BRB No. 95-1856 BLA

DELBERT D. TROUP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
READING ANTHRACITE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David H. Rattigan (Williamson, Friedberg & Jones), Pottsville, Pennsylvania, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-0601) of

Administrative Law Judge Paul H. Teitler awarding benefits on a claim[1] 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 is before the Board for the second time.

In *Troup v. Reading Anthracite Coal Co*., BRB No. 92-2015 BLA (Dec. 27, 1994)(unpub.), the Board held that the newly submitted evidence established a material change in conditions pursuant to *Shupink v. LTV Steel Co*., 17 BLR 1-24 (1992), and affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c)(2)-(4) and 718.204(b). However, the Board vacated his findings pursuant to 20 C.F.R. §718.202(a)(1) because he had relied upon the true-doubt rule, at 20 C.F.R. §718.204(c)(1) because he failed to consider a qualifying pulmonary function study, and at Section 718.204(c) because he did not consider the contrary probative evidence. *Troup*, slip op. at 2-6. Accordingly, the Board remanded the case for further consideration.

On remand, the administrative law judge found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), reweighed the opinions of Drs. Levinson, Karlavage, Cable, and Munir, and determined that total respiratory disability had been established pursuant to Section 718.204(c). Decision and Order on Remand at 5, 7-8. Accordingly, he awarded benefits, payable from January 1, 1990. Decision and Order on Remand at 8.

On appeal, employer contends that remand is required under 20 C.F.R. §725.309(d). Employer's Brief at 10. Employer further contends that the administrative law judge's findings at Sections 718.202(a)(4), 718.204(c), and 718.204(b) are unsupported by the record evidence and do not comport with the Administrative Procedure Act. Employer's Brief at 9-21. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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[1] Claimant is Delbert D. Troup, the miner, who filed this claim for benefits on January 31, 1990. Director's Exhibit 1. A prior claim, filed with the Social Security Administration (SSA) on June 25, 1973, was denied on January 18, 1974. Director's Exhibit 46. Claimant requested further review of the claim, which was again denied by SSA on June 13, 1979. *Id*. The claim was reconsidered by the Department of Labor and denied on September 11,
1981. *Id*. Claimant did not appeal the denial.

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding entitlement date and pursuant to 20 C.F.R. §718.202(a)(1). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the Board's application of the material change in conditions standard set out in *Shupink* compels remand. Employer's Brief at 10-11. Subsequent to the issuance of the administrative law judge's Decision and Order and the filing of briefs in this case, the United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, held that, pursuant to Section 725.309, the administrative law judge must consider all of the new evidence to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, BLA (3d Cir. 1995). Because we find that the administrative law judge's analysis of the evidence meets this standard, we reject employer's contention that remand is required for a new material change in conditions finding.

Claimant's prior claim was denied because the existence of pneumoconiosis and total disability due to pneumoconiosis were not established. Director's Exhibit 49. On remand, the administrative law judge weighed the three newly submitted medical opinions and found pneumoconiosis established. Decision and Order on Remand at 5. Later, the administrative law judge found the additional medical opinion evidence from claimant's prior claim supportive of a diagnosis of pneumoconiosis, Decision and Order on Remand at 6-7 n.3, and considered the rest of the record evidence in finding claimant entitled to benefits. Therefore, we conclude that in these circumstances, remand for an explicit material change in conditions finding is unnecessary. *See Keating v. Director, OWCP*, 71 F.3d 1118, BLR (3d Cir. 1995); *cf. Swarrow*, *supra*.

Employer raises a host of arguments challenging the administrative law judge's weighing of the evidence. Employer's Brief at 9-21.

We reject, as we did previously, employer's contention that Dr. Karlavage's opinion is inherently unreliable. Employer's Brief at 13, 17-18; *Troup*, slip op. at 4-5; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). Unlike the medical opinion in *Siwiec*, which was based solely on an invalid pulmonary

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(1983).

function study, Dr. Karlavage's opinion was based on physical examinations, medical and coal mine employment histories, claimant's symptoms, objective testing, and an x-ray. Director's Exhibit 32. In the same vein, we reject employer's argument that Dr. Karlavage's opinion was not credible because it was based on "questionable evidence." Employer's Brief at 13. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

We also reject employer's contention that the administrative law judge's decision to accord greater weight to Dr. Karlavage based on his familiarity with claimant's medical history and physical condition was impermissible and unsupported by the record. Employer's Brief at 14. The administrative law judge acted within his discretion in inferring that Dr. Karlavage, who examined claimant three times and administered objective tests during another office visit, was more familiar with claimant's medical history and physical condition than the other physicians of record. *See Anderson*, *supra*; *Fagg*, *supra*; *see also Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

We disagree with employer's contention that the administrative law judge erred in relying on Dr. Cable's opinion to find pneumoconiosis established because Dr. Cable diagnosed only "coal workers' pneumoconiosis" based "exclusively on a discredited x-ray reading." Employer's Brief at 15. Contrary to employer's contention, "coal workers' pneumoconiosis" is included within the definition of pneumoconiosis. 20 C.F.R. §718.201. Furthermore, Dr. Cable examined claimant, took medical and work histories, administered objective tests, and considered an x-ray reading. Director's Exhibit 13. Dr. Cable explained that his diagnosis was "suggested by CXR," adding that claimant's coal dust exposure in forty-five years of coal mine employment supported the diagnosis. *Id*.

We also reject employer's contentions that the administrative law judge substituted his opinion for that of Dr. Levinson and "intimated . . . that Dr. Levinson's opinion was suspect because he was retained by employer." Employer's Brief at 15-16, 18-19. We are unable to detect in the administrative law judge's discussion of the evidence the bias suggested by employer. *See Cochran v. Consolidation Coal Co*., 16 BLR 1-101 (1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge erred in finding Dr. Cable's opinion worthy of greater weight than that of Dr. Levinson. Employer's Brief at 19. The administrative law judge credited Dr. Cable's interpretation of claimant's pulmonary function study as "suggestive for a mild obstructive pattern" because the doctor explained that the "flow volume loop correlates with this finding." Director's Exhibit 13; Decision and Order on Remand at

7. Because Dr. Levinson did not discuss the flow volume loop, the administrative law judge found his opinion not as well reasoned as Dr. Cable's. Decision and Order on Remand at 7. Inasmuch as the administrative law judge permissibly found Dr. Cable's opinion to be better explained than that of Dr. Levinson, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), we reject employer's contention that the administrative law judge failed to provide a valid rationale for his weighing of the evidence.

Pursuant to Section 718.204(b), employer raises the same allegations of error considered and rejected in the first appeal. Employer's Brief at 19-21; *Troup*, slip op. at 5-7. Inasmuch as employer has not urged that a basis for an exception to the law-of-
the-case doctrine exists, nor is any apparent,[3] we hold that this doctrine is controlling on this issue. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting); *Gillen v. Peabody Coal Co*., 16 BLR 1-22 (1991)(Stage, J., dissenting).

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,437.50 for 16.25 hours of legal services at an hourly rate of $150.00, and reimbursement of $83.25 in expenses incurred for a hearing transcript. As the fee petition appears to be in order, the fee requested and hourly rate are not excessive, and no objections to the fee petition have been received, counsel is awarded a fee of $2,437.50 plus expenses of $83.25 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and counsel is awarded a fee of $2,437.50 plus $83.25 in expenses.

SO ORDERED.

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[3] Employer contends that *Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) requires that the administrative law judge reconsider the medical opinion evidence at Section 718.204(b). We note that the administrative law judge did not apply the true-doubt rule in finding causation established. *See* Decision and Order at 10; Decision and Order on Remand at 8.

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S. DOLDER
Administrative Appeals Judge

_____REGINA C. McGRANERY
Administrative Appeals Judge