

BRB No. 03-0824 BLA

JUDY M. RICHARD (on behalf of	)	
BARBARA A. RAY, Surviving Child of	)	
RALPH E. RAY)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING	)	DATE ISSUED: 09/28/2004
CORPORATION	)	
	)	
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 on Second Remand - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Julie A. Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand - Denying Benefits (97-BLA-0952) of Administrative Law Judge Richard A. Morgan on a survivor's claim<sup>1</sup> filed

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<sup>1</sup> On May 17, 1996, claimant, Judy M. Richard, filed the current survivor's claim on behalf of her sister, Barbara A. Ray, who is the miner's dependent disabled child. Director's Exhibit 1. The miner, Ralph E. Ray, filed an application for benefits on April 1, 1987, which was finally denied in a Decision and Order issued by Administrative Law Judge Michael F. Colligan on June 2, 1989. Director's Exhibit 38. The miner died on April 18, 1996. Director's

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).<sup>2</sup> This case is before the Board for the third time. The procedural history of this case is contained in the Board's most recent decision. *Richard v. Keystone Coal Mining Corp.*, BRB No. 00-0152 BLA (Jan. 29, 2001) (unpub.). In that decision, the Board held that the administrative law judge failed to follow its previous remand instructions to indicate how much weight, if any, he accorded the negative CT scan readings. The Board held further that the administrative law judge erred in finding that the diagnosis of cor pulmonale rendered by Drs. Patel and Rao was an indicator of the existence of pneumoconiosis and erred in relying on a medical treatise that was not a part of the record in order to credit Dr. Wald's opinion under 20 C.F.R. §§718.202(a) and 718.205(c). The Board additionally held that the administrative law judge failed to provide a basis or reason for his crediting of the opinions of Drs. Eligator and Connelly. Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.205(c) and remanded the case.

On remand, the administrative law judge reevaluated all of the medical opinion evidence of record, including the CT scan evidence, in accordance with the Board's remand instructions and concluded that he could no longer find the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge found that the x-ray and CT scan evidence was overwhelmingly negative for the existence of pneumoconiosis and that the preponderance of the medical opinion evidence failed to establish the presence of pneumoconiosis under Section 718.202(a)(4). Therefore, the administrative law judge determined that a finding of entitlement was precluded because claimant failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in reversing his prior credibility determinations on remand in order to find that the opinions of Drs. Scott, Tuteur, and Bush outweighed the opinion of Dr. Wald and erred in finding that Dr. Sinnenberg's opinion was equivocal. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

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Exhibit 12.

<sup>2</sup> 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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).

Claimant argues that the administrative law judge erred in reversing his prior credibility determinations under Section 718.202(a)(4) because the Board affirmed these findings in its previous decision, and consequently, these determinations became the law of the case and were binding on subsequent proceedings.<sup>3</sup> Claimant asserts, therefore, that the administrative law judge’s crediting on remand of the opinions of Drs. Scott, Tuteur, and Bush, physicians who found that the miner did not have pneumoconiosis, contradicts the Board’s affirmance of the administrative law judge’s previous rejection of these physicians’ opinions.

Contrary to claimant’s assertion, the Board did not explicitly or implicitly affirm the administrative law judge’s previous relevant determinations. Rather, in reviewing the administrative law judge’s determination as to whether the existence of pneumoconiosis was established, the Board vacated the administrative law judge’s weighing of the medical opinion evidence and his attendant finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) in both the 1999 and 2001 decisions. *Richard*, BRB No. 00-0152 BLA, *slip op.* at 7; *Richard*, BRB No. 98-1146 BLA, *slip op.* at 5. It is well established that when the Board vacates an administrative law judge’s decision, be it an award or denial of benefits, it annuls or sets aside that decision rendering it of no force or effect. The effect of the Board’s action is to return the parties to the *status quo ante* the administrative law judge’s decision. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). Consequently, the Board’s 2001 decision to vacate the administrative law judge’s finding at Section 718.202(a), in effect, annulled all of the administrative law judge’s prior pertinent weighing of the evidence, factual findings, and conclusions of law. Thus, the administrative law judge was not bound by his prior credibility determinations when he reconsidered the medical evidence on remand. Because the administrative law judge discussed the CT scan and medical opinion evidence on remand in accordance with the Board’s instruction and sufficiently explained his weighing of the conflicting evidence of record, we reject claimant’s argument that the administrative law judge erred in making credibility determinations *de novo*.

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<sup>3</sup> In support of her argument, claimant cites the Board’s 1999 decision stating, “In crediting Dr. Wald’s opinion, the administrative law judge permissibly criticized Dr. Scott for failing to account persuasively for the miner’s exposure to coal dust.” *Richard v. Keystone Coal Mining Corp.*, BRB No. 98-1146 BLA., *slip op.* at 5 (May 21, 1999) (unpub.). Similarly, claimant cites the Board’s 2001 decision stating, “The administrative law judge again, as previously affirmed by the Board, discounted Dr. Scott’s opinion, ... that claimant did not have coal workers’ pneumoconiosis or occupational lung disease...,” *Richard v. Keystone Coal Mining Corp.*, BRB No. 00-0152 BLA, *slip op.* at 4 n.4 (Jan. 29, 2001) (unpub.).

Claimant next contends that the administrative law judge erred in rejecting the opinion of Dr. Wald because, in his prior decisions, the administrative law judge credited Dr. Wald's opinion as he was the only physician who considered the impact of the miner's many years of coal mine employment, which caused the miner's chronic obstructive pulmonary disease. Acknowledging that the administrative law judge's discounting of Dr. Wald's opinion "appears to follow established principles for weighing evidence," claimant argues that, nevertheless, the administrative law judge erred in according less weight to Dr. Wald's opinion because he is only an A-reader and not a Board-certified pulmonologist, where Dr. Wald is Board-certified in internal medicine, a Fellow in the College of Chest Physicians, and an assistant professor of clinical medicine at the University of Pittsburgh. Further, claimant contends that the administrative law judge erred in criticizing Dr. Wald's admission during his deposition that part of his testimony was "conjecture" and "only a possibility." Brief of Claimant at 11.

Contrary to claimant's contention, the administrative law judge acknowledged Dr. Wald's medical expertise by noting that he is Board-certified in internal medicine, that a significant portion of his practice is devoted to pulmonary medical care, and that he is an A-reader. However, the administrative law judge found that the opinions of Drs. Scott, Tuteur, and Bush, physicians who opined that the miner did not suffer from coal workers' pneumoconiosis, were more persuasive because these physicians "are well-credentialed, Board-certified pulmonary specialists." See *Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002) ("physicians' reasoning, consideration of records, and credentials are relevant to an ALJ's determination"); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); Decision and Order on Second Remand at 12, 16. The administrative law judge accorded less weight to Dr. Wald's opinion that, while the miner's chronic obstructive pulmonary disease initially resulted from his cigarette smoking history, this disease was aggravated and accelerated by coal dust exposure, because it was not only "somewhat ambiguous and conflicting" but also contrary to the preponderance of the more credible medical evidence. Decision and Order on Second Remand at 13-14. Specifically, the administrative law judge noted that Dr. Wald characterized as "just conjecture" his own deposition testimony that, even though the miner's x-rays and CT scan did not demonstrate any radiographic manifestations of pneumoconiosis, abnormalities indicative of pneumoconiosis may have been masked by the changes due to the emphysema in the miner's lungs. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); cf. *Balsavage*, 295 F.3d at 397, 22 BLR at 2-396 (finding error in administrative law judge's rejection of physician's opinion as "qualified" since entire opinion must be read in context); Claimant's Exhibit 5 at 45. The administrative law judge found that while Dr. Wald disagreed with the prior finding in the miner's claim in 1989, that the miner did not have pneumoconiosis, he admitted that the likelihood of the miner developing pneumoconiosis after 1989 would be very small. In addition, the administrative law judge noted that Dr. Wald's disagreement with the previous

finding that the miner did not have pneumoconiosis was not only contrary to Judge Colligan's adjudication of the miner's claim, but was also contrary to the well-reasoned and documented medical opinions of three Board-certified pulmonary specialists, namely Drs. Scott, Tuteur, and Bush. Decision and Order on Second Remand at 14. Consequently, the administrative law judge found that, in light of Dr. Wald's flawed opinion, he could no longer find that Dr. Wald's opinion was more persuasive than the opinions of Drs. Scott, Tuteur, and Bush regarding the existence of pneumoconiosis. Contrary to claimant's contention that the administrative law judge improperly rejected Dr. Wald's opinion simply because Dr. Wald disagreed with the opinions of "other qualified physicians," the administrative law judge properly found that the opinions of the "other physicians" were better reasoned and rendered by physicians with greater pulmonary expertise. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Because the administrative law judge critically assessed the probative value of each medical opinion and, within a rational exercise of his discretion, discounted Dr. Wald's opinion because it contained flaws rendering it less probative, we reject claimant's argument that the administrative law judge improperly discounted Dr. Wald's opinion.

Contesting the administrative law judge's weighing of Dr. Sinnenberg's opinion, claimant argues that the administrative law judge erred in finding that Dr. Sinnenberg's opinion was equivocal. Claimant avers that Dr. Sinnenberg's mere usage of the terms "probably" and "if" does not necessarily nullify his medical opinion that the miner suffered from coal workers' pneumoconiosis. A review of Dr. Sinnenberg's opinion reveals that the administrative law judge's determination was rational and supported by substantial evidence. The administrative law judge reevaluated Dr. Sinnenberg's September 19, 1997 opinion that objective medical evidence of coal workers' pneumoconiosis was not consistently documented in the medical records. Specifically, Dr. Sinnenberg found that "the preponderance of opinion appears to indicate that coal workers' pneumoconiosis did not exist," but given the miner's occupational exposure, coal workers' pneumoconiosis "may have existed to some mild extent." Employer's Exhibit 3. Similarly, the administrative law judge reconsidered Dr. Sinnenberg's November 25, 1997 deposition testimony that the miner "probably had a mild form of coal workers' pneumoconiosis" and "if the coal workers' pneumoconiosis was present at all, it was very mild, ... in the form that would not show up consistently on a chest x-ray." Employer's Exhibit 7 at 13, 14. The administrative law judge properly found that Dr. Sinnenberg, who is Board-certified in pathology, rendered an equivocal opinion regarding the existence of pneumoconiosis and therefore, found that this opinion was worthy of little weight. See *Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; Decision and Order on Second Remand at 15. Further, the administrative law judge noted that Dr. Sinnenberg's opinion that pneumoconiosis, if found, did not cause any physiologic impairment or hasten the miner's death, was consistent with the opinions of Drs. Scott, Tuteur, and Bush, physicians who, as found by the administrative law judge, rendered more

credible opinions. Accordingly, we reject claimant's argument challenging the administrative law judge's weighing of Dr. Sinnenberg's opinion.

Next, claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Scott, Tuteur, and Bush because they failed to address the issue of whether the miner had legal or statutory pneumoconiosis and only addressed the issue of whether the miner had clinical pneumoconiosis. We disagree. In his reports dated April 11, 1988, February 1, 1989, and December 31, 1996, Dr. Scott opined that the miner suffered from marked impairment due to chronic obstructive pulmonary disease with emphysema caused by cigarette smoking over a period of years. Director's Exhibits 34, 38. On December 29, 1988, Dr. Tuteur opined that the miner's severe chronic obstructive pulmonary disease, manifested both by chronic bronchitis and emphysema, was not related to, aggravated by, or caused by the inhalation of coal mine dust and concluded that the miner had no disease process arising out of coal mine dust exposure. Director's Exhibit 38. Likewise, Dr. Bush diagnosed chronic obstructive pulmonary disease, primarily of the emphysematous type with an element of chronic bronchitis, due to cigarette abuse. Director's Exhibit 38.

The regulation set forth in 20 C.F.R. §718.201 provides, in pertinent part, "[f]or purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae... arising out of coal mine employment. ... For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a), (b). Chronic obstructive lung disease is encompassed within the definition of pneumoconiosis for purposes of entitlement to benefits provided that there is competent medical evidence that the miner's coal dust exposure contributed to this pulmonary condition. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000) (legal definition of pneumoconiosis requires evidence that coal dust exposure aggravated respiratory condition); *Handy v. Director, OWCP*, 16 BLR 1-73, 1-76 (1990) (medical opinions insufficient to support finding of pneumoconiosis where physicians found respiratory condition unrelated to dust exposure in miner's coal mine employment); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990). Consequently, the opinions of Drs. Scott, Tuteur, and Bush addressed the issue of the presence, or rather absence in this case, of legal pneumoconiosis inasmuch as these physicians opined that the miner's chronic obstructive pulmonary disease was related to the miner's cigarette smoking history and not to his dust exposure in his coal mine employment. Hence, contrary to claimant's assertion, the opinions of Drs. Scott, Tuteur, and Bush addressed the issue of whether the miner suffered from pneumoconiosis as defined in the Act, and we hold that the administrative law judge reasonably found that these physicians' opinions were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201.

Claimant also asserts that because Drs. Scott, Tuteur, and Bush opined that the

miner's "long-term exposure to coal dust had no impact at all on his medical condition," the administrative law judge erred in according dispositive weight to these physicians' opinions because this conclusion is antithetical to the Act. Brief of Claimant at 14. Further, claimant argues that the opinions of Drs. Scott, Tuteur, and Bush are not persuasive evidence on the issue of whether the miner had pneumoconiosis because they were rendered in 1988 and 1989, which was seven or eight years before the miner died. Claimant asserts that these opinions are thus "too old and stale to constitute reliable evidence." Brief of Claimant at 15.

As an initial matter, claimant is correct that most of the circuit courts have held that an administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act, *e.g.*, pneumoconiosis does not progress after cessation of a miner's coal mine employment, obstructive disorders cannot be caused by coal mine employment, etc., because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). However, none of the challenged physicians herein assumed that coal mine employment can never cause chronic obstructive pulmonary disease; they merely opined that in this case, the miner's chronic obstructive pulmonary disease was not caused by his coal mine employment but rather was caused by his cigarette smoking history. *See Stiltner*, 86 F.3d at 341, 20 BLR at 2-254; Director's Exhibit 38. Thus, contrary to claimant's argument, none of the challenged physicians rendered a conclusion based on a premise that is fundamentally at odds with the statutory and regulatory scheme of the Act. Accordingly, we reject claimant's contention in this regard. Furthermore, claimant's contention concerning the lack of recency of the opinions of Drs. Scott, Tuteur, and Bush is without merit where "a bare appeal to recency is an abdication of rational decisionmaking." *Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97, 2-101 (4th Cir. 1995) (table); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993).

Finally, claimant contends that her right to due process was violated because she was denied the opportunity to confront and to cross-examine Drs. Scott, Tuteur, and Bush regarding their medical opinions in this case. Claimant argues that because the medical reports of Drs. Scott, Tuteur and Bush were "buried within the massive stack of documents" her attorney received while the litigation of this matter was pending and because employer failed to emphasize these reports, instead of only emphasizing the opinion of Dr. Sinnenberg, claimant was denied a reasonable opportunity to confront and to cross-examine these physicians.

Claimant's assertion lacks merit. A review of the record reveals that claimant's counsel has been representing claimant since she initially filed the survivor's claim in 1996.

At the formal hearing held on December 18, 1997, counsel for claimant was present when the reports of Drs. Scott, Tuteur, and Bush, contained at Director's Exhibit 38 with all of the documents pertaining to the miner's claim, were admitted into the record and counsel did not object to their admission. *See* [1997] Hearing Transcript at 5-6; [1988] Decision and Order at 2. Moreover, claimant, by counsel, did not raise this argument at any time during the prior proceedings in this case. Absent exceptional circumstances, a claim not raised before the administrative law judge is waived. *Bracher v. Director, OWCP*, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994); *Thorn*, 3 F.3d at 717, 18 BLR at 2-22; *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986); *See Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984) (Board will not address issue raised for first time on appeal). Furthermore, it is not the responsibility of employer, or any other party, to inform claimant's counsel as to which exhibits are, or are not, important or particularly significant.

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).<sup>4</sup> Because claimant has failed to satisfy her burden to establish that the miner suffered from pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Accordingly, the Decision and Order on Second Remand - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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<sup>4</sup> Citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), claimant argues that the Board, in its prior decisions, erroneously interpreted the holding in *Williams* by concluding that the administrative law judge's failure to state what weight he assigned to a particular item of evidence constituted a failure to actually consider that item of evidence, and as such, his decision failed to demonstrate that he weighed all the evidence together. Claimant's failure to raise this issue previously obviates the need for the Board to address it now. *See* 20 C.F.R. §802.407; *see also Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984) (Board will not address issue raised for first time on appeal). Notwithstanding, a review of the case history reveals that claimant's assertion is without merit.

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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