BRB No. 01-0463 BLA

BENJAMIN WITMER	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
BARREN CREEK COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order Upon Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Kruegar, Jenkintown, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C, for employer.

Edward Waldman (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the (87-BLA-0991) of Administrative Law Judge Ralph A. Romano with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on October 5, 1984. Director's Exhibit 1. Following the district director's denial of his claim, claimant requested modification. The case was subsequently transferred to the Office of Administrative Law Judges for a hearing, which took place before Administrative Law Judge Ralph A. Romano (the administrative law judge). In his Decision and Order, the administrative law judge credited claimant with nineteen years of coal mine employment and determined that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. Accordingly, benefits were awarded.

Upon consideration of employer's appeal, the Board affirmed the administrative law judge's Decision and Order. *Witmer v. Barren Creek Coal Co.*, BRB No. 89-3412 BLA (Apr. 28, 1993)(unpub.). The Board also summarily denied employer's two motions for reconsideration. *Witmer v. Barren Creek Coal Co.*, BRB No. 89-3412 BLA (May 25, 1996)(unpub. Order); *Witmer v. Barren Creek Coal Co.*, BRB No. 89-3412 BLA (Jan. 18, 1996)(unpub. Order). Employer subsequently filed an appeal with the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. The court vacated the award of benefits on the ground that the administrative law judge failed to set forth the rationale underlying his findings with respect to 20 C.F.R. §718.204.[1] *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997).

[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

The case was remanded to the administrative law judge for reconsideration.

In his Decision and Order on Remand, the administrative law judge again determined that the evidence of record was sufficient to establish the presence of a totally disabling respiratory impairment and that pneumoconiosis was a substantial contributor to claimant's total disability. Accordingly, benefits were awarded. Employer filed an appeal with the Board which, in a Decision and Order issued on November 13, 1998, vacated the administrative law judge's findings under Section 718.204(b) and (c), as the administrative law judge did not adequately explain his decision to accord greatest weight

---

effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). Unless otherwise noted, all citations are 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*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). 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). Therefore, any arguments made by the parties in response to the Board's Order requesting briefing are now moot.

to Dr. Kraynak's opinion or his finding that the evidence of record as a whole supported a determination that claimant is suffering from a totally disabling respiratory impairment. *Witmer v. Barren Creek Coal Co.*, BRB No. 98-0288 BLA (Nov. 13, 1998)(unpub.)(*Witmer II*).

On remand, the administrative law judge found that Dr. Kraynak's opinion was supported by the objective evidence of record and was entitled to great weight on the ground that he is claimant's treating physician. The administrative law judge concluded, based primarily upon Dr. Kraynak's opinion, that claimant established that he was totally disabled due to pneumoconiosis. Accordingly, benefits were awarded. Employer appealed the award to the Board. In its Decision and Order, the Board vacated the administrative law judge's findings under Section 718.204(b) and (c)(4), as the administrative law judge essentially transcribed claimant's brief on remand rather than engaging in an independent analysis of the evidence. *Witmer v. Barren Creek Coal Co.*, BRB No. 99-1003 BLA (June 23, 2000)(unpub.)(*Witmer III*). The case was remanded to the administrative law judge for reconsideration.

In the Decision and Order that is the subject of the present appeal, the administrative law judge accorded determinative weight to Dr. Kraynak's opinion based upon his status as claimant's treating physician and in light of the fact that his opinion is well-reasoned and well-documented. Consequently, the administrative law judge found that Dr. Kraynak's opinion supported a finding that claimant is totally disabled due to pneumoconiosis and awarded benefits accordingly. Employer argues on appeal that the administrative law judge erred in failing to make a threshold inquiry as to whether claimant established the prerequisites for modification set forth in 20 C.F.R. §725.310. Employer also contends that the administrative law judge did not fully comply with the Board's remand instructions regarding the consideration of Dr. Kraynak's opinion and did not adequately set forth the rationale underlying his weighing of the opinion. In addition, employer asserts that the administrative law judge erred in discrediting Dr. Dittman's opinion. Finally, employer asserts that if the Board determines that Section 718.204(a) is applicable in the present case, the case must be remanded to the administrative law judge so that he can apply the amended regulation.[2] The Director, Office of Workers' Compensation Programs (the Director), has responded with respect to the latter issue and urges the Board to reject employer's contention. Claimant has also responded and urges affirmance of the award of benefits.

[2]Under 20 C.F.R. §718.204(a), any nonrespiratory or nonpulmonary condition that causes an independent disability is not considered in determining whether a miner is totally disabled due to pneumoconiosis.

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 applicable 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).

Employer argues first that before addressing the merits of the claim, the administrative law judge was required to conduct a separate inquiry into whether there was a basis for modification of the district director's denial of benefits in 1985. This same contention has been raised by employer and rejected by the Board in three prior appeals. Employer asserts that case law issued subsequent to the Board's initial disposition of this issue mandates reconsideration. According to employer, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), which concerned the interpretation of the duplicate claims provision set forth in 20 C.F.R. §725.309, the Third Circuit held that a consideration of whether the prerequisites for reopening a claim have been met is not subsumed into a finding of entitlement on the merits of a claim. In the Decision and Order issued on June 23, 2000, the Board held that the administrative law judge's determination that the weight of the evidence established a change claimant's condition was in accord with the Third Circuit's decision in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).[3] *Witmer v. Barren Creek Coal Co.*, BRB No. 99-1003 BLA (June 23, 2000)(unpub.). slip op. at 3 n. 1. Inasmuch as employer has not identified intervening case law which affects the Board's affirmance of the administrative law judge's finding in light of *Keating*, the Board's holding constitutes the law of the case and will not be disturbed. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Turning to the administrative law judge's consideration of the merits of the claim, in its most recent Decision and Order, the Board remanded the case "for the administrative law judge to perform independent factfinding based on the record, in

[3]In *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), the court held that an administrative law judge is required to review all of the evidence of record, not just that evidence submitted with the request for modification, and ascertain whether it is sufficient to establish either a change in conditions or a mistake in the determination of the ultimate fact of entitlement.

accordance with our previous remand instructions." *Witmer III*, slip op. at 5. Regarding the issue of total respiratory disability pursuant to Section 718.204(c)(4) (2000), the Board instructed the administrative law judge to examine the validity of the reasoning of the medical opinions in light of the studies conducted and the objective evidence upon which the physicians' conclusions were purportedly based. *Witmer II*, slip op. at 5. The Board also instructed the administrative law judge to consider, pursuant to Section 718.204(b) (2000), whether the evidence of record supported a determination that claimant was totally disabled due to heart disease, rather than pneumoconiosis. *Id*. at 6-7.

On remand, the administrative law judge first addressed whether Dr. Kraynak's diagnosis of a totally disabling respiratory impairment is reasoned and documented despite the fact that Dr. Kraynak relied, in part, upon pulmonary function studies that did not conform to the quality standards set forth in 20 C.F.R. §718.103 (2000). The administrative law judge determined that:

> Dr. Kraynak stated...and I have reiterated his statements in this regard, that he relied on everything that he had in his possession in formulating his opinion. He relied upon qualifying tests, nonqualifying tests, conforming tests and nonconforming tests in formulating his opinion. He relied upon chest x-rays, his physical examination of the Miner, his treatment of the Miner over the course of two years prior to his deposition testimony and he relied upon the social history of the miner. Nowhere in the record does it state that Dr. Kraynak solely relied upon one nonqualifying or one nonconforming test in formulating his opinion. He stated on multiple occasions throughout the course of his deposition testimony that he was considering the evidence as a whole, and that one particular test was not dispositive as to the state of the Miner's condition.

Decision and Order at 4; Claimant's Exhibits 1, 20. The administrative law judge next addressed "the reliability of the opinions of Drs. Kraynak and Kruk in light of contrary evidence suggesting that the Miner may have been suffering from some form of cardiac disease." *Id*. at 6. The administrative law judge found that:

> Simply suggesting that the Miner may have heart disease does not cast doubt upon the reliability of the opinions of Drs. Kraynak and Kruk. Dr. Kraynak clearly considered the possibility of cardiac disease because he referred the Miner to Dr. Kruk so that Dr. Kruk could independently evaluate the Miner. I emphasize the fact that Dr. Kraynak was the Miner's treating physician for two years prior to Dr. Kraynak's deposition testimony. In that time period, Dr. Kraynak treated the Miner for his pulmonary ailment. In the course of this treatment, Dr. Kraynak referred the Miner to Dr. Kruk to rule out the possibility of heart disease. Dr.

> Dittman examined the Miner once and came to the conclusion that the Miner was suffering from cardiac disease.

Id. at 7. The administrative law judge also concluded that Dr. Dittman's opinion was entitled to little weight, as Dr. Dittman did not explain the basis of his determination that claimant has heart disease, did not have a complete understanding of the nature of claimant's coal mine employment, did not review a valid pulmonary function test, and did not review any of the positive x-ray readings of record. *Id*. at 5-6; Employer's Exhibits 3, 6.

Employer asserts that the administrative law judge erred in according greatest weight to Dr. Kraynak's opinion under Section 718.204(c) (2000), as the administrative law judge did not resolve the issue of how Dr. Kraynak's opinion was affected by his reliance upon invalid pulmonary function tests. Employer further contends that the administrative law judge did not reconcile his crediting of Dr. Kraynak's diagnosis with his earlier determination that total disability was not established pursuant to Section 718.204(c)(1) (2000) because the most recent conforming pulmonary function study, obtained by Dr. Kraynak on June 30, 1988, was nonqualifying.[4] In addition, employer argues that Dr. Kraynak's total disability finding is not consistent with the relevant Department of Labor guidelines. Based upon these allegations of error, employer further maintains that the administrative law judge erred in relying, in part, upon Dr. Kraynak's status as a treating physician to find that his opinion is entitled to great weight. Finally, employer asserts that the administrative law judge should have compared the qualifications of Drs. Kraynak and Dittman.

We reject employer's initial contention, that the administrative law judge did not adequately address the issue of Dr. Kraynak's reliance upon invalid pulmonary function studies. The administrative law judge's determination that the invalid pulmonary function studies did not detrimentally affect the credibility of Dr. Kraynak's conclusions is supported by substantial evidence. As the administrative law judge found, Dr. Kraynak testified that he did not rely upon any one type of data, to the exclusion of others, to

[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values.

diagnose claimant's total respiratory disability. Claimant's Exhibit 20 at 17-21, 31-34. In addition, Dr. Kraynak specifically stated that he would not base a disability evaluation upon the results of a study that was nonconforming due to poor effort. Claimant's Exhibit 20 at 22.

With respect to the purported conflict between the administrative law judge's finding that total disability was not established under Section 718.204(c)(1) and his crediting of Dr. Kraynak's opinion, the administrative law judge was not required to discredit Dr. Kraynak's diagnosis of total respiratory disability on the ground that claimant's most recent pulmonary function study did not produce qualifying values. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1985)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Moreover, Dr. Kraynak indicated that although the test in question was not qualifying, the results of the study were not normal. Claimant's Exhibit 20 at 32. We also reject employer's similar allegation that Dr. Kraynak's finding of total disability is inconsistent with the regulatory guidelines regarding total disability merely because claimant's most recent pulmonary function study was nonqualifying. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985).

Finally, we affirm the administrative law judge's determination that Dr. Kraynak's opinion regarding the presence of a totally disabling respiratory impairment was entitled to great weight based, in part, upon Dr. Kraynak's status as claimant's treating physician. The administrative law judge acted within his discretion in determining that Dr. Kraynak's opinion in this regard was reasoned and documented, as Dr. Kraynak referred to claimant's medical history, symptoms, and objective test results, including three conforming pulmonary function studies, two of which produced qualifying values. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The absence of Dr. Kraynak's treatment notes from the record did not obligate the administrative law judge to discredit his opinion nor was the administrative law judge required to compare the respective qualifications of Drs. Kraynak and Dittman. *See Mancia*, *supra*; *Lango*, *supra*; *see also Peabody Coal Co. v. Director, OWCP, [Durbin]*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999). We also affirm, therefore, the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) (2000).

Turning to the issue of total disability causation pursuant to Section 718.204(b) (2000), employer maintains that the administrative law judge erred in determining that Drs. Kraynak and Kruk adequately considered whether claimant's disability is attributable to heart disease. Employer asserts specifically that the administrative law judge did not properly characterize the opinions of Drs. Kraynak, Kruk, and Dittman with respect to this issue. We agree. Contrary to the administrative law judge's determination, Dr. Dittman stated that his diagnosis of atherosclerotic heart disease was based upon

claimant's chest x-ray, EKG, and physical examination and identified the findings consistent with his diagnosis. Decision and Order at 5-6; Claimant's Exhibits 3, 6 at 10-11, 18. In addition, in crediting Dr. Kruk's cardiac evaluation, in which the doctor stated that claimant does not have heart disease, the administrative law judge did not resolve the conflict between Dr. Kruk's opinion and Dr. Dittman's allegation that Dr. Kruk's examination was flawed because the stress test upon which he relied was not conducted to claimant's maximum capacity. Employer's Exhibit 6 at 31. In light of these omissions in the administrative law judge's consideration of the relevant medical opinion evidence regarding the cause of claimant's disability, we vacate the administrative law judge's finding that claimant has established this element of entitlement and remand the case to the administrative law judge for reconsideration of this issue. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). On remand, the administrative law judge should consider the evidence concerning the cause of claimant's totally disabling impairment pursuant to the amended versions of Section 718.204(a) and (c).[5] 20 C.F.R. §718.204(a), (c); *see also Bonessa v. United States Steel Corp.*, 884 F.2d 756, 13 BLR 2-23 (3d Cir. 1989).

[5]The regulatory provisions governing proof of total respiratory or pulmonary disability, previously set forth in 20 C.F.R. §718.204(c), now appear in 20 C.F.R. §718.204(b). The regulatory provisions regarding proof of total disability due to pneumoconiosis, previously set forth in 20 C.F.R. §718.204(b), are now found in 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge