BRB No. 03-0334 BLA

ALBERT REPELLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/26/2003
	)	
READING ANTHRACITE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL, and GABAUER Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0171) of Administrative Law Judge Robert D. Kaplan 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).[1] This case is before the Board for the third time.[2] In the most recent Decision and Order, the administrative law judge found that the newly submitted evidence of record failed to establish the existence of pneumoconiosis, or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b), and therefore, did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the medical evidence of record is insufficient to establish the existence of coal workers' pneumoconiosis, or a totally disabling respiratory impairment arising out of coal mine employment, and a material change in conditions pursuant to Sections 718.202(a), 718.204(b), and 725.309 (2000). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter asserting that the holdings in *Black and Decker Disability Plan v. Nord*, 123 U.S. 1965 (2003), *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), are not controlling in this case, but has not otherwise addressed the merits of the claim.[4]

---

[1]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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]A complete recitation of the extensive procedural history of this case is set forth in *Repella v. Reading Anthracite Co.*, BRB No. 02-0149 BLA (July 31, 2002)(unpub.), slip op. at 2-3.

[3]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[4]The administrative law judge's determination that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim pursuant to 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, 718.202, 718.203, 718.204 (2000). Failure to establish any one 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*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.202(a)(1), claimant's contention that the administrative law judge erred by failing to credit the uncontradicted positive x-ray reading of Dr. Kraynak is without merit. The administrative law judge permissibly found that this interpretation was insufficient to establish the existence of pneumoconiosis since Dr. Kraynak was neither a Board-certified radiologist nor a B reader. Decision and Order on Remand at 4-5; Director's Exhibit 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Moreover, the administrative law judge is not required to credit an uncontradicted x-ray reading. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-296 (1985), *recon. denied* 8 BLR 1-5 (1985); *Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984).

Pursuant to Section 718.202(a)(4), we reject claimant's contentions that the administrative law judge erred by finding that the medical reports of Drs. Kraynak and Dittman, were in equipoise, which claimant asserts amounts to a "mechanical nose count of the opinion evidence," Claimant's Brief at 4, and erred by failing to accord determinative weight to Dr. Kraynak's opinion based on his status as claimant's treating physician. The record indicates that Dr. Kraynak, who is Board-eligible in Family Medicine, diagnosed the presence of totally disabling coal workers' pneumoconiosis. Claimant's Exhibits 4-6, Director's Exhibit 8. Dr. Dittman, who is Board-certified in Internal Medicine, found no evidence of pneumoconiosis. Employer's Exhibit 23. The

---

C.F.R.§718.202(a)(2),(3), is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge noted that a treating physician's opinion may be accorded controlling weight if he has "special knowledge of or insight into the miner's medical conditions." Decision and Order on Remand at 5. However, the administrative law judge rationally determined that the record did not indicate that Dr. Kraynak possessed any special knowledge of claimant's medical condition as the record contains little information regarding Dr. Kraynak's treatment of claimant. Decision and Order on Remand at 5; Claimant's Exhibits 4-6; Director's Exhibit 8; *cf. Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).[5]

The administrative law judge also acted within his discretion in finding that:

> Absent consideration of the fact that Dr. Dittman's qualifications are superior to those of Dr. Kraynak, I find that the opinions of Dr. Kraynak and Dr. Dittman are in equilibrium. Taking into consideration Dr. Dittman's superior qualifications, I find that his opinion is entitled to greater weight than that of Dr. Kraynak.

Decision and Order on Remand at 5; Employer's Exhibit 23; Claimant's Exhibits 4, 5; Director's Exhibit 8. Thus, the administrative law judge rationally accorded greater weight to Dr. Dittman's report based on his superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1983).

Moreover, since determining the weight of the evidence and the credibility of medical opinions is within the discretion of the administrative law judge, we also reject claimant's contention that the administrative law judge erred by failing to specifically consider Dr. Kraynak's experience in interpreting x-ray readings. The administrative law judge fully considered this opinion, but permissibly determined not to accord it determinative weight. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). We also hold that the administrative law judge did not err in crediting Dr. Dittman's opinion when this physician reviewed an x-ray reading which was not admitted into the record, since we previously held that the regulations implementing the Act do not require that physicians base their opinions solely upon

[5]Because the miner's last coal mine employment took place in the Commonwealth of Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence admitted into the record. *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126 (7th Cir. 1999).[6]

We further reject claimant's contention that the Board has affirmed the administrative law judge's crediting of Dr. Kraynak's opinion as establishing the presence of pneumoconiosis and that the administrative law judge could not give it less weight on remand without contravening the law of the case doctrine. The Board previously affirmed the administrative law judge's determination that this opinion is documented and reasoned, and could, if credited, establish the existence of pneumoconiosis when the administrative law judge properly weighed all the relevant evidence of record. However, the administrative law judge's finding that Dr. Kraynak's opinion did, in fact, establish this element of entitlement was vacated. Thus, no legal finding was upheld to which the law of the case doctrine would apply. *Coleman v. Ramey Coal Co.,* 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990). The law of the case doctrine does not preclude the administrative law judge from reweighing the evidence on remand. Accordingly, we affirm the finding that claimant's newly submitted evidence is insufficient to establish the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

We also hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment. Pursuant to Section 718.204(b)(2)(i), we decline to address claimant's contention that the administrative law judge erred by failing to find total disability established based on the newly submitted pulmonary function studies of record, inasmuch as claimant has not identified any specific error in the administrative law judge's weighing of this evidence. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).[7]

With respect to the administrative law judge's weighing of the medical evidence relevant to Section 718.204(b)(2)(iv), claimant contends that the Board affirmed the administrative law judge's finding that Dr. Kraynak's opinion established the presence of

---

[6]The Board previously acknowledged that the Department of Labor has indicated that medical reports developed pursuant to the revised regulations may consider only material admitted into evidence. *Repella v. Reading Anthracite Co.*, BRB No. 02-0149 BLA (July 31, 2002)(unpub.), slip op. at 5 n.9. However, since the revisions to the regulations at 20 C.F.R.§725.457 apply only to claims filed after January 19, 2001, the revisions do not apply in this case.

[7]We affirm the administrative law judge's findings pursuant to 20 C.F.R. 718.204(b)(ii),(iii), as unchallenged on appeal. *Skrack*, 6 BLR 1-710.

a totally disabling respiratory impairment, and that this finding constitutes the law of the case. Claimant's contention is without merit, as we previously held that while Dr. Kraynak's opinion was sufficient to support a finding of total disability, the administrative law judge's reliance on this report to establish this element was vacated, and the case was remanded for the administrative law judge to properly weigh this opinion, diagnosing totally disabling pneumoconiosis, with the contrary opinion of Dr. Dittman. Thus, the law of the case doctrine does not bar reconsideration of this evidence on remand. *Coleman*, 18 BLR 1-9, 15; *Brinkley*, 14 BLR 1-147, 150-151.

Similarly, we reject claimant's contention that the administrative law judge failed to provide a rationale for rejecting the opinion of Dr. Kraynak, since the Decision and Order on Remand indicates that the administrative law judge permissibly determined that the opinion "should not be given added weight simply because he treated Claimant," Decision and Order on Remand at 7, and that the opinion of Dr. Dittman should be accorded greater weight due to this physician's superior qualifications. Decision and Order on Remand at 7; Employer's Exhibit 23; Claimant's Exhibits 4-6; Director's Exhibit 8; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Dillon*, 11 BLR 1-113; *Martinez*, 10 BLR 1-24.

We further find no merit in claimant's contention that Dr. Dittman's opinion is unreasoned because the physician found that his pulmonary function studies revealed only a mild impairment which he suggested was due to obesity, which contradicts Dr. Kraynak's opinion, and because Dr. Dittman did not review any x-ray readings which were admitted into the record, and is not a pulmonologist. The determination of whether a medical report is documented and reasoned is within the purview of the administrative law judge. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Accordingly, it was within the administrative law judge's discretion to find Dr. Dittman's opinion reasoned. Moreover, we previously held that the relevant regulations implementing the Act do not require that medical reports be based only upon medical evidence admitted into the record. *See generally Durbin*, 165 F.3d 1126. As the administrative law judge rationally determined that Dr. Dittman's opinion is reasoned and worthy of greater weight than Dr. Kraynak's opinion, we affirm his finding that the medical evidence is insufficient to establish the presence of a totally disabling respiratory impairment. Decision and Order on Remand at 7; Employer's Exhibit 3; Claimant's Exhibits 4-6; Director's Exhibit 8; *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

As we have affirmed the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, we also affirm the finding that claimant has failed to establish a material change in conditions. Consequently, we also affirm the denial of benefits and, therefore, we need not address the arguments raised in employer's

brief. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge