

BRB Nos. 05-0411 BLA
and 03-0373 BLA

PETER P. LAWSON)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/23/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the 2003 Decision and Order Denying Benefits and 2005 Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the 2003 Decision and Order Denying Benefits and 2005 Decision and Order Denying Benefits (02-BLA-0210 and 04-BLA-0043) of Administrative Law Judge Robert D. Kaplan rendered 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). This case involves claimant's appeal of the administrative law judge's 2005 Decision and Order denying claimant's request for modification (BRB No. 05-0411 BLA), as well as the reinstatement of claimant's appeal of the administrative law judge's 2003 Decision and Order (BRB No. 03-0373 BLA).

In his 2003 Decision and Order, the administrative law judge set forth the protracted procedural history of this claim, which has remained pending based on multiple requests for modification of the denial of claimant's original application for benefits filed in 1989. 2003 Decision and Order at 2-4. Specifically, the administrative law judge found that the case was a request for modification of a 2001 Decision and Order, in which Administrative Law Judge Ainsworth Brown denied benefits based on his determination that claimant failed to establish either a mistake in a determination of fact or a change in conditions in the prior decision, as the evidence did not establish a total respiratory disability. Addressing claimant's request for modification, the administrative law judge found that the new evidence did not establish a total respiratory disability and, thus, did not establish a change in conditions. The administrative law judge further found that there was no mistake in a determination of fact. Consequently, the administrative law judge found that claimant did not establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000).¹ Accordingly, the administrative law judge denied benefits.

Claimant appealed to the Board. In response to the Board's June 10, 2003 Order to show cause why his appeal should not be dismissed for failure to file a Petition for Review and brief, claimant requested that the appeal be dismissed so that he could request modification of the denial of benefits. By Order dated July 9, 2003, the Board dismissed claimant's appeal, subject to reinstatement, and remanded the case to the district director for modification proceedings. *Lawson v. Director, OWCP*, BRB No. 03-0373 BLA (Jul. 9, 2003)(unpub. Order).

After administrative processing by the district director, the case was transferred to the Office of Administrative Law Judges. Following a formal hearing, the administrative law judge issued a Decision and Order denying claimant's request for modification. After noting again the protracted procedural history of this claim, *see* 2005 Decision and Order at 2-3, the administrative law judge accepted the parties' stipulations to eleven years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. Addressing the specifics of claimant's request for modification, the administrative law judge rejected claimant's allegations of error and found that there was not a mistake in a determination of fact in the 2003 Decision and Order. He further found that claimant failed to establish a change in conditions, as the evidence did not establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that the evidence did not support granting claimant's

¹ Because this claim was pending on January 19, 2001, the effective date of the revisions to the regulations, the former version of 20 C.F.R. §725.310 applies to this claim. 20 C.F.R. §725.2(c).

request for modification pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied benefits.

Initially on appeal, claimant requested reinstatement of his appeal of the 2003 Decision and Order, which the Board granted by Order dated March 2, 2005. *Lawson v. Director, OWCP*, BRB Nos. 03-0373 BLA and 05-0411 BLA (Mar. 2, 2005)(unpub. Order). In challenging the administrative law judge's denial of his request for modification, claimant contends that the administrative law judge erred in finding that there was no mistake in a determination of fact in the 2003 Decision and Order. Claimant also contends that the administrative law judge erred in finding that the evidence did not establish a change in conditions pursuant to Section 725.310 (2000). Additionally, claimant contends that the administrative law judge erred in admitting a post-hearing exhibit submitted by the Director, Office of Workers' Compensation Programs (the Director), which claimant contends was submitted late. In response, the Director requests affirmance of the administrative law judge's denial of claimant's modification request. The Director also argues that the administrative law judge did not err in admitting the July 2004 report of Dr. Rashid.²

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

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification within one year of a denial based on a change in conditions or a mistake in a

² The parties do not challenge the administrative law judge's crediting claimant with eleven years of coal mine employment, his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, or his findings pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

determination of fact. If a claimant merely alleges that the ultimate fact of entitlement was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly *i.e.*, “there is no need for a smoking-gun factual error, changed conditions, or startling new evidence.” *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995), *discussing Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, the United States Court of Appeals for the Third Circuit has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both newly submitted evidence and evidence previously in the record, and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact. *Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

Initially, claimant contends that the administrative law judge erred in failing to make the necessary finding of “good cause” prior to allowing the Director’s late submission into the record of Dr. Rashid’s July 23, 2004 medical report. We disagree.

