BRB No. 97-1496 BLA

JOHN A. KEGOLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

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

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

James E. Pocius and John J. Notarianni (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0450) of Administrative Law Judge Ralph A. Romano 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). Initially, Administrative Law Judge Robert D. Kaplan denied benefits because he found that the evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Director's Exhibit 29. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted

additional medical evidence. Director's Exhibits 33, 36. On modification, Administrative Law Judge Ralph A. Romano held a hearing and, adjudicating the claim *de novo*, determined that the medical evidence failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a), 718.204(c). Director's Exhibits 89, 90. Accordingly, he denied benefits. The Board affirmed the administrative law judge's finding pursuant to Section 718.204(c) as supported by substantial evidence, and therefore affirmed the denial of benefits. *Kegolis v. Jeddo-Highland Coal Co*., BRB No. 93-2201 BLA (May 24, 1995)(unpub.); Director's Exhibit 95. Claimant again requested modification and submitted additional medical evidence. Director's Exhibit 96.

On second modification, the parties agreed to a determination on the record by Judge Romano. The administrative law judge found that the weight of the new medical evidence did not establish the existence of pneumoconiosis or total respiratory disability and therefore did not establish a change in conditions, and concluded that a review of the entire record did not demonstrate a mistake in a determination of fact pursuant to Section 725.310. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to weigh properly the x-rays pursuant to Section 718.202(a)(1) or the medical opinions pursuant to Section 718.202(a)(4). Claimant further asserts that the administrative law judge erred in his weighing of the pulmonary function studies and medical opinions pursuant to Section 718.204(c)(1), (4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

[1] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (3) and 718.204(c)(2), (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all sixteen readings of the two x-rays taken since the previous denial. There were seven positive readings and nine negative readings. As noted by the administrative law judge, all of the readings were by physicians qualified as both Board-certified radiologists and B-readers. Director's Exhibits 96, 108, 114, 115, 120; Claimant's Exhibits 2-6, 12. The August 14, 1995 x-ray was classified as positive by one physician and negative by another, and the May 6, 1996 x-ray was classified as positive by six physicians and negative by eight. The administrative law judge weighed separately the readings of each x-ray and concluded that claimant failed to establish by a preponderance of the evidence that either x-ray was positive for the existence of pneumoconiosis. Decision and Order at 5.

Claimant contends that the administrative law judge failed to consider the bias of employer's x-ray readers. Claimant's Brief at 2-3. The Board has held that, without specific evidence indicating that a report prepared for one party is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). Claimant alleges that Drs. Laucks, Soble, and Duncan are biased because they are all employed by Radiology Associates, P.C., and that Drs. Wheeler, Gayler, and Scott are similarly unreliable because they are all Associate Professors of Radiology at Johns Hopkins Hospital. *Id*. In support of this assertion, claimant contends generally that the "professional association among these physicians results in a lesser degree of objectivity . . . ." Claimant's Brief at 3. In view of the need for specific evidence of bias in the record, *see Melnick, supra*, we disagree with claimant's assertion that professional association, by itself, constitutes evidence of bias.[2] *See Melnick, supra*. Therefore, we reject claimant's contention. Because the administrative law judge permissibly concluded that the weight of the x-ray readings viewed in light of the readers' radiological qualifications was negative for the existence of pneumoconiosis, *see Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to accord proper weight to the opinion of claimant's treating

[2] Review of the record indicates that two of claimant's readers, Drs. Smith and Malnar, are employed by Smith Radiology, Incorporated. Claimant's Exhibits 4, 5, 9, 10.

physician. Claimant's Brief at 3. Dr. Kraynak, who is Board-eligible in family medicine, testified that based on his bimonthly examinations of claimant and on his review of the medical evidence of record, claimant has pneumoconiosis. Claimant's Exhibit 15 at 4-5, 13. Dr. Dittman, who is Board-certified in internal medicine, examined and tested claimant and reviewed the medical evidence and concluded that claimant does not have pneumoconiosis but does suffer from heart disease. Director's Exhibits 107; Employer's Exhibits 3, 4 at 19. An administrative law judge may, but is not required to credit the opinion of a treating physician. *See Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992). Contrary to claimant's contention, the administrative law judge considered Dr. Kraynak's treating status, Decision and Order at 7, but permissibly accorded greater weight to Dr. Dittman's opinion based on his superior qualifications in internal medicine, and based on the administrative law judge's conclusion that Dr. Dittman's opinion was well documented and better explained. *See Clark, supra*. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1), the administrative law judge found that the six pulmonary function studies performed since the previous denial did not establish total respiratory disability. Five studies were qualifying[3] and one was non-qualifying. Three of the qualifying studies were administered by Dr. Kraynak, and an additional qualifying study was performed by the William H. Ressler Center of Shamokin, Pennsylvania, at Dr. Kraynak's request. Claimant's Exhibit 15 at 7. For each of these four studies, Dr. Kraynak indicated that claimant's cooperation and comprehension were good, and concluded that the results were diagnostic of a severe restrictive ventilatory defect. However, Drs. Kaplan and Levinson, who are Board-certified in internal medicine and pulmonary disease, reviewed the tracings of each study and opined that the studies were invalid because of sub-optimal effort, cooperation, and comprehension, and because the studies were improperly performed. Director's Exhibits 99, 100, 105; Employer's Exhibit 1. At his deposition, Dr. Kraynak disagreed with and challenged certain aspects of the reviewers' invalidation reports. Claimant's Exhibit 15 at 7-12. However, based on the reviewing physicians' reports, the administrative law judge concluded that these four pulmonary function studies were invalid.[4] *See Director, OWCP v. Siwiec*, 894 F.2d

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[4] The fifth qualifying study was administered by Dr. Dittman, who indicated that the test was “not truly an accurate reflection of the patient's pulmonary function” because of his “poor effort.” Director's Exhibit 107. Claimant does not challenge the administrative law judge's finding that this study was invalid.

635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220 (3d Cir. 1987).

Claimant contends that the administrative law judge "blindly accepted" the invalidation reports without considering whether the reviewers applied the proper quality standards and without considering Dr. Kraynak's testimony. Claimant's Brief at 4. Review of the record indicates that for each study, either Dr. Kaplan or Dr. Levinson identified one or more specific deviations from the Part 718 Appendix B quality standards.[5] Director's Exhibits 99, 100, 105; Employer's Exhibit 1. Dr. Kraynak's response to these valid criticisms was that he "did not detect this on the tracings," or that he simply disagreed. Claimant's Exhibit 15 at 9. Contrary to claimant's contention, the administrative law judge considered Dr. Kraynak's testimony, Decision and Order at 8, but permissibly accorded greater weight to the invalidation reports based on the reviewers' superior qualifications. *See Clark, supra*; *Siwiec, supra*; *Mangifest, supra*. Therefore, we reject claimant's contention and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge erred in crediting Dr. Dittmans's opinion over that of Dr. Kraynak. Claimant's Brief at 3-4. Contrary to claimant's contention, the administrative law judge permissibly found that Dr. Kraynak's opinion was "entitled to less weight" because it was based in part on several invalid pulmonary function studies. Decision and Order at 9; *see Siwiec*, *supra*. Further, the administrative law judge permissibly accorded greater weight to Dr. Dittmans's opinion based on his superior qualifications and because the administrative law judge found his opinion to be more consistent with the non-qualifying blood gas studies. *See Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences. *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Because the administrative law judge properly weighed the medical opinions and permissibly found that Dr. Dittman's opinion outweighed Dr. Kraynak's opinion, we affirm the administrative law judge's finding pursuant to

[5] These physicians noted excessive variability between the FEV1 curves, failure to exert sustained maximum effort on forced expiration for at least five seconds or until an obvious plateau in the volume-time curve occurred, failure to maintain consistent effort on the MVV for at least twelve to fifteen seconds, and failure of the tracing to record the entire FVC maneuver. Director's Exhibit 99, 100, 105; Employer's Exhibit 1; 20 C.F.R. §718.103(c); Part 718 App. B(1)(vii); 2(ii)(B), (C), and (G); 2(iii)(A).

Section 718.204(c)(4). Therefore, we also affirm the administrative law judge's finding that a change in conditions was not established, and his unchallenged finding that a review of the record disclosed no mistake in a determination of fact. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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

REGINA C. McGRANERY
Administrative Appeals Judge