BRB No. 03-0807 BLA

EDWARD O'DONNELL Claimant-Petitioner v. GILBERTON COAL COMPANY and LACKAWANNA CASUALTY COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/08/2004 DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-0419) of Administrative Law Judge Ralph A. Romano 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).[1] The administrative law judge credited claimant with thirty-one

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[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 20 C.F.R. Parts 718, 722, 725 and 726

years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.203. Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[4]

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed a claim on October 31, 1989. Director's Exhibit 27. However, on September 14, 1994, Administrative Law Judge Robert D. Kaplan granted claimant's request to withdraw this claim. *Id*. Claimant filed the instant claim on February 8, 1996. Director's Exhibit 1. On October 8, 1998, Judge Kaplan issued a Decision and Order denying benefits. Director's Exhibit 31. Judge Kaplan's denial was based on claimant's failure to establish the existence of pneumoconiosis. *Id*. While the case was pending before the Board, claimant requested that the Board remand the case to the district director for modification proceedings. Director's Exhibit 36. On March 11, 1999, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *O'Donnell v. Gilberton Coal Co.*, BRB No. 99-0183 BLA (order)(Mar. 11, 1999)(unpub.). The district director denied claimant's request for modification on July 15, 1999. Director's Exhibit 44. In addition, Judge Kaplan issued a Decision and Order denying benefits on August 17, 2000. Judge Kaplan's denial was based on claimant's failure to establish the existence of pneumoconiosis. *Id*. Claimant filed a second request for modification on May 30, 2001. Director's Exhibit 99.

[3]The revisions to the regulation at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

[4]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of six interpretations of a newly submitted x-ray dated November 30, 2001. Drs. Ahmed, Cappiello and Miller read the November 30, 2001 x-ray as positive for pneumoconiosis, Claimant's Exhibits 16, 17, 19, while Drs. Barrett, Ciotola and Sundheim read the same x-ray as negative for pneumoconiosis, Director's Exhibits 106, 108, 109. Although the administrative law judge noted that all of the physicians are B-readers and Board-certified radiologists, he accorded greater weight to the negative x-ray reading provided by Dr. Barrett based on Dr. Barrett's qualifications as a professor of radiology. Alternatively, the administrative law judge found the conflicting x-ray evidence to be in equipoise.

Claimant asserts that the administrative law judge impermissibly engaged in a nose count of the newly submitted x-rays. Contrary to claimant's assertion, in addition to considering the quantity of the newly submitted x-ray readings, the administrative law judge also considered the quality of the newly submitted x-ray readings. The administrative law judge stated, "[t]he x-ray readings in this case are in conflict, with an equal number of [B]oard-certified radiologists having read the November 30, 2001, chest x-ray [as] negative as [those having] read it to be positive." August 5, 2003 Decision and Order at 11. Based on his weighing of the conflicting x-ray readings, the administrative law judge stated that "[a]t best, the x-ray evidence is in equipoise, and as such, insufficient to meet [c]laimant's burden of proof." *Id*. at 12. In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose. Thus, we reject claimant's assertion that the administrative law judge impermissibly engaged in a nose count of the newly submitted x-ray evidence.

Claimant also asserts that the administrative law judge irrationally determined that Dr. Barrett's qualifications are superior to the qualifications of the other physicians of record. The administrative law judge stated, "I find that the newly submitted x-ray is negative, according the greatest weight to the reading rendered by Dr. Barrett, who is not only a B-reader and [B]oard certified radiologist, but a lecturer in pneumoconiosis at the Harvard School of Public Health and an associate clinical professor of radiology at Tufts Medical School." August 5, 2003 Decision and Order at 12. However, the administrative law judge did not explain how Dr. Barrett's credentials as a professor of

radiology are superior to Dr. Cappiello's and Dr. Miller's credentials as professors of radiology. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The record indicates that Dr. Cappiello was an assistant professor of radiology at the Albert Einstein College of Medicine from August 1, 1976 to June 30, 1980 and from September 1, 1982 to September 1, 1984, Claimant's Exhibit 11, and that Dr. Miller is an assistant clinical professor of radiology at the College of Physicians and Surgeons of Columbia University, Claimant's Exhibit 18. Moreover, the record, itself, does not indicate that Dr. Barrett is a professor of radiology. Nonetheless, since the administrative law judge provided a proper alternate basis for finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis, in that he found the conflicting x-ray readings in equipoise, *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12, we hold that any error by the administrative law judge in according greater weight to Dr. Barrett's negative x-ray reading based on his credentials is harmless, *Larioni v. Director, OWCP*, 6 BLR 1-710 (1983). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Next, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted reports of Drs. Dittman, R. Kraynak, M. Kraynak, Kruk and Simelaro. Drs. R. Kraynak, M. Kraynak, Kruk and Simelaro opined that claimant suffers from pneumoconiosis, Director's Exhibit 100, Claimant's Exhibits 1, 4, 20, while Dr. Dittman opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 107; Employer's Exhibit 1.

Claimant asserts that the administrative law judge erred in discrediting the opinions of Drs. R. Kraynak, M. Kraynak and Kruk. Contrary to claimant's assertion, the administrative law judge permissibly discredited the opinions of Drs. R. Kraynak, M. Kraynak and Kruk because they are not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Specifically, the administrative law judge stated that "Dr. R. Kraynak, at best, finds the 'scales to be balanced,' yet states that given [c]laimant's history of coal mine employment, the diagnosis of coal worker's pneumoconiosis should be made." August 5, 2003 Decision and Order at 15. The administrative law judge also stated, "Dr. M. Kraynak submits a one page report which concludes that coal workers' pneumoconiosis is present, failing however, to adequately explain how he reaches this conclusion." *Id.* Additionally, the administrative law judge stated that "Dr. Kruk's medical opinion is also conclusory at best, failing to adequately address how he determines that [c]laimant's pulmonary condition is coal workers' pneumoconiosis." *Id.*

Claimant also asserts that the administrative law judge should have accorded dispositive weight to the opinions of Drs. R. Kraynak and M. Kraynak based on their status as treating physicians. The criteria set forth in 20 C.F.R. §718.104(d)(1)-(4) for considering a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations.[5] Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In this case, although the administrative law judge considered Dr. R. Kraynak's and Dr. M. Kraynak's status as claimant's treating physician, he did not specifically consider their opinions in light of the criteria provided in 20 C.F.R. §718.104(d). Nonetheless, since the administrative law judge permissibly discredited their opinions because they are not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we hold that any error by the administrative law judge in this regard is harmless, *Larioni*, 6 BLR at 1-1278.

Claimant further asserts that the administrative law judge erred in discrediting the opinion of Dr. Simelaro.[6] The administrative law judge discredited the opinions of Drs. Simelaro and Kruk because they relied on an inaccurate smoking history. August 5, 2003

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[5]Dr. R. Kraynak's deposition is dated February 28, 2003 and Dr. M. Kraynak's report is dated May 4, 2001. Director's Exhibit 100; Claimant's Exhibit 20.

[6]Claimant asserts that the administrative law judge erred in considering the smoking histories relied on by the physicians in rendering their opinions with respect to the issue of the existence of pneumoconiosis because "cigarette smoking does not cause opacities on x-rays." Claimant's Brief at 13. Contrary to claimant's assertion, under the facts of this case, claimant's history of smoking is relevant in determining whether pneumoconiosis is established at 20 C.F.R. §718.202(a)(4). In considering medical reports addressing the existence of pneumoconiosis, therefore, the administrative law judge must resolve any inconsistencies between claimant's smoking history, as reflected in the medical reports, and claimant's hearing testimony. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Decision and Order at 15. Dr. Simelaro noted a smoking history of one-half pack per day for fifteen years, Claimant's Exhibit 4, and Dr. Kruk noted that "[claimant] smoked a few cigarettes up until about 35 years ago but then quit," Claimant's Exhibit 1. The administrative law judge noted that "[c]laimant testified that it has been thirty-two to thirty-three years since he last smoked cigarettes." August 5, 2003 Decision and Order at 4; Hearing Transcript at 15. The administrative law judge also noted that "[claimant] stated that he used to smoke one or two cigarettes per day, doing so for approximately fifteen to eighteen years." August 5, 2003 Decision and Order at 4; Hearing Transcript at 18. However, the administrative law judge found that "[Dr. Kruk's] reliance upon a minimal smoking history is…contrary to the facts in the record." August 5, 2003 Decision and Order at 15. Citing Judge Kaplan's August 17, 2000 decision, the administrative law judge concluded that claimant's smoking history "is not an insignificant history." *Id.* Specifically, the administrative law judge stated, "[a]s Judge Kaplan noted in his decision, a cigarette smoking history of half a pack to one pack of cigarettes per day from the ages of 18 to 42 years was recorded." *Id.*