At the formal hearing, the administrative law judge provided the Director until August 1, 2004 to submit Dr. Rashid’s response to Dr. Simelaro’s deposition testimony. Hearing Transcript at 15-18. By cover letter dated August 2, 2004, the Director submitted the July 23, 2004 report of Dr. Rashid. On September 1, 2004, Claimant filed a Motion to Strike this report as untimely or, in the alternative, to allow claimant additional time in which to respond to Dr. Rashid’s report. The administrative law judge, in an Order dated September 14, 2004, denied claimant’s motion to strike the report and accepted it into evidence. However, the administrative law judge also provided claimant until October 18, 2004 to submit an appropriate response to Dr. Rashid’s report, as requested by claimant. The record contains no indication that claimant submitted any responsive evidence.

Because the administrative law judge considered claimant’s arguments regarding the late submission of this evidence prior to admitting Dr. Rashid’s report into the record, as well as granting claimant additional time in which to respond to this evidence, we hold that it was not an abuse of his discretion to admit Dr. Rashid’s report. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Consequently, we affirm the administrative law judge’s admission of Dr. Rashid’s report.

Pursuant to Section 718.204(b)(2), the administrative law judge found the newly submitted evidence did not establish a totally disabling respiratory impairment and thus, did not establish a change in conditions pursuant to Section 725.310 (2000). Specifically, the administrative law judge found that the weight of the pulmonary function study evidence did not establish total disability pursuant to Section 718.204(b)(2)(i). 2005 Decision and Order at 7-8. The administrative law judge further found that the new

medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv), based on his crediting of Dr. Rashid's opinion over the opinions of Drs. Kraynak, Simelaro, and Wychulis, which he found not credible. 2005 Decision and Order at 11-12. The administrative law judge then weighed all of the new evidence together and found that claimant failed to establish total respiratory disability.

On appeal, claimant contends that the administrative law judge erred in finding that the weight of the new pulmonary function study evidence does not support a finding of total disability. Claimant contends that the administrative law judge impermissibly substituted his interpretation of the data for that of the medical experts in finding the March 4, 2004 pulmonary function study to be valid.

Contrary to claimant's contention, the administrative law judge did not impermissibly substitute his own interpretation of Dr. Rashid's March 4, 2004 pulmonary function study for those of the medical experts. Rather, he considered the conflict regarding whether this ventilatory study was conforming and valid, specifically the criticisms of the study by Drs. Kraynak and Simelaro, *see* Claimant's Exhibits 10, 12, but he credited Dr. Rashid's rebuttal of these criticisms and, therefore found this to be a valid pulmonary function study. 2005 Decision and Order at 8; Director's Exhibit 217; *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476, 1-479 (1983). Consequently, we reject claimant's contention that the administrative law judge substituted his own opinion for that of the medical experts.

Moreover, we reject claimant's contention that the administrative law judge erred in "impermissibly engaging in a mechanical nose count" of the new pulmonary function study evidence. Claimant's Brief at 16. The administrative law judge noted that the record contains three current ventilatory studies, of which two produced non-qualifying results; he found all studies to be valid. 2005 Decision and Order at 7-8; Director's Exhibits 210, 215; Claimant's Exhibits 3, 12. However, contrary to claimant's contention, the administrative law judge considered individually each new pulmonary function study, including the criticisms of each study and, therefore, considered not only the quantity of qualifying and non-qualifying studies, but also the quality of each of these tests. 2005 Decision and Order at 7-8. Furthermore, despite Dr. Simelaro's impression that the March 2, 2004 study showed total disability, the administrative law judge properly found that this ventilatory study was non-qualifying, as the study yielded values greater than the regulatory criteria set forth at 20 C.F.R. Part 718, Appendix B. 20 C.F.R. §718.204(b)(2)(i). Thus, finding that these studies are contemporaneous, as they were all administered within a six week period, the administrative law judge reasonably found that the weight of the new pulmonary function study evidence was non-qualifying and, therefore, did not support a finding of total disability. 2005 Decision and Order at 8; 20 C.F.R. §718.204(b)(2)(i); *see Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *see generally Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Since the administrative law judge considered all aspects of the new pulmonary function study evidence, we affirm his finding that total disability was not established at Section 718.204(b)(2)(i).

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding the newly submitted opinions of Drs. Kraynak, Simelaro, and Wychulis entitled to less weight than the new opinion of Dr. Rashid. Specifically, claimant contends that the administrative law judge did not provide valid bases for discrediting the opinions of Drs. Kraynak, Simelaro, and Wychulis. In addition, claimant contends that the administrative law judge failed to consider Dr. Kraynak's fifteen-year history as claimant's treating physician and erred in failing to give special consideration to Dr. Kraynak's opinion based on this status. We disagree.

While an administrative law judge may accord greater weight to the medical opinion of a treating physician, he is not required to do so. *See Mancina v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Rather, the administrative law judge must examine the treating physician's opinion on its merits and make a reasoned judgment about its credibility "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Lango*, 104 F.3d at 577-78, 21 BLR at 2-20-21; *Clark*, 12 BLR at 1-155.

In the case at bar, the administrative law judge found that Dr. Kraynak's current opinion was not credible because the physician did not adequately explain his diagnosis and because the diagnosis was not supported by the documentation of record. Specifically, the administrative law judge found that in diagnosing a total respiratory disability, Dr. Kraynak relied, in part, on a finding of cor pulmonale and on a qualifying pulmonary function study, which the administrative law judge found to be spuriously low in relation to other contemporaneous studies. 2005 Decision and Order at 10-11. Contrary to claimant's contention, the administrative law judge reasonably found that Dr. Kraynak did not adequately explain his diagnosis of total disability when he relied on a diagnosis of cor pulmonale, which was inadequate to establish total disability because it was not a diagnosis of cor pulmonale with right-sided congestive heart failure, as required under the regulations. 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991). Furthermore, the administrative law judge reasonably accorded less weight to Dr. Kraynak's opinion, as he based it on claimant's subjective complaints and relied on a pulmonary function study which, while qualifying, was found spuriously low compared to contemporaneous studies and, thus, was not entitled to determinative weight. *See Anderson v. The Youghioghenny and Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984); *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-81 (1984); *Crapp*, 6 BLR at 1-479;

see also Andruscavage v. Director, OWCP, No. 93-3291, slip op. at 9-10 (3d Cir. February 22, 1994). Consequently, we reject claimant's contention that the administrative law judge erred in according Dr. Kraynak's current opinion less weight.

Likewise, we hold that substantial evidence supports the administrative law judge's weighing of the opinions of Drs. Simelaro and Wychulis. Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding that Dr. Simelaro did not adequately explain his diagnosis in light of the underlying documentation. 2005 Decision and Order at 10-11; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984). In addition, the administrative law judge reasonably accorded less weight to Dr. Simelaro's opinion, finding that the physician relied on a diagnosis of cor pulmonale, which was not sufficient to establish total disability. *Newell*, 13 BLR at 1-39. The administrative law judge also reasonably accorded less weight to Dr. Wychulis's opinion as he found that Dr. Wychulis did not adequately set forth the documentation upon which he relied. 2005 Decision and Order at 11; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-46. Rather, the administrative law judge reasonably exercised his discretion in according determinative weight to the opinion of Dr. Rashid, based on his determination that Dr. Rashid's opinion was best supported by the underlying documentation of record. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-46. The administrative law judge is empowered to weigh the evidence and to draw his own conclusions therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As the administrative law judge considered all aspects of the new medical opinion evidence and claimant's contentions are tantamount to a request to reweigh the evidence, we affirm the administrative law judge's finding that the new medical evidence is insufficient to establish a totally disabling respiratory impairment and thus, insufficient to establish a change in conditions.

Moreover, any error in the administrative law judge's failure to discuss specifically the Progress Notes from the VA Hospital is harmless because these notes do not contain a physician's diagnosis of total respiratory disability. Director's Exhibit 203. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We affirm the administrative law judge's finding that there was no mistake in a determination in fact in the 2003 Decision and Order. Claimant, in challenging the administrative law judge's mistake of fact determination, is in effect seeking a reweighing of the evidence. In particular, contrary to claimant's contention, the administrative law judge did not provide disparate treatment to claimant by not taking judicial notice of Dr. Desai's credentials, as it is claimant's burden to establish the

credentials of his experts. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). The credentials of Dr. Sherman were previously admitted into the record and, therefore, the administrative law judge did not provide disparate treatment by acknowledging Dr. Sherman's credentials, while declining to take judicial notice of Dr. Desai's credentials, which had not been previously admitted into the record. In addition, a review of the record indicates that the administrative law judge correctly found that Dr. Rashid is Board-certified in Internal Medicine, whereas Dr. Matthew Kraynak is Board-certified in Family Medicine. Director's Exhibits 159, 193; 2005 Decision and Order at 5. As the administrative law judge is responsible for weighing the conflicting evidence, we hold that it was a reasonable exercise of his discretion in finding Dr. Rashid's qualifications superior to the credentials of Dr. Matthew Kraynak. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Moreover, contrary to claimant's contention, the administrative law judge did not rely solely on Dr. Rashid's credentials in according his opinion greater weight, but rather, found it better reasoned and documented.

Furthermore, the remainder of claimant's contentions amount to a request to reweigh the pulmonary function study evidence, which the Board is not empowered to do. *Anderson*, 12 BLR at 1-113. Contrary to claimant's contention, the administrative law judge reasonably exercised his discretion in finding the June 10, 2002 pulmonary function study invalid, as he reasonably accorded greater weight to Dr. Sherman's invalidation of this study over Dr. Raymond Kraynak's statement that the study was valid, based on Dr. Sherman's superior credentials as a Board-certified pulmonologist. *Wetzel*, 8 BLR at 1-141. In addition, we reject claimant's contention that the administrative law judge failed to consider the substance of the validation reports in weighing the evidence, as Drs. Simelaro and Venditto did not elaborate on their summary opinion that the ventilatory study was valid, whereas Dr. Sherman specifically stated that the study was invalid based on excessive variability. *Compare* Director's Exhibit 193 *with* Director's Exhibit 185. Consequently, it was a reasonable exercise of the administrative law judge's discretion to accord greater weight to the April 4, 2002 non-qualifying study, based on his determination that while the studies were contemporaneous, the qualifying results in June 2002 were significantly lower than the results in the April 2002 study and, therefore, were questionable. *Anderson*, 7 BLR at 1-154; *Crapp*, 6 BLR at 1-479; *see also Andruscavage*, slip op. at 9-10. Based on the administrative law judge's findings and the specifics of claimant's contentions, we affirm the administrative law judge's finding that there was no mistake in a determination of fact in the 2003 Decision and Order.

Finally, while claimant requested reinstatement of his appeal of the administrative law judge's 2003 Decision and Order denying modification, he has not alleged any other

specific errors with the administrative law judge's determinations in the 2003 decision. Board review is properly invoked when the appealing party assigns specific allegations of legal or factual error in the administrative law judge's decision. Failure to do so precludes review and requires the Board to affirm the decision below. 20 C.F.R. §802.211(b); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Consequently, we affirm the administrative law judge's 2003 denial of benefits.

Accordingly, the administrative law judge's 2003 Decision and Order Denying Benefits and 2005 Decision and Order Denying Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge