BRB No. 97-0935 BLA

JOHN E. BRENNAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANTHRACITE TECHNOLOGY, INCORPORATED	)	DATE ISSUED:
	)	
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.

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

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1020) 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). In a Decision and Order dated July 14, 1989, Administrative Law Judge Paul H. Teitler found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, therefore, denied benefits. Claimant subsequently requested modification of his denied claim. By Decision and Order dated February 21, 1995, Administrative Law Judge Frank D. Marden found that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R.

§725.310,[1] and denied claimant's request for modification. Claimant again requested modification of his denied claim. In the most recent decision, Administrative Law Judge Robert D. Kaplan (the administrative law judge) noted that claimant waived any contention that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge further found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification. On appeal, claimant contends that the newly submitted x-ray and medical opinion evidence is sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Claimant also contends that the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, 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. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If the administrative law judge finds the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310, he must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Id.*

[1]Judge Marden found that there was no issue as to a mistake in a determination of fact. Director's Exhibit 189.

[2]Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in his consideration of the newly submitted x-ray evidence. The record contains newly submitted interpretations of x-rays taken on June 15, 1995 and October 1, 1996.[3] In his consideration of the newly submitted x-ray evidence, the administrative law judge found that "a preponderance of the interpretations of each of the two current films is negative for pneumoconiosis." Decision and Order at 5. The administrative law judge, therefore, found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge erred in considering the x-ray interpretations designated as Employer's Exhibit 10 (the negative interpretations of claimant's October 1, 1996 x-ray rendered by Drs. Laucks, Soble, Duncan and Robinson) because this evidence was not properly admitted into the record. We agree. In his decision, the administrative law judge noted that pursuant to his prior rulings, he was admitting certain evidence post-hearing, including the four x-ray interpretations identified as Employer's Exhibit 10. Decision and Order at 3 n.2. Although the administrative law judge ruled at the hearing that claimant and employer could submit certain evidence post-hearing,[4] the x-rays contained in Employer's Exhibit 10 do not fall within the scope of his ruling. Employer actually exchanged the x-ray interpretations contained in Employer's Exhibit 10 on November 11, 1996, less than twenty days prior to the November 19, 1996 hearing. Neither the administrative law judge nor the parties made any reference to this evidence at the hearing. Inasmuch as the the x-ray interpretations designated as Employer's Exhibit 10 were not admitted into evidence at the hearing and do not fall within the scope of the administrative law judge's ruling on the admission of post-hearing evidence, we remand the case to the administrative law judge to address whether this evidence should be admitted into the record. *See* 20 C.F.R.

[3]Dr. Smith interpreted claimant's June 15, 1995 and October 1, 1995 x-rays as positive for pneumoconiosis. Director's Exhibit 196; Claimant's Exhibit 4. Drs. Navani, Francke and Duncan, interpreted claimant's June 15, 1995 x-ray as negative for pneumoconiosis. Director's Exhibits 197, 198; Employer's Exhibit 4. Drs. Ciotola, Laucks, Soble, Duncan and Robinson, interpreted claimant's October 1, 1996 x-ray as negative for pneumoconiosis. Employer's Exhibits 6, 10.

[4]At the hearing, employer submitted Dr. Ciotola's negative interpretation of claimant's October 1, 1996 x-ray. Transcript at 6. The administrative law judge allowed claimant thirty days in which to obtain and submit an interpretation of the October 1, 1996 x-ray as Claimant's Exhibit 4. Transcript at 5. The administrative law judge also permitted employer additional time to submit Dr. Dittman's report and Dr. Dittman's deposition as Employer's Exhibits 8 and 9. *Id.* at 6-7.

Claimant subsequently submitted Dr. Smith's positive interpretation of claimant's October 1, 1996 x-ray on December 2, 1996. Employer submitted Dr. Dittman's November 13, 1996 report on December 5, 1996 and Dr. Dittman's January 17, 1997 deposition testimony on January 21, 1997.

§725.456. Inasmuch as the administrative law judge's finding under 20 C.F.R. §718.202(a)(1) was based in part upon the four negative x-ray interpretations contained in Employer's Exhibit 10, we vacate the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis.

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge properly found that Dr. Kraynak's diagnosis of pneumoconiosis was outweighed by Dr. Dittman's contrary opinion, based upon Dr. Dittman's superior qualifications.[5] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6; Director's Exhibit 194; Claimant's Exhibit 2; Employer's Exhibits 8, 9. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant finally contends that the newly submitted medical evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge did not address whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Because the issue of total disability was not previously adjudicated in claimant's favor, the administrative law judge, on remand, is instructed to consider additionally whether the newly submitted medical evidence is sufficient to establish total disability, thereby enabling claimant to establish a change in conditions pursuant to 20 C.F.R. §725.310. *See Nataloni, supra*. On remand, if the administrative law judge finds the newly submitted evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310, he must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Kovac, supra.*

[5]Dr. Dittman is Board-certified in Internal Medicine. Employer's Exhibits 8, 9. Dr. Kraynak is merely Board-eligible in Family Medicine. Director's Exhibit 195.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge