BRB No. 00-0835 BLA

EDWARD BITEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Harold H. Davis, Jr. (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (Judith E. Kramer, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (97-BLA-1464) of Administrative Law Judge Ralph A. Romano 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] This case is before the Board for the second time. In the administrative law judge's initial Decision and Order-Denying Benefits, issued on July 21, 1998, the administrative law judge noted that the parties had stipulated to twenty-eight years of coal mine employment and noted that this case involved a duplicate claim.[2] The administrative law judge found the newly submitted evidence insufficient to establish either the existence of pneumoconiosis or total disability, and therefore found that claimant did not establish a material change in conditions. Accordingly, benefits were denied.

On claimant's appeal, the Board vacated the administrative law judge's finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)(2000). The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to 20

[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.

[2] Claimant filed a claim for benefits on May 23, 1973, which was denied by the district director on July 10, 1980. Director's Exhibit 30. On February 20, 1988, claimant filed another application for benefits, which was denied by the district director on April 5, 1988. Director's Exhibit 32. The instant claim was filed on January 21, 1997. Director's Exhibit 1.

C.F.R. §718.202(a)(2)-(3)(2000). The Board also rejected claimant's assertions concerning the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §718.202(a)(4)(2000). In addition, the Board affirmed the administrative law judge's finding that the newly submitted evidence was insufficient to establish the existence of a totally disabling respiratory impairment. In view of the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Board instructed the administrative law judge, on remand, to consider all of the evidence relevant to the existence of pneumoconiosis. *Bitel v. Reading Anthracite Co.*, BRB No. 98-1446 BLA (Aug. 6, 1999)(unpub.).

On remand, the administrative law judge reevaluated the x-ray evidence and found it "evenly balanced." 2000 Decision and Order at 3. Since claimant bears the burden of persuasion, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis. The administrative law judge incorporated by reference his prior evaluation of the medical opinion evidence, and found that claimant "failed to establish the presence of pneumoconiosis under any of the methods set forth at Section 718.202." 2000 Decision and Order at 3. Consequently, the administrative law judge determined that claimant did not establish a material change in conditions on the issue of the presence of pneumoconiosis. The administrative law judge noted that the Board had affirmed his earlier finding that a material change in conditions was not established on the issue of total disability. Accordingly, he denied benefits. 2000 Decision and Order at 3.

On appeal, claimant asserts that there is a typographical error in the 2000 Decision and Order where the administrative law judge refers to a February 4, 1999 film, which is actually a February 4, 1991 film. Claimant also asserts that the administrative law judge erred by finding the x-ray evidence to be equally probative since six of the ten x-ray interpretations are positive for pneumoconiosis and four of the ten x-ray interpretations are negative for pneumoconiosis. Claimant asserts that rather than being equally probative, the evidence is sufficient to establish the existence of pneumoconiosis. Claimant also asserts that the administrative law judge erred in considering the medical opinion evidence. Specifically, claimant alleges that the opinions of Drs. Kruk and Kraynak are sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and claimant maintains that these opinions are more probative than the opinions of Drs. Dittman and Rashid.

Employer responds, urging affirmance of the administrative law judge's 2000 Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by Order issued on March 9, 2001, to which all of the parties have responded. Claimant states that it is his position that the amended regulations will not affect the outcome of this case. Employer asserts that the amended regulations do not affect the disposition of the issues before the Board on appeal. Employer further asserts, however, that if the amended regulations are upheld, remand would be required for further development of the evidence. The Director indicates that application of the amended regulations will not affect this case. Based on the briefs submitted by claimant, employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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).

In evaluating the x-ray evidence on remand, the administrative law judge described the interpretations of the physicians who are both B-readers and Board-certified radiologists. The administrative law judge stated that the March 6, 1990 film was interpreted once as negative and twice as positive, and that the February 4, 1991 film was interpreted once as negative and once as positive by these highly qualified physicians. The administrative law judge also found that the February 19, 1997 film was interpreted once as negative and three times as positive, while the January 6, 1998 film was interpreted once as negative by these highly qualified physicians. 2000 Decision and Order at 3. In weighing the evidence, the administrative law judge stated:

> I note that physicians with equally high qualifications reached equally probative but conflicting opinions after reviewing the x-ray films. Under such circumstances, I find the readings of the newly submitted x-ray reports are equally probative and, thus, I find the evidence is evenly balanced. When the evidence is evenly balanced, the benefits claimant must lose since he bears the burden of persuasion.

2000 Decision and Order at 3. Consequently, the administrative law judge found the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis.

As an initial matter, we hold that the administrative law judge's error in describing the February 4 x-ray as being taken in 1999, rather than in 1991, is, as claimant acknowledges, a typographical error, which has no impact on the administrative law judge's evaluation of the evidence. As such, this error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, we reject claimant's assertion regarding the administrative law judge's weighing of the x-ray evidence. The administrative law judge properly considered the quality and the quantity of the x-ray interpretations. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. Director, OWCP*, 8 BLR 1-150 (1985). The Board is not permitted to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Three of the four films were interpreted as both positive and negative for pneumoconiosis by highly qualified physicians. The record contains only one interpretation of the fourth film, which was a negative reading. We hold that, given the facts in this case, it was not irrational for the administrative law judge to determine that the x-ray evidence is insufficient to demonstrate the existence of pneumoconiosis. *See Ondecko, supra*; *Roberts, supra*; *Dixon, supra*.

Claimant again challenges the administrative law judge's weighing of the medical opinion evidence regarding the existence of pneumoconiosis and total disability. The Board previously upheld the administrative law judge's findings regarding the administrative law judge's weighing of the medical opinion evidence. *See Bitel*, slip op. at 3-5. The doctrine of the law of the case provides that when a case is before a tribunal for the second time, the tribunal will adhere to its prior decision. Consequently, we hold that claimant's allegation of error lacks merit, inasmuch as the Board's prior holding on this issue constitutes the law of the case, and claimant has not argued that any of the exceptions to the law of the case doctrine apply in this instance. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Inasmuch as claimant raises no other issues on appeal, we affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge