

BRB No. 00-0251 BLA

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

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

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

Helen H. Cox (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand (97-BLA-00859) of Administrative Law Judge Ainsworth H. Brown 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Pursuant to claimant's prior appeal, the

¹ Claimant filed his claim for benefits on September 23, 1996, which was denied by the Office of Workers' Compensation Programs on July 14, 1998. Director's Exhibit 1. On August 6, 1999, the Board affirmed in part, vacated in part, and remanded the case to the administrative law judge. On October 28, 1999, the administrative law judge denied benefits.

Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. 718.202(a)(2) and (3), but vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. 718.202(a)(1), as the administrative law judge found the x-rays equally probative and failed to consider the readers' qualifications in weighing the x-ray evidence of record. The Board also vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. 718.202(a)(4) as the administrative law judge selectively analyzed and mischaracterized the medical opinions of record. The Board remanded the case to the administrative law judge to reweigh the x-rays and medical opinions of record pursuant to 20 C.F.R. Section 718.202(a) pursuant to *Penn Allegheny Coal Co. v. Williams*, 111 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

On remand, the administrative law judge noted that he was required "to weigh all of the evidence together and not separately," pursuant to *Williams, supra*, and concluded upon consideration of the evidence that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). Benefits were, accordingly, denied. Decision and Order on Remand at 3. On appeal, claimant contends that the administrative law judge failed to follow the Board's remand instructions when he weighed the evidence of record pursuant to 20 C.F.R. §718.202(a)(1) and (4), and that if he had, he would have found that the evidence supports a finding of the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, is not participating 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 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).

After careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. On remand, the administrative law judge properly noted that he was required to weigh all relevant evidence together at Section 718.202(a) pursuant to *Williams, supra*, in determining whether claimant

² The administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3) were affirmed in the Board's previous Decision and Order. *Shade v. Director, OWCP*, BRB No. 98-1449 BLA (August 6, 1999)(unpub).

³ The Director's motion requesting an enlargement of time to submit a response to claimant's Petition for Review and brief was denied by the Board's Order dated May 12, 2000.

established the existence of pneumoconiosis. In considering the relevant evidence, the administrative law judge determined, after discussing the x-ray and medical opinion evidence, that, “[c]onsidering all the evidence together with the credentials of the doctors being taken into account as indicated, the Claimant has not achieved his burden of persuasion in proving that he has a coal dust related respiratory condition.” Decision and Order on Remand at 3. In reaching this conclusion, the administrative law judge properly noted that the two x-rays were basically read positive and negative by equally qualified physicians the same number of times. Turning to the medical opinions, the administrative law judge permissibly found that the opinion of Dr. Kraynak which was based on his familiarity with claimant’s condition as a treating physician was not as persuasive as the opinion of Dr. Green, which was well documented, in light of Dr. Green’s superior expertise and since Dr. Kraynak had not started seeing claimant until October 1996, and had seen him on only two other occasions. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Shaaf v. Matthews*, 574 F.2d 157, 160 (3d Cir. 1978); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In remanding the case, the Board also instructed the administrative law judge to reconsider Dr. Kraynak’s opinion because the administrative law judge had impermissibly substituted his own opinion for that of Dr. Kraynak in finding November 1997 pulmonary function studies conducted by Dr. Kraynak to be invalid. On remand, in considering the evidence, the administrative law judge concluded that the validity of ventilatory testing goes more to the question of total disability as opposed to the diagnosis of disease. The administrative law judge, therefore, rationally concluded on the basis of the previously discussed reasons that Dr. Green’s opinion was entitled to greater weight. Accordingly, the administrative law judge properly found that upon considering all the evidence together, claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Williams, supra*; *see also Director, OWCP v. Greenwich Collieries*, 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). Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, benefits must be denied. *Perry, supra*.

Accordingly, the administrative law judge’s Decision and Order Denying Benefits Upon Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge