support claimant's burden of establishing total respiratory disability due to pneumoconiosis, *see* discussion, *supra*; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), claimant's contentions regarding the adequacy of the contrary opinion of Dr. Ranavaya are moot and we will not address those specific contentions.[15] *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984); *see generally Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand 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