BRB No. 04-0611 BLA

ANDREW DREBITKO Claimant-Petitioner v. DREW DEVELOPMENT COMPANY and TRAVELERS INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	DATE ISSUED: 03/10/2005 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.

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-00252) of Administrative Law Judge Robert D. Kaplan 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). Claimant filed claims for benefits in 1992, 1994, and 1997, which were denied due to abandonment. Decision and Order at 3; Director's Exhibits 40-41.

Administrative Law Judge Paul H. Teitler issued a Decision and Order denying benefits on August 13, 2002. Decision and Order at 3; Director's Exhibit 46. Claimant appealed, but requested remand for initiation of modification while the case was pending with the Board, and in *Drebitko v. Drew Development Co.*, BRB No. 03-0169 BLA (Feb. 28, 2003)(unpub.)(Order), the Board remanded the case and dismissed the appeal. Decision and Order at 3; Director's Exhibit 53. On remand to the district director, modification was denied. Decision and Order at 3; Director's Exhibit 56. The case was then referred to the Office of Administrative Law Judges for a hearing. Director's Exhibits 60-62.

In a Decision and Order issued on March 30, 2004, which is the subject of this appeal, Administrative Law Judge Robert D. Kaplan (the administrative law judge) credited claimant with twenty years of coal mine employment and considered the newly submitted evidence in conjunction with the previous evidence of record, to determine whether claimant established either the existence of pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge concluded that the record established neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, he denied modification and benefits. On appeal, claimant alleges the administrative law judge erred in disallowing the submission of post-hearing evidence and challenges the administrative law judge's weighing of the x-rays, pulmonary function studies and medical opinions pursuant to 20 C.F.R. §§718.202(a)1), (4), 718.204(b)(2)(i). (iv). Employer responds, urging affirmance of the denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000).[1] In

[1] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error.

The administrative law judge held the formal hearing on December 17, 2003, and admitted into the record evidence which had been exchanged by the parties. Hearing Transcript at 13-18. At the hearing, claimant's counsel requested an opportunity to obtain and submit a supplemental report from Dr. Simelaro commenting in response to Dr. Levinson's recently submitted deposition testimony wherein he discussed the validity of the May 28, 2003, pulmonary function study. The administrative law judge denied claimant's request to obtain and submit a report in response to this deposition, pointing out that claimant had had "plenty of time to do that" prior to the hearing since it had been "over 6 weeks ago that that deposition took place." Hearing Transcript at 18.

We reject claimant's contention that his right to due process was denied. The regulation at 20 C.F.R. §725.456(b)(1) provides that any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing. *See* 20 C.F.R. §725.456(b)(1). Moreover, an administrative law judge is generally afforded broad discretion in dealing with procedural matters, so long as the administrative law judge ensures a full and fair hearing on all the issues presented. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). In addition, although claimant alleges that he was surprised by employer's submission of the deposition of Dr. Levinson, the administrative law judge's acknowledgement that claimant's counsel participated in the deposition supports his discretionary ruling denying claimant's motion to submit post-hearing evidence. Hearing Transcript at 17; *see Newland v. Consolidation Coal Co*., 6 BLR 1-1286 (1986). Therefore, we hold that the administrative law judge did not abuse his discretion in denying claimant the opportunity to submit a report from Dr. Simelaro in response to Dr. Levinson's deposition testimony, and we affirm the administrative law judge's procedural ruling in this regard. *See* 20 C.F.R. §725.456.

Claimant also contends that the administrative law judge erred in allowing excessive

x-ray readings of earlier films submitted by employer into the record while not admitting claimant's earlier readings of the same film into the record. Claimant's Brief at 17. Contrary to claimant's contention, the administrative law judge addressed the issue of the exclusion of x-ray readings proffered by both employer and claimant and instructed the parties to submit post-hearing statements identifying the readings to be included or excluded from the record. Decision and Order at 2; Hearing Transcript at 8-9; 12-14. By Order dated February 9, 2004, the administrative law judge granted employer's post-hearing motion and allowed employer's readings to remain in the record and closed the evidentiary record. While claimant was given the opportunity to file a post-hearing motion to reinstate the excluded exhibits, claimant did not avail himself of the opportunity and the disputed readings were excluded. Decision and Order at 2; Claimant's Exhibits 4-10. Therefore, we reject claimant's contention of error. *Martin v Island Creek Coal Co*., 2 BLR 1-276 (1979); *Reale v. Barnes & Tucker Co.*, 1 BLR 1-133 (1977).

On the merits of entitlement, we also reject claimant's argument that the administrative law judge erred in his consideration of the x-ray evidence. The administrative law judge discussed the six readings of the single new x-ray taken on May 15, 2003 as well as the qualifications of the readers. Decision and Order at 5-6; Claimant's Exhibits 14-15, 17; Employer's Exhibits 4-6. The administrative law judge found that since three interpretations were read as positive and three were read as negative, the x-ray evidence was in equipoise and thus claimant failed to carry his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). As the administrative law judge properly considered both the quality and quantity of the x-ray evidence, we reject claimant's contention that the administrative law judge failed to explain the basis of his determination. *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). We therefore affirm the administrative law judge's finding that the x-ray evidence was in equipoise and thus insufficient to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence pursuant to Section 718.202(a)(1), as it is supported by substantial evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Moreover, contrary to claimant's assertion, the administrative law judge permissibly concluded that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) since he rationally found that the there were no credible medical opinions diagnosing the existence of pneumoconiosis submitted since the previous denial. *See* 20 C.F.R. §718.202(a)(4); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Perry*, 9 BLR at 1-2; Decision and Order at 6-11. Contrary to claimant's assertion that Dr. Kraynak's opinion is reasoned and establishes the existence of pneumoconiosis, especially in light of his status as a treating physician, the administrative law judge acted within his discretion as fact-finder in

discrediting Dr. Kraynak's opinion, despite his status as claimant's treating physician, because the opinion was inadequately reasoned and documented regarding claimant's condition in light of the physician's discrepancy with respect to claimant's weight and his reluctance to acknowledge the deficiencies of his pulmonary function study. *See Lango v. Director, OWCP,* 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark,* 12 BLR at 1-155; Decision and Order at 9-10. We also reject claimant's allegation of error with respect to the administrative law judge's failure to discuss the medical report of Dr. Matthew J. Kraynak. Claimant's Brief at 8. A review of the record discloses that Claimant's Exhibit 16 is a letter written to claimant's counsel dated October 27, 2003, by Dr. Matthew J. Kraynak. In that letter, the physician reiterates his conclusion regarding a his June 1, 2000 examination of claimant and the results of his March 22, 2000, x-ray and pulmonary function study, which is evidence that predates the prior denial and, as such, does not constitute new evidence relevant to establishing a change in conditions pursuant to Section 725.310. We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as it is supported by substantial evidence. *Clark*, 12 BLR at 1-155; *Perry*; 9 BLR at 1-2; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985).

Claimant next contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i) based on the newly submitted pulmonary function study evidence. We reject claimant's allegation of error. The administrative law judge rationally concluded that the preponderance of the newly submitted pulmonary function study evidence was insufficient to establish total disability since he reasonably found that the three studies, including the sole qualifying pulmonary function study of May 28, 2003, were invalid.[2] In reaching his conclusion, the administrative law judge noted that although the May 28, 2003, pulmonary function study was qualifying and had been found to be valid by Drs. Simelaro, Venditto, and Kraynak, that study had been invalidated by three reviewing physicians, Drs. Levinson, Kaplan, and Dittman. Decision and Order at 8-9; Claimant's Exhibits 2-3, 11-12, 21; Employer's Exhibits 2-3, 9. The administrative law judge rationally found that the opinions of Drs. Dittman, Levinson, and Kaplan invalidating the May 28, 2003, pulmonary function study were entitled to greater weight than Dr. Kraynak's contrary opinion on the basis of their relative qualifications.[3] Decision and Order at 8; *see Siegel v. Director, OWCP*,

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[2] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[3] The administrative law judge noted that Drs. Levinson, Dittman, and Kaplan were Board-certified in internal medicine and that Drs. Levinson and Kaplan were also Board-certified in internal medicine. Decision and Order at 7-8; Employer's Exhibits 2-3, 9.

8 BLR 11-156 (1985); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Furthermore, contrary to claimant's assertion, the administrative law judge acted within his discretion in according little weight to the validations by Drs. Venditto and Simelaro since both physicians stated their narrative conclusions in identical language, thus rendering their objectivity and independence suspect. Decision and Order at 8-9; see *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).

In considering whether total disability was established under Section 718.204(b)(2)(iv), the administrative law judge permissibly credited the opinion of Dr. Levinson, who stated that claimant was not totally disabled from a respiratory standpoint, because it was found to be reasoned and documented on this issue. *Clark,* 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 13; Employer's Exhibits 3, 7, 10. In addition, with respect to the opinions of the Drs. Kraynak, Simelaro, and Venditto who concluded that claimant was totally disabled, the administrative law judge reasonably allocated no weight to these opinions regarding total disability as they were not well-reasoned. *See Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see also Clark*, 12 BLR at 1-155; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 13; Claimant's Exhibits 11-12, 19-20. Moreover, we reject claimant's assertion that it was irrational to reject Dr. Levinson's opinion on issue of the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(4); Decision and Order at 11, and then find the same physician's opinion reasoned and documented on the issue of total disability. *See Luketich v. Director, OWCP*, 8 BLR 1-477, 1-480 n.3 (1986). Upon weighing the conflicting opinions, the administrative law judge rationally found, within his discretion as fact-finder, that the medical opinion evidence failed to establish total disability by a preponderance of the evidence and this finding is affirmed.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *Trent,* 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences. *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because claimant has failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to Sections 718.202(a) and 718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to demonstrate a change in conditions pursuant to Section 725.310 (2000). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000),

as it is supported by substantial evidence. *See Keating*, 71 F.3d at 1123, 20 BLR at 2-62-63. Since claimant's petition for modification was properly denied, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order 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