BRB No. 06-0444 BLA

MATTHEW J. CHUPLIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/20/2006
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (02-BLA-5231) of Administrative Law Judge Janice K. Bullard 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 of *et seq*. (the Act).[1] This case is before the Board for the second time.

[1]Claimant filed his claim for benefits on July 9, 2001. It was denied by the district director for reason of abandonment in a Proposed Decision and Order on March 12, 2002. Director's Exhibits 1, 20. Claimant requested a formal hearing on March 22, 2002, which was held on February 11, 2003. Director's Exhibit 22. Administrative Law Judge

In its prior decision in *Chuplis v. Director, OWCP*, BRB No. 03-0808 BLA (Aug. 30, 2004) (unpub.), the Board affirmed in part, and vacated in part, the administrative law judge's August 7, 2003 Decision and Order denying benefits. Specifically, the Board affirmed, as unchallenged, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). The Board, however, remanded the case for further consideration of the evidence at 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(c) and 718.204(c). The Board vacated the administrative law judge's finding at Section 718.202(a)(1), holding that the administrative law judge mischaracterized the x-ray evidence. The Board specifically held, contrary to the administrative law judge's findings, that 1) the record does not reveal that Dr. Benjamin is a B reader and Board-certified radiologist and 2) Dr. Navani did not read the September 20, 2001 x-ray as negative, but read it for quality purposes only. *Chuplis*, slip.op. at 3. The Board held that the administrative law judge failed to consider that Dr. Cali based his opinion on Dr. Miller's interpretation of the September 30, 2002 x-ray, which was not admitted into the record.[2] The Board further held that the administrative law judge failed to explain his reasons for finding that Dr. Cali's opinion was better reasoned and supported by the objective evidence of record, and also erred to the extent that she credited Dr. Cali's opinion based on pulmonary function study results. *Id.* at 8, n.9. Thus, the Board vacated the administrative law judge's findings at Section 718.202(a)(4). *Id.* at 7-8. The Board instructed that if, on remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R.§718.202(a)(1) or (a)(4), then all of the relevant evidence must be weighed together at 20 C.F.R. §718.202(a), pursuant to the standard enunciated by the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams,*

Janice K. Bullard (the administrative law judge) issued a Decision and Order Denying Benefits on August 7, 2003. The administrative law judge found and the Director, Office of Workers' Compensation Programs (the Director), stipulated that the evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(a)(4) and 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant appealed to the Benefits Review Board on August 28, 2003.

[2]The Board held that Dr. Miller's reading of the September 13, 2002 x-ray was properly excluded, and instructed the administrative law judge to provide claimant the opportunity to submit a statement from Dr. Smith regarding his interpretation of the September 13, 2002 x-ray as rehabilitative evidence pursuant to Section 725.414(a)(2)(ii). *Chuplis*, slip. op. at 4-6.

114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *Id.* at 8. The Board additionally vacated the administrative law judge's finding at Section 718.203(c).[3] The Board indicated, "In summarily concluding that claimant had not established this element of entitlement,… the administrative law judge failed to explain why Dr. Kraynak's opinion, that claimant's pneumoconiosis arose out of his coal mine employment, was insufficient to establish this element of entitlement." *Id.* Thus, the Board held that the administrative law judge's analysis did not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(A). *Id.* Finally, the Board vacated the administrative law judge's determination at Section 718.204(c), as the administrative law judge failed to adequately explain her rejection of Dr. Kraynak's opinion regarding the etiology of claimant's disability. *Id.* at 9.

On September 29, 2004, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Reconsideration of the Board's remand decision. On March 30, 2005, the Board issued a Decision and Order on Reconsideration, granting the Director's motion and modifying its Decision and Order of August 30, 2004. *Chuplis v. Director, OWCP*, BRB No. 03-0808 BLA (Mar. 30, 2005) (Decision and Order on Recon.) (unpub.). Specifically, the Board agreed that it erred in declining to address the Director's arguments regarding the administrative law judge's finding of six years of coal mine employment and therein considered the Director's arguments. The Board affirmed the administrative law judge's finding that claimant was entitled to credit for four years of coal mine employment from 1946-1950. The Board however, vacated the administrative law judge's finding that claimant is entitled to credit for two years of coal mine employment from 1950-1952 based on his work at Hammond Coal Company (Hammond), as the administrative law judge failed to explain the basis for her determination that claimant's Social Security records were incomplete. The Board remanded the case for the administrative law judge to reconsider the length of coal mine employment for which claimant should be credited for his work at Hammond.

On remand, the administrative law judge credited claimant with four and one-half years of coal mine employment. The administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), but found the medical opinion insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). After weighing the relevant evidence together pursuant to *Williams*, the administrative law judge found the evidence sufficient to establish the

[3]Claimant has the burden of establishing, by competent evidence, that his pneumoconiosis arose out of his coal mine employment, because the administrative law judge only credited him with six years of coal mine employment. 20 C.F.R. §718.203(c).

existence of pneumoconiosis at Section 718.202(a)[4] After noting that, in her previous decision, she found claimant totally disabled based on the Director's stipulation of total disability and evidence supportive of the stipulation, the administrative law judge found that the evidence was insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment or that his total disability was due to pneumoconiosis at 20 C.F.R. §§ 718.203(c) and 718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that in the prior appeal, the Board erred in allowing the length of coal mine employment issue to be reconsidered. Claimant specifically argues that the Director waived the right to raise the issue by failing to file an appeal or a cross-appeal on the issue from the administrative law judge's first decision. Claimant urges reversal of the administrative law judge's finding that the evidence is insufficient to establish disease causation and disability causation at 20 C.F.R.§§718.203(c), 718.204(c). The Director responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We initially address claimant's argument that the administrative law judge erred in reconsidering the length of coal mine employment issue. As noted, *supra*, in our Decision and Order on Reconsideration in *Chuplis v. Director, OWCP*, BRB No. 03-0808 BLA (Mar. 30, 2005) (unpub.), we affirmed the administrative law judge's finding that claimant was entitled to credit for four years of coal mine employment from 1946-1950, but vacated the administrative law judge's finding that claimant was entitled to credit for two years of coal mine work at Hammond. The Board held that the administrative law judge failed to provide any basis for her finding that claimant's Social Security records are incomplete, and therefore should not be used to determine the length of claimant's coal mine employment with Hammond. Thus, the administrative law judge was instructed to reconsider the length of coal mine employment for which claimant should be credited for his employment at Hammond. Claimant contends on appeal, however, that he is entitled to credit for two years of work at Hammond, and that the administrative law judge erred in finding, on remand, that claimant was only entitled to credit for six months of employment at Hammond.

[4]We affirm the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a) as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On remand, the administrative law judge found that claimant's testimony was the only evidence presented by claimant to establish his length of coal mine employment at Hammond, as the two affidavits claimant relied upon acknowledged that he was employed at Hammond, but failed to specify a time period of employment. Decision and Order on Remand at 6. The administrative law judge also found that claimant's Social Security records include "all the years from 1948 through 2000." *Id.* at 7.

The administrative law judge specifically found:

> There is no employment information for the year 1950. The Social Security records for 1951 do not reveal any employment with Hammond but they do disclose employment with three other employers from April 1951 through December 1951. DX-4. The Social Security records for 1952 reveal that Claimant was employed by Hammond from April 1952 through September 1952. DX-4. The records also reveal that he was employed by three other companies from July 1952 through December 1952. DX– 4.

Id. In contrast, the administrative law judge found that claimant's testimony was vague and confusing regarding his length of coal mine employment at Hammond, citing examples from the hearing transcript. Decision and Order on Remand at 7-9. Citing the Hearing Transcript at 21-31, the administrative law judge found "Because of the vagueness and uncertainty of Claimant's testimony as well as the major discrepancy between his testimony and his Social Security records, I find that the Social Security statement entered into the record by the Director is the most reliable means of establishing Claimant's length of employment at Hammond[.]" *Id.* at 10. The administrative law judge concluded that claimant established six months of coal mine employment at Hammond, and therefore credited claimant with a total of four and one-half years of coal mine employment. *Id.*

Claimant contends that the Director waived the right to raise the length of coal mine employment issue, as the Director failed to file an appeal or a cross-appeal on the issue and thus, the Board erred in allowing the issue to be reconsidered in the prior appeal. Claimant specifically contends that the Board treated the Director's Motion to Remand in the prior appeal as a response brief, and since claimant did not challenge the administrative law judge's length of coal mine employment finding, the Director should not have been allowed to raise the issue, and his arguments should have been limited to the issues raised in claimant's brief. Claimant relies on the Third Circuit holding in *Bernardo v. Director, OWCP*, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986), that "a court should not consider an argument which has not been raised in the agency proceedings which preceded the appeal, absent unusual circumstances." Claimant further notes that the standard enunciated by the Third Circuit in *Dalle Tezze v. Director,* 814 F.2d 129, 10

BLR 2-62 (3d Cir. 1987), that the Board may consider an argument that is raised in a response brief under certain circumstances, is not applicable in this case. Claimant argues that Dr. Kraynak's opinion was rejected and found insufficient to establish claimant's entitlement to benefits based on the recalculated length of coal mine employment. Claimant argues that "since this finding [recalculation of the length of coal mine employment] essentially constitutes the sole basis for rejecting the medical opinion evidence and for failing to find Claimant entitled to benefits," his rights were diminished by the recalculation of the length of coal mine employment, and, therefore, he is entitled to a finding of entitlement. Claimant's Brief at 11.

The Director contends that claimant has misunderstood the holding in *Dalle Tezze*. Director's Brief at 2. The Director notes that, under *Dalle Tezze*, the Board may accept an issue for review that was not previously appealed if it "'would merely provide another avenue by which an ALJ could reach the same favorable judgement' and if it would neither enlarge nor diminish any party's rights." *Id.* The Director further notes that in *Dalle Tezze*, the Court's focus is on the rights of the parties after, not before, a decision has been made below. *Id.* at 3. The Director also notes the Court's explanation, that "allowing such an argument to be addressed rests on the principle that 'a party who is satisfied with the judgment below need not appeal from it.' *Dalle Tezze,* 814 F.2d at 133." The Director concludes that, as the administrative law judge denied benefits in the instant case, "the Board correctly held that acceptance of the Director's argument regarding the length of coal mine employment 'would neither enlarge the Director's rights nor diminish claimant's rights as tentatively resolved by the administrative law judge's Decision and Order.' Decision and Order on Reconsideration, at 2." Director's Brief at 3.

We agree with the Director's position on this issue. Under the reasoning set out in *Dalle Tezze* the inquiry should be: If the Director were to prevail on the length of coal mine employment issue, would claimant receive less, or could the Director receive more, than what was given under the administrative law judge's Decision and Order? Moreover, as the Third Circuit noted, the inveterate and certain rule focuses on the rights of the parties after, not before, the rendering of the tribunal below. In this case, the administrative law judge, in her Decision and Order, found that claimant was not entitled to benefits. Acceptance of the Director's argument would merely provide another avenue by which an administrative law judge could reach the same judgment; it could neither enlarge the Director's rights nor diminish claimant's rights as tentatively resolved by the administrative law judge's Decision and Order. *See Dalle Tezze,* 814 F.2d at 133, 10 BLR at 2-68. Thus, the administrative law judge's reconsideration of the length of coal mine employment issue would still result in the same conclusion [denial of benefits] and would neither enlarge the Director's rights nor diminish claimant's rights. Therefore, contrary to claimant's contention, the Director was not required to file a cross-appeal in order to raise his contentions regarding error in the administrative law judge's length of

coal mine employment finding. We therefore hold that the length of coal mine employment issue was properly before the Board and properly before the administrative law judge on remand.

Claimant argues, in the alternative, that the administrative law judge erred when she found that claimant's coal mine employment with Hammond was six months based on the Social Security records, as she did not have an "adequate basis in the record" for rejecting claimant's contrary testimony as "vague and confusing."[5] Claimant's Brief at 12.

The administrative law judge noted that claimant submitted only his testimony and affidavits from John Rooney and Vincent Maloney in support of his position that he should be credited with three[6] years of coal mine employment at Hammond. The administrative law judge found that although the affidavits of John Rooney and Vincent Maloney "acknowledge that claimant was employed at Hammond", they "fail to specify a time period of employment there." Decision and Order at 6; Claimant Exhibits 8, 10. Thus, the administrative law judge found that claimant's testimony was the only evidence of record submitted by claimant to meet his burden of establishing his length of coal mine employment at Hammond. Decision and Order at 6, 7. The administrative law judge found that excerpts from claimant's testimony demonstrate that claimant was unsure, vague, and confused, when answering questions about when he was employed at Hammond. The administrative law judge also noted that the Social Security records contradict claimant's testimony that he worked for Hammond from 1950-1952, as the records contain no information for the year 1950, but detailed employment with three other employers from April 1951-December 1951, employment with Hammond from April 1952-September 1952 (six months) and employment with three other employers from July 1952-December 1952. Decision and Order at 10; Director's Exhibit 4. Thus, the administrative law judge found that the Social Security statement was the most reliable evidence of claimant's length of coal mine employment at Hammond. Decision and Order at 10.

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[5]We reject claimant's assertions that the administrative law judge's review of the claimant's testimony is a mischaracterization of the testimony and a violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), in the absence of any supporting evidence.

[6]The administrative law judge indicated that he assumed that claimant meant he worked at Hammond from 1950 through 1952, which is three years of employment, not two. Decision and Order at 6, n. 7.

A finding of the length of coal mine employment may be based exclusively on a claimant's own testimony, where it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343 (1984). However, the Board has held that Social Security records may be credited over a claimant's testimony and co-workers affidavits where claimant's memory was unreliable and the co-workers failed to state that the claimant had worked continuously with them during the specified period of employment. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). In the instant case, the administrative law judge rationally determined that claimant's testimony was unsure and not clear regarding his employment at Hammond and, thus, discredited it. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Yendall v. Director, OWCP*, 4 BLR 1-467 (1982) (discrediting of claimant's testimony affirmed where he was very old, many years had passed and the testimony was very uncertain). Thus, the administrative law judge rationally relied on the Social Security records when determining claimant's length of coal mine employment in this case.[7] *Brumley v. Clay Coal Corp.*, 6 BLR 1-956 (1984); *Tackett, supra; Yendall, supra*.

In light of the foregoing, we affirm the administrative law judge's finding of six months of employment at Hammond and, thus, a total of four and one-half years of coal mine employment.[8]

Claimant next contends that Dr. Kraynak's opinion is sufficient to establish disability causation at Section 718.204(c)[9] and was improperly rejected, based solely on

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[7]Claimant further contends that the administrative law judge erred by suggesting that the Social Security records documented all employment from 1948-2000, as the records did not report any earnings until 1951, the noted earnings were sporadic, and "did not encompass the years in question in total." Claimant's Brief at 13. Claimant, however, bears the burden of proof to establish the number of years actually worked in the coal mines. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984).

[8]Claimant questions "whether the recalculated length of coal mine employment is anything more than a difference without distinction." Claimant's Brief at 22. A physician's conclusion based on an erroneous assumption regarding length of coal mine employment may properly be accorded less weight. *Long v. Director, OWCP*, 7 BLR 1-254 (1984); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985). Thus, as discussed, *infra*, the administrative law judge rationally accorded Dr. Kraynak's opinion little weight based on the discrepancy between her length of coal mine employment finding (four and one-half years), and the length of coal employment finding relied on by Dr. Kraynak (eight years).

[9]Claimant contends that the administrative law judge erred by failing to accord Dr. Kraynak's opinion controlling weight as claimant's treating physician. Claimant's

the administrative law judge's recalculated finding of the length of coal mine employment. Dr. Kraynak found:

> Based upon Mr. Chuplis' history of having worked in the anthracite coal industry approximately eight years, the complaints with which he has presented, my physical examination and the diagnostic studies performed, it is my opinion that he is totally and permanently disabled, secondary to Coal Workers' Pneumoconiosis, contracted during his employment in the anthracite coal industry. He is unable to lift, carry, climb steps or walk for any period of time. He must be able to sit, stand and lay at his leisure, secondary to his severe respiratory impairment.

Claimant's Exhibit 13. The administrative law judge concluded that claimant had failed to establish total disability due to pneumoconiosis. The administrative law judge specifically found:

> Claimant has proffered the report of Dr. Kraynak as his documented and reasoned medical report evidence pursuant to §718.204(c). Dr. Kraynak reported that it was his opinion that Claimant "is totally and permanently disabled, secondary to Coal Workers' pneumoconiosis." Cx-13 at 3. Again, I reiterate that because Dr. Kraynak's opinion is based upon an erroneous coal mine employment history, the probative value of his report is greatly diminished. No other physician of record opined that Claimant was totally disabled due to pneumoconiosis. Because Dr. Kraynak's unreliable opinion is not corroborated with another physician's opinion, I find that claimant has failed to sustain his burden.

Brief at 15-18. The administrative law judge found the Dr. Kraynak's opinion was not entitled to controlling weight as claimant's treating physician as, "[t]he record does not fully document the nature of the physician-patient relationship and its duration, or the frequency and extent of his treatment." Decision and Order at 15. Although claimant testified on February 11, 2003, that Dr. Kraynak had seen him two or three times in the last year or so, Dr. Kraynak, in his report dated October 3, 2003, stated that claimant had been under his care since September 13, 2002. (less than one month). Hearing Transcript at 23-24; Claimant's Exhibit 13. Thus, contrary to claimant's contention, the administrative law judge permissibly declined to accord Dr. Kraynak's opinion controlling weight as a treating physician as the record fails to document a relationship of adequate duration, frequency or extent between Dr. Kraynak and the claimant. 20 C.F.R. §718.104(d).

Decision and Order at 17.

An administrative law judge may discredit a medical opinion based on an inaccurate work history. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Thus, the administrative law judge rationally found Dr. Kraynak's opinion unreliable and less probative, given the discrepancy between the eight years of coal mine employment relied on by Dr. Kraynak and her crediting of claimant with four and one-half years of coal mine employment. Moreover, the administrative law judge properly found that no other physician of record opined that claimant was totally disabled due to pneumoconiosis. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at Section 718.204(c), as it is supported by substantial evidence.[10]

Since we have affirmed the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis, an essential element of entitlement, we need not address claimant's arguments regarding the administrative law judge's findings at 718.203(c), as any error therein would be harmless.[11] *Trent v. Director,*

[10]Claimant contends that the administrative law judge failed to discuss medical evidence and the case should be remanded. Claimant's Brief at 19. Claimant specifically contends that the administrative law judge did not consider Dr. Kraynak's acknowledgement in the Occupational History section of his report that, "[Claimant] has been given credit [by DOL] for 0.25 years." Claimant's Exhibit 13. We note that this contention was raised as part of claimant's discussion of Section 718.203(c). However, it equally applies to the administrative law judge's treatment of Dr. Kraynak's opinion at Section 718.204(c). Thus, the argument and resolution are included herein.

Claimant's contention lacks merit. As the Director notes, there is no evidence that Dr. Kraynak actually considered that claimant may have had .25 years of coal mine employment, when formulating his opinion, but rather, based his opinion on eight years of coal mine employment. Director's Brief at 6. Thus, the administrative law judge correctly considered Dr. Kraynak's opinion. As the Director further notes, Dr. Kraynak was aware of the .25 years of coal mine employment that DOL credited claimant with, and thus, Dr. Kraynak could have actually considered how less than eight years of coal mine employment would affect his diagnosis. Director's Brief at 6.

[11]We need not address claimant's contentions that the administrative law judge erred by failing to allow him to submit an additional statement from Dr. Smith to rehabilitate his x-ray evidence, and by rejecting Dr. Kraynak's opinion on the existence of pneumoconiosis: The administrative law judge found the existence of pneumoconiosis established on the basis of the x-ray evidence of record, and thus, any error in the

OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-36 (1986) (*en banc*); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant finally requests that the case be remanded to the administrative law judge, and the record be reopened to allow for the submission of a supplemental report by Dr. Kraynak, so that he may formulate an opinion on the cause of disease and disability, based on a finding of four and one-half years of coal mine employment. Claimant's Brief at 21. Claimant specifically contends that there was no way for Dr. Kraynak to have anticipated the administrative law judge's determination of four and one-half years of coal mine employment, and, thus, claimant has a "fundamental right" to have Dr. Kraynak submit an opinion based on the administrative law judge's finding of four and one-half years of coal mine employment. *Id*. However, in the instant case, the administrative law judge rationally found that claimant was not entitled to benefits. Thus, we need not order reopening of the case for submission of a supplemental report by Dr. Kraynak. However, as noted by the Director, claimant may submit a revised report by Dr. Kraynak in support of a request for modification, if he so chooses. 20 C.F.R. §725.310.

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administrative law judge's consideration of the evidence at 20 C.F.R. §718.202 is harmless. *Larioni v. Director, OWCP*, 6 BLR 1 -1276 (1984). We note that claimant raises these contentions to preserve them for any further appeal.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge