BRB No. 00-1203 BLA

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| JOHN R. JONES | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: _____ |
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| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order - Denying Modification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification (00-BLA-0266) of Administrative Law Judge Paul H. Teitler 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] Claimant filed a third petition for modification following the Board's

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Decision and Order in *Jones v. Director, OWCP*, BRB No. 98-0437 BLA (Dec. 16, 1998)(unpublished), and submitted new evidence. Director's Exhibit 115. In *Jones*, the Board affirmed the finding of Administrative Law Judge Ainsworth H. Brown that the newly submitted evidence failed to establish total disability under 20 C.F.R. §718.204(c) (2000).[2]

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Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is

The Board further affirmed Judge Brown's findings that claimant failed to establish a change in conditions or a mistake in a determination of fact on a second request for modification under 20 C.F.R. §725.310 (2000).[3] The Board thus affirmed Judge Brown's denial of benefits. Director's Exhibit 114.

In considering the newly submitted evidence pursuant to claimant's request for modification, Administrative Law Judge Paul H. Teitler (the administrative law judge) found that claimant failed to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c)(1) - (4) (2000). The administrative law judge thus found that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000). The administrative law judge also found that a review of the record did not establish a mistake in a determination of fact in the prior denial, or that claimant had alleged a mistake in a determination of fact. The administrative law judge additionally found that the medical opinions did not establish that claimant's pneumoconiosis was a substantial contributor to his respiratory or pulmonary disability. Accordingly, the administrative law judge denied claimant's request for modification and further denied the claim.

On appeal, claimant contends that the administrative law judge committed reversible error in considering the pulmonary function study evidence. Claimant further contends that the administrative law judge should have accorded greatest weight to Dr. Kraynak's medical opinion that claimant is totally and permanently disabled due to coal workers' pneumoconiosis because his opinion is reasoned and documented and Dr. Kraynak is claimant's treating physician. The Director, Office of Workers' Compensation Programs responds, and seeks affirmance of the decision below.

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,

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now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]The amendments to the regulation at 20 C.F.R. §725.310 (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; 65 Fed. Reg. 80,057.

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 modification under 20 C.F.R. §725.310 (2000), claimant must establish a change in conditions or a mistake in a determination of fact in the prior denial. *Keating v. Director, OWCP,* 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). In the instant case, the prior denial was based on claimant's failure to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c) (2000). *See* 20 C.F.R. §718.204(b).[4]

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant failed to establish a mistake in a determination of fact in the prior decision under 20 C.F.R. §725.310 (2000), that the newly submitted blood gas study evidence fails to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(c)(2) (2000), *see* 20 C.F.R. §718.204(b)(2)(ii), and that there is no evidence to support a finding of total disability under 20 C.F.R. §718.204(c)(3) (2000), *see* 20 C.F.R. §718.204(b)(2)(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant initially contends that the administrative law judge failed to discuss the pulmonary function study conducted by Dr. Kraynak on February 16, 2000 which resulted in qualifying values.[5] Claimant also argues that the administrative law judge erred in according less weight to the qualifying studies dated March 24, 1999 and February 15, 2000, conducted by Dr. Kraynak and Dr. Ahluwalia, respectively.

Claimant's contentions lack merit. Contrary to claimant's assertion, the administrative law judge specifically addressed and weighed Dr. Kraynak's February 16, 2000 pulmonary function study, noting that it was invalidated by Dr. Michos. Decision and Order at 9; *see* Claimant's Exhibit 1; Director's Exhibit 125. Further, the administrative law judge, within his discretion, credited Dr. Michos' invalidation of Dr. Kraynak's March 24, 1999 pulmonary function study based on Dr. Michos' superior credentials. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*,10 BLR 1-24 (1987). With regard to the pulmonary function study conducted by Dr. Ahluwalia on February 15, 2000, the administrative law judge correctly noted Dr. Ahluwalia's opinion that the pulmonary function study was not interpretable due to claimant's variable and poor effort. Decision and Order at 7, 10; *see* Director's Exhibit 123. We thus reject claimant's arguments in this regard and affirm the administrative law judge's finding that the newly submitted pulmonary function studies fail to establish total disability under 20 C.F.R. §718.204(c)(1). *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant next contends that the administrative law judge should have accorded greatest weight to Dr. Kraynak's medical opinion that claimant is totally and permanently disabled due to coal workers' pneumoconiosis, Claimant's Exhibit 2, because his opinion is reasoned and documented and Dr. Kraynak is claimant's treating physician. Claimant asserts:

> What the administrative law judge fails to note is the fact that Dr. Kraynak has examined this Claimant on a regular basis over a period in excess of 5 years. Further, Dr. Kraynak had the opportunity to review the results of multiple diagnostic tests including chest x-rays, pulmonary function studies, arterial

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000); 20 C.F.R. §718.204(b)(2)(i), (ii).

> blood gas study and stress test results. The opinion of Dr. Ahluwalia is based on the results of a single chest x-ray, pulmonary function study (which Dr. Ahluwalia found to be invalid,) a single arterial blood gas study and stress test results.

Claimant's Brief at 3. Claimant's contention lacks merit. The administrative law judge properly noted Dr. Kraynak's May 12, 2000 deposition testimony that claimant has been under his care since February 24, 1992. Decision and Order at 9; Claimant's Exhibit 2 at 7. The administrative law judge was not, however, obligated to accord Dr. Kraynak's opinion determinative weight based on his status as claimant's treating physician. *See Mancia 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). In the instant case, the administrative law judge, within his discretion, accorded less weight to Dr. Kraynak's opinion based on his finding that it was incomplete; that Dr. Kraynak failed to list all of claimant's conditions and the medications he was taking. Decision and Order at 11; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). The administrative law judge further properly found that Dr. Kraynak's opinion that claimant was totally disabled was not supported by its underlying evidence. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). We thus hold that the administrative law judge provided valid reasons for according less weight to the opinion of Dr. Kraynak, the only newly submitted medical opinion which could support claimant's burden on modification. We, therefore, affirm the administrative law judge's finding at 20 C.F.R. §718.204(c)(4) (2000). *See* 20 C.F.R. §718.204(b)(2)(iv).

Based on the foregoing, we hold that the administrative law judge's finding that claimant failed to establish a change in conditions on modification at 20 C.F.R. §725.310 (2000) is supported by substantial evidence. We thus affirm the administrative law judge's denial of claimant's request for modification and his denial of the claim.

Accordingly, the administrative law judge's Decision and Order - Denying Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge