BRB No. 01-0616 BLA

PAUL DRAHUSCHAK (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Joseph E. Janc (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2000-BLA-0693) of Administrative Law Judge Ainsworth H. Brown rendered 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's initial application for benefits filed on May 7, 1973 was denied by the Social Security Administration on July 30, 1973 and again on June 21, 1979, and was ultimately denied by the Department of Labor on November 9, 1979. Director's Exhibit 18. Claimant's second application for benefits filed on November 9, 1982 was finally denied on November 29, 1983. Director's Exhibit 19. On November 8, 1999, claimant filed the current claim, which is a subsequent claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d)(2000). The District Director of the Office of Workers' Compensation denied the claim and claimant requested a hearing, which was held on September 13, 2000.

The administrative law judge found that the chest x-ray and medical opinion evidence developed since the prior denial, when weighed together, did not establish the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The administrative law judge additionally found that the medical evidence developed since the prior denial did not establish the presence of a totally disabling respiratory or pulmonary impairment. Consequently, the administrative law judge concluded that the new medical evidence did not establish a material change in conditions as required by 20 C.F.R. §725.309(d)(2000), and he therefore denied benefits.

On appeal, claimant contends that the administrative law judge erred in admitting into evidence a medical report submitted by employer without determining whether good cause existed for employer's failure to exchange the report with claimant at least twenty days before the hearing as required by 20 C.F.R. §725.456(b)(1),(2)(2000). Claimant alleges that the administrative law judge erred

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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 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.

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 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*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. No party responded. 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*, 160 F. Supp.2d 47 (D.D.C. 2001).

further by limiting to one each the number of post-hearing x-ray readings the parties could obtain of a particular x-ray, and by permitting employer to replace one physician's reading of that x-ray with the reading of a more highly qualified physician. Claimant additionally contends that the administrative law judge made several errors in his analysis of the chest x-ray readings, the medical opinions, and the pulmonary function studies when he found that neither the existence of pneumoconiosis nor the presence of total disability were established. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

Initially, claimant contends that the administrative law judge erred by admitting into the record Dr. Sander Levinson's August 23, 2000 physical examination report and related testing. Claimant notes that employer failed to send Dr. Levinson's report to claimant at least twenty days before the hearing, and asserts that the administrative law judge did not first determine whether employer demonstrated good cause for failing to timely exchange Dr. Levinson's report before the administrative law judge admitted the report into the record.

Any evidence not submitted to the District Director "may be received into evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(1)(2000). Evidence that was not sent to all parties at least twenty days before the hearing may nevertheless be admitted by the administrative law judge if the parties waive the twenty-day requirement, or "upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph." 20 C.F.R. §725.456(b)(2)(2000). We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(*en banc*).

Review of the hearing transcript indicates that when claimant objected to Employer's Exhibit 8, Dr. Levinson's report, based on the twenty-day rule, the administrative law judge asked employer's counsel whether "there [was] any good cause to explain that submission within the 20 day period of [the] Hearing?" Tr. at 8. Employer's counsel responded that good cause existed because claimant's examination and testing initially scheduled for June 22, 2000 with Dr. Levinson had to be rescheduled when, on the day of the examination, claimant advised that he was unable to attend. *Id*. Employer's counsel indicated further that the earliest available examination date was July 27, 2000, and that thereafter, Dr. Levinson did

not write his report until August 23rd, and employer did not receive it until August 25th, nineteen days before the September 13th hearing date. Tr. at 8, 11. After hearing this uncontradicted explanation, the administrative law judge ruled, "All right. Well I'll allow the--I'll allow 1 through 9 in the record. The Claimant will have rebuttal with respect to RO-8." Tr. at 11.

On these facts, we conclude that the administrative law judge satisfied his obligation to make a good cause determination under 20 C.F.R. §725.456(b)(2)(2000). *See Conn v. White Deer Coal Co*., 6 BLR 1-979, 1-982 (1984); *cf. Buttermore v. DuQuesne Light Co*., 8 BLR 1-36 (1985)(Smith, J., dissenting). We detect no abuse of discretion in the administrative law judge's conclusion that good cause was shown under the circumstances, and we therefore hold that he did not err in admitting Dr. Levinson's examination report into the record. *See Clark, supra*. In reaching this conclusion, we note that the administrative law judge properly held the record open for forty-five days for claimant to submit post-hearing evidence in response to Dr. Levinson's report. Tr. at 11, 44; *see* 20 C.F.R. §725.456(b)(3)(2000); *North American Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Baggett v. Island Creek Coal Co*., 6 BLR 1-1311, 1-1314 (1984). The administrative law judge admitted that evidence into the record and considered it. Claimant's Exhibits 17-19. Therefore, we reject claimant's allegation of error and we affirm the administrative law judge's ruling admitting Dr. Levinson's examination report into the record.

Claimant next contends that the administrative law judge abused his discretion in limiting the number of post-hearing readings of the July 27, 2000 chest x-ray and in allowing employer to replace Dr. Levinson's negative reading of that x-ray with the negative reading of a Board-certified radiologist and B-reader. At the hearing, the parties discussed and agreed upon the scope of post-hearing evidentiary development regarding the July 27, 2000 x-ray, and review of the hearing transcript reveals no objection by claimant to this arrangement. Tr. at 17-23. Because claimant waived this issue by failing to object before the administrative law judge, he cannot now raise the argument before the Board.[2] *Dankle v. DuQuesne Light Co*., 20 BLR 1-1, 1-6 (1995). Accordingly, we now turn to the administrative law judge's consideration of the medical evidence.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989);

[2] In any event, the hearing transcript reflects that the administrative law judge did not impose this arrangement; he merely granted the parties' requests in this matter. Tr. at 17-23.

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(c)(1)(2000), the administrative law judge found that the five new pulmonary function studies did not establish total disability. All five studies appear to be qualifying,[3] but the technical validity of each study was questioned by physicians who reviewed the tracings. Director's Exhibit 3; Claimant's Exhibits 1, 2, 10, 12. Claimant contends that the administrative law judge erred in finding all of the new pulmonary function studies to be invalid. This argument lacks merit.

Contrary to claimant's contention, the administrative law judge permissibly deferred to the consulting opinion of Dr. Sander Levinson that the studies administered on November 24, 1999, February 17, 2000, February 23, 2000, June 6, 2000, and August 2, 2000 were invalid because they did not conform to the applicable quality standards. Employer's Exhibits 1, 5, 9; *see* 20 C.F.R. §718.103(c)(2000); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). For each of these tests, Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease, concluded based on review of the tracings that the test was improperly administered and that claimant's effort was unacceptable. The administrative law judge considered Dr. Raymond Kraynak's and Dr. Matthew Kraynak's disagreement with these invalidations, Decision and Order at 5, 7-8; Claimant's Exhibits 7, 8, 11, 13, 14, 16, but rationally deferred to Dr. Levinson's conclusion based on his "superior expertise."[4] Decision and Order at 8; *see Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Consequently, we hold that the administrative law judge permissibly found that the new pulmonary function studies were invalid.

Pursuant to 20 C.F.R. §718.204(c)(2)(2000), the administrative law judge found that claimant's new blood gas studies were "normal," Decision and Order at 7, a finding that coincides with the administering physicians' interpretation of those

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[3] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. *See* 20 C.F.R. §718.204(b)(2)(i). Those tables list values for miners up to age 71 whereas claimant was 82 when he was tested. The administrative law judge did not categorize the resulting values as either qualifying or non-qualifying. As neither party on appeal has stated that the exceedingly low values that were obtained on the new tests would not be labeled at least facially "qualifying," we have assumed for purposes of discussion that the new tests were qualifying.

[4] Review of the record indicates that Dr. Raymond Kraynak is Board-eligible in Family Practice, and Dr. Matthew Kraynak is Board-certified in Family Practice. Claimant's Exhibits 9, 15.

studies and which claimant does not challenge. Both studies were non-qualifying. Director's Exhibit 6; Employer's Exhibit 8. Therefore, we affirm the administrative law judge's finding. Additionally, review of the record discloses no evidence of *cor pulmonale* with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).

Pursuant to 20 C.F.R. §718.204(c)(4)(2000), the administrative law judge considered the medical opinions of Drs. Raymond and Matthew Kraynak, Dr. Levinson, and Dr. Simelaro, who, like Dr. Levinson, is Board-certified in Internal Medicine and Pulmonary Disease. Drs. Kraynak concluded that claimant's pulmonary function studies reflected a severe and totally disabling respiratory impairment. Director's Exhibit 5; Claimant's Exhibits 11, 14, 18. Dr. Simelaro similarly opined that claimant's pulmonary function studies revealed severe obstruction that was totally disabling. Claimant's Exhibit 19. Dr. Levinson noted that claimant's blood gas studies were normal, concluded that all of the pulmonary function studies were invalid and thus unreliable, and reported that despite several attempts during his examination, he was unable to administer pulmonary function testing due to claimant's lack of cooperation. Employer's Exhibit 1, 5, 8, 9.

Having permissibly found that the pulmonary function studies were invalid, *see* discussion, *supra*, the administrative law judge rationally found that the Kraynaks' diagnosis of total disability was "less probative in comparison with Dr. Levinson's conclusion." Decision and Order at 8; *see Siwiec, supra*. Additionally, the administrative law judge permissibly found that Dr. Simelaro, although highly qualified, diagnosed severe obstruction by pulmonary function study without explaining how he accounted for the invalidation of those studies. Decision and Order at 5, 8; *see Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-154 (1989)(*en banc*). Contrary to claimant's contention, the administrative law judge adequately explained his analysis and substantial evidence supports his finding that the medical opinions did not establish total disability, a finding we therefore affirm.

Claimant contends that remand is required because the administrative law judge, in finding that claimant did not establish the existence of pneumoconiosis with the new medical evidence, did not analyze Dr. Matthew Kraynak's diagnosis of pneumoconiosis.

Upon review of the record as a whole, we hold that remand is not required. The administrative law judge permissibly found that the newly developed evidence did not establish total disability. Review of the record indicates further that even if all of the evidence of record were considered after a finding of a material change in conditions, *see* 20 C.F.R. §725.309(d)(2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318, 20 BLR 2-76, 2-96 (3d Cir. 1995), a finding of total disability is precluded. All of the new pulmonary function studies were found to be invalid.

Review of the old studies reveals that claimant's November 2, 1982 pulmonary function study was qualifying but was declared invalid by the physician who administered it due to claimant's lack of cooperation. Director's Exhibit 19 at 13. Claimant's January 27, 1983 pulmonary function study was non-qualifying. Director's Exhibit 19 at 6. Claimant's January 27, 1983 blood gas study was non-qualifying, as were the two new studies. Director's Exhibits 6, 19 at 8; Employer's Exhibit 8. The new medical opinions diagnosing total disability were permissibly discounted, and the old medical opinion evidence consists of a January 7, 1982 report by Dr. Norman Wall finding no evidence of disability, and a January 11, 1983 report by Dr. John Karlavage which does not diagnose an impairment or address total disability. Director's Exhibit 19 at 7, 13. Because the record contains no evidence to support a finding of total disability, a necessary element of entitlement under Part 718, a remand for the administrative law judge to reweigh the new evidence pertaining to the existence of pneumoconiosis is unnecessary. *See Anderson, supra*; *Trent, supra*. Consequently, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge