BRB No. 94-0377 BLA

THEODORE FRENDAK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREENWOOD STRIPPING CORPORATION	)	
	)	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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Theodore Frendak, Coaldale, Pennsylvania, *pro se*.

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

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order (92-BLA-0180) of Administrative Law Judge Paul H. Teitler denying benefits on a

[1]Claimant is Theodore Frendak, whose initial application for benefits, which was filed with the Department of Labor on May 10, 1974, was ultimately denied on September 17, 1986, when the Board issued a Decision and Order affirming the administrative law judge's Decision and Order denying benefits. *Frendak v. Greenwood Mining Co.*, BRB No. 84-1915 BLA (Sep. 17, 1986)(unpub.).

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 a duplicate claim. Claimant's second claim for benefits, which was filed on September 29, 1987, was ultimately denied on July 6, 1989. Director's Exhibit 20. Claimant filed the present claim on March 14, 1991.

Pursuant to 20 C.F.R. Part 718, the administrative law judge

determined that claimant established eleven years of qualifying coal mine employment but failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant generally contests the denial of benefits. Both employer and the Director, Office of Workers' Compensation Programs (the Director), have chosen not to respond to this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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 determining whether claimant has established a material change in conditions, the administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. 20 C.F.R. §725.309; *Id*.

In the present claim, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309 because the evidence submitted since the 1989 denial of benefits was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). However, Dr. Kraynak, in 1991, interpreted an x-ray as positive for the existence of pneumoconiosis, performed a pulmonary function study which produced qualifying results, and opined, in a medical report and deposition testimony, that claimant is completely and permanently disabled due to anthracosilicosis contracted during his coal mine employment. Director's Exhibit 6. As the record contains evidence which, if fully credited, could change the prior administrative result, the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309 is erroneous. *See Shupink*, *supra*.

However, we deem this error harmless because the administrative law judge in considering the merits of the claim properly found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge accorded determinative weight to Dr. Levinson's opinion based on his "excellent credentials" and the fact that his conclusions were supported by "objective laboratory data." Decision and Order at 8; Employer's Exhibits 1, 6. The administrative law judge noted that while the 1987 pulmonary function study produced qualifying values, Director's Exhibit 6, and was deemed valid by Drs. Kraynak and Simelaro, Director's Exhibit 6, it and the 1991 pulmonary function study were both found to be invalid by Dr. Levinson due to less than optimal effort, cooperation and comprehension. Decision and Order at 8; Director's Exhibit 7. Finally, the administrative law judge found the higher values obtained by Dr. Levinson in the 1992 pulmonary function study to be "convincing evidence" that claimant is not totally disabled, noting that Dr. Kraynak, who opined that claimant was totally disabled, conceded that the 1992 values were normal. *Id*.

The administrative law judge has broad discretion to assess the evidence of record, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), and is not bound to accept the opinion or theory of a given doctor but may weigh the medical evidence and form his own conclusions, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The Board has consistently held that where there is conflicting evidence on a single issue, the administrative law judge's function is to determine the relative credibility of that evidence, and the Board will not interfere with such credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Further, the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1980); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

In this case, the administrative law judge permissibly credited the opinion of Dr. Levinson over that of Dr. Kraynak, based on the former's superior credentials, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and his finding that Dr. Levinson's opinion was better supported by its underlying documentation, *see Fagg*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-126 (1985). Inasmuch as the administrative law judge acted within his discretion as fact-finder in resolving the conflicting evidence regarding claimant's respiratory condition, *see Lafferty*, *supra*, and consistently applied his credibility analysis to all the evidence, *see Christian v. Monsanto Corp.*, 12 BLR 1-56 (1988), we affirm his conclusions

pursuant to Section 718.204(c),[2] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

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

[2]The administrative law judge failed to weigh the arterial blood gas studies of record pursuant to 20 C.F.R. §718.204(c)(2), however, we deem any error harmless as the two studies of record resulted in non-qualifying values. Director's Exhibits 8, 17; *see Larioni*, *supra*. We affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c)(3) as there is no evidence of cor pulmonale with right-sided congestive heart failure in the record.