In addition, the administrative law judge stated that "Dr. Simelaro also relies upon an erroneous smoking history, finding seven pack years." *Id.* However, the administrative law judge did not explain why he relied on the smoking history noted in Judge Kaplan's decision, rather than claimant's testimony about his smoking history given in the most recent hearing on this case or any other relevant evidence on the issue. *Wojtowicz*, 12 BLR 1-165; *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Moreover, with respect to the administrative law judge's reference to Judge Kaplan's smoking history, the smoking history noted in Judge Kaplan's Decision and Order was specifically the smoking history noted in Dr. Dittman's November 24, 1999 report. August 17, 2000 Decision and Order at 8. The smoking history noted in Dr. Dittman's report is inconsistent with the smoking history set forth by claimant in his prior hearing dated February 15, 2000. Although Judge Kaplan noted that claimant testified that he smoked one-quarter pack of cigarettes per day for twenty-seven years in the prior hearing, Judge Kaplan did not rely on or discredit claimant's testimony. August 17, 2000 Decision and Order at 3. Thus, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case to the administrative law judge to make an independent smoking history finding and then to reevaluate the medical opinions accordingly.

Claimant additionally asserts that the administrative law judge should have accorded dispositive weight to the opinion of Dr. Simelaro based on his "teaching" credentials and because he is the only pulmonologist who rendered an opinion. Although the record indicates that Dr. Simelaro is a professor of internal medicine at the Philadelphia College of Osteopathic Medicine, the administrative law judge did not

consider Dr. Simelaro's credentials as a professor.[7] Claimant's Exhibit 5. The administrative law judge noted that Drs. Dittman[8] and Kruk are Board-certified in internal medicine, while Dr. Simelaro is Board-certified in internal medicine and "medical diseases of the chest." August 5, 2003 Decision and Order at 14. The administrative law judge also noted that "Dr. R. Kraynak is not [B]oard] certified in any specialty, while Dr. M. Kraynak is [B]oard-certified in family medicine. *Id.* An administrative law judge is not required to defer to the opinions of the physicians with superior qualifications. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). However, in the instant case, the administrative law judge stated that "Drs. R. Kraynak and M. Kraynak lack the credentials of the other physicians of record." August 5, 2003 Decision and Order at 14. Hence, the administrative law judge found that Dr. Dittman's, Dr. Kruk's and Dr. Simelaro's qualifications are superior to the qualifications of Drs. R. Kraynak and M. Kraynak. Nonetheless, the administrative law judge did not indicate that he considered whether the credentials of Dr. Simelaro are superior to the credentials of Drs. Dittman and Kruk. Thus, since the administrative law judge inconsistently considered the qualifications of the physicians, we hold that the administrative law judge erred in his consideration of the relevant qualifications of the physicians. *Wojtowicz*, 12 BLR at 1-165.

Because we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000) and remand the case for further consideration of the evidence. Moreover, we vacate the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), and remand the case for further consideration of the evidence. If, on remand, the administrative law judge finds the evidence sufficient to establish a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), he must then consider this case on the merits based on all the evidence of record.

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[7]The record reflects that Dr. Simelaro is a professor of internal medicine. The administrative law judge must determine on remand, *inter alia*, whether Dr. Simelaro's "teaching" credentials are relevant in weighing the medical opinions at 20 C.F.R. §718.202(a)(4).

[8]Dr. Dittman's curriculum vitae notes "[s]pecialt[ies] in [i]nternal [m]edicine [and] [p]ulmonary [d]isease." Director's Exhibit 107.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge