BRB No. 02-0558 BLA

GARY F. FARBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAM F. SCHICKRAM	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
CONSTITUTION STATE SERVICE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Ross A. Carrozza (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0222) of Administrative Law Judge Robert D. Kaplan 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 *et*

seq. (the Act).[1] In this duplicate claim, the administrative law judge found that claimant established seven years of coal mine employment,[2] but found that claimant failed to establish a material change in conditions as he failed to establish any element of entitlement previously adjudicated against him. Accordingly, benefits were denied.

On appeal, claimant contends that the x-ray and medical opinion evidence establish the existence of pneumoconiosis and that the pulmonary function study and medical opinion evidence establish a totally disabling respiratory impairment. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first argues that the administrative law judge erred in not finding the

[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 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] This finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

existence of pneumoconiosis and a material change in conditions established. Specifically, claimant contends that his due process right to have his claim fully and fairly considered was violated when the administrative law judge limited the parties to the submission of an equal number of x-ray interpretations, and then determined that claimant failed to establish the existence of pneumoconiosis because the x-ray readings of record were in equipoise. Claimant further contends that the administrative law judge's reasoning on this issue violates the Administrative Procedure Act (APA), 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) because the administrative law judge failed to fully explain the bases for his decision, the weight assigned to the evidence, and the relationship between the evidence and his legal and factual conclusions.

In the notice of hearing, the administrative law judge ordered that a maximum of three interpretations of each x-ray would be received in the record from each party, unless fairness required additional readings. Notice of Hearing and Order Limiting X-ray Interpretations dated January 18, 2001. While objecting to the admission of several other items of evidence, *see* Hearing Transcript at 5-26, claimant never objected to the administrative law judge's order limiting the number of admissible x-ray interpretations. Accordingly, because claimant did not raise this argument before the administrative law judge, he has waived his right to raise it before the Board. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984). Moreover, claimant has not proferred any explanation for his assertion that the limitations placed on the submission of x-ray interpretations by the administrative law judge in this case violated his due process right to a full and fair hearing other than to assert such limitations resulted in evidence which was in equipoise; nor has he shown that the administrative law judge erred in finding that the x-ray evidence in this case failed to establish the existence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *see also* 5 U.S.C. §556(d); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950, 21 BLR 2-23, 2-30-31 (4th Cir. 1997).

Claimant next contends that the administrative law judge erred in crediting Dr. Levinson's opinion regarding the existence of pneumoconiosis as more thorough and detailed over the opinions of claimant's two treating physicians, Drs. Raymond and Matthew Kraynak, without considering their status as treating physicians and without considering that Dr. Raymond Kraynak also reviewed all of the evidence.

In finding that the medical opinion evidence did not establish the existence of pneumoconiosis, the administrative law judge accorded greater weight to Dr. Levinson's opinion of no pneumoconiosis, than to the contrary opinions by Drs. Raymond and Matthew Kraynak, because he found Dr. Levinson's opinion more thorough and detailed, and because

his credentials were superior to those of both Drs. Kraynak. This was rational. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, contrary to claimant's contention, the administrative law judge recognized the status of the treating physicians and, citing Section 718.104, nonetheless found that their opinions were not entitled to greater weight. This was permissible. *See* 20 C.F.R. §718.104(d)(5). The administrative law judge further found that on reviewing all the relevant medical evidence together at Section 718.202(a)(1)-(4), claimant failed to establish the existence of pneumoconiosis. This was proper. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and, therefore, a material change in conditions. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Claimant next contends that the administrative law judge erred in finding that total disability and a material change in conditions were not established based on a qualifying pulmonary function study. Specifically, claimant contends that the administrative law judge's reasoning that the qualifying study was invalid due to the greater number of invalidations of the study by better qualified physicians was improper. Contrary to claimant's contention, the administrative law judge may accord greater weight to the invalidations of a study by physicians with superior qualifications. *See Dillon, supra*; *see also Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985)(Brown, J., dissenting). Moreover, regarding claimant's argument as to the probative value of the non-qualifying pulmonary function study which had also been invalidated by some physicians, the administrative law judge did not substitute his medical opinion for that of the physicians when he noted that the non-qualifying pulmonary function study was more probative of claimant's condition than the qualifying pulmonary function study:

> Pulmonary function tests are effort-dependent, and it is generally accepted that spuriously low values are possible but spuriously high values are not. Therefore, the later study with its higher values would tend to be a more reliable indicator of Claimant's current lung function than the August 2, 2000 study. *See Andruscavage v. Director, OWCP*, No. 93-3291, slip. op. at 9-10 (3d Cir., February 22, 1994)("medical literature supports...the conclusion that [pulmonary function studies] which return disparately higher values tend to be more reliable indicators of an individual's respiratory capacity than those with lower values").

Decision and Order at 9. Thus, despite some invalidations, the administrative law judge permissibly found the non-qualifying study to have probative value. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-685 (1985). Accordingly we affirm the administrative law judge's finding that the pulmonary function study evidence did

not establish total disability at Section 718.204(b)(2)(i).

Finally, claimant contends that the administrative law judge did not properly consider the medical opinion evidence relevant to total disability and erred in finding that it did not establish total disability and, therefore, a material change in conditions. We reject claimant's argument that the administrative law judge erred in discrediting the opinions of Drs. Raymond and Matthew Kraynak without sufficiently discussing the reasons for doing so. Contrary to claimant's argument, the administrative law judge permissibly accorded less weight to the opinions of Drs. Raymond and Matthew Kraynak because the pulmonary function study they relied on in making their determination was subsequently invalidated by pulmonary specialists. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Likewise, contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinions of Drs. Raymond and Matthew Kraynak because they were treating physicians when he found that their opinions were not as credible as the opinion of Dr. Levinson. *See* 20 C.F.R. §718.104(d)(5); *Balsavage v. Director, OWCP*, 295 F.3d 390, BLR (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326-327 (6th Cir. 2002), *cert. denied*, U.S. , 2003 WL 102516 (U.S. Jan. 13, 2003); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability and a material change in conditions on that basis. *See Swarrow, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge