BRB Nos. 07-0473 BLA
and 07-0473 BLA-A

D. U.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 02/29/2008
KOCHER COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Maureen E. Herron, Wilkes- Barre, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denying Benefits (05-BLA-5594) of Administrative Law Judge Ralph A. Romano 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). This case involves claimant's request for modification of the denial of a subsequent claim that was filed on July 9, 2001.[1] Director's Exhibit 3. Initially, Administrative Law Judge Janice K. Bullard denied the subsequent claim on December 15, 2003, because claimant did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore did not establish a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); Director's Exhibit 40.

Claimant appealed, but later requested modification while his appeal was pending before the Board. Accordingly, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *See* 20 C.F.R. §725.310, Director's Exhibits 47, 48. The district director denied modification on November 18, 2004, and claimant requested a formal hearing with the Office of Administrative Law Judges.

The administrative law judge credited claimant with thirty-nine years of coal mine employment.[2] Decision and Order at 13. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), or any mistake in a determination of fact or change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Claimant further asserts that the administrative law judge did not explain his determination that all the relevant evidence weighed together did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Claimant also contends that the administrative law

[1] Claimant filed his first claim for benefits on March 21, 1995, which was finally denied on July 27, 1999, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 1 at 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

judge erred in finding that the pulmonary function study and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant further contends that the administrative law judge failed to consider whether the evidence established a mistake in a determination of fact in the prior denial. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred by failing to consider all relevant x-ray evidence in the record. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response in this appeal.[3]

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3). In considering a request for modification of the denial of a subsequent claim, which was denied based upon a failure to establish a change in an applicable condition of entitlement, the administrative law judge must determine whether the evidence developed in the subsequent claim, including any evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

[3] We affirm the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2),(3), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, the administrative law judge found that the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). He then considered whether the new medical opinion evidence supported a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge considered the opinions of Drs. Kraynak, Corazza, and Levinson. Dr. Kraynak, who is Board-eligible in Family Medicine and who is claimant's treating physician, opined that "based on the Claimant's 39 year occupational history, his social and medical histories, and his own treatment of the miner over the years, that Claimant suffers from coal workers' pneumoconiosis contracted during his employment in the anthracite coal industry . . . ." Claimant's Exhibit 6 at 14.

Dr. Corazza, who is Board-certified in Internal Medicine, found no evidence of pneumoconiosis. He diagnosed: "1. Mild chronic obstructive pulmonary disease, etiology undetermined. 2. Heart disease: (a) arterioslcerotic; (b) coronary artery disease, history of myocardial infarction; (c)normal sinus rhythm with 1 [degree] AV block and a complete right bundle branch block." Director's Exhibit 6. He found that the degree of claimant's impairment is slight and that heart disease is the major contributor to claimant's impairment. *Id*.

Dr. Levinson, who is Board-certified in Internal Medicine and Pulmonary Disease, in a report dated December 5, 2001, found no evidence that claimant was suffering from any form of industrial impairment. Director's Exhibit 24. He noted that "the current examination is negative for any findings of coal workers' pneumoconiosis. He does not appear to be suffering from a pulmonary impairment from any causes . . . ." *Id.* Dr. Levinson concluded that claimant's "present symptomatology is related to his arterioslcerotic heart disease and coronary artery disease as well as his diabetes mellitus and is not related to his prior coal mine employment." *Id.* In a report dated December 19, 2004, Dr. Levinson concluded that claimant's "current symptomatology is clearly related to his generalized arteriosclerosis, arteriosclerotic heart disease, coronary artery disease, cerebral vascular disease as well as his diabetes mellitus and bears no relationship to any form of independent pulmonary disease or indeed to any disease related to his previous coal mine employment." Employer's Exhibit 2. Dr. Levinson's deposition testimony reiterated the conclusions in his reports. Director's Exhibit 34.

The administrative law judge found that all three physicians' opinions were well documented, in that the physicians examined claimant, performed objective tests, and reviewed medical records, and social and occupational histories. Decision and Order at 16. However, the administrative law judge found that although Dr. Kraynak is claimant's treating physician, he was "not nearly as qualified" as Drs. Levinson and Corazza, who are "board-certified pulmonologists, while Dr. Kraynak is not board-certified in any area, and is only board eligible in family medicine." *Id.* at 17. The administrative law judge

further found that whereas Dr. Kraynak "discount[ed] the impact of Claimant's cardiac condition and smoking history," Drs. Levinson and Corazza better "discussed Claimant's occupational, medical, and social histories in relation to his physical complaints and presentation." *Id.* The administrative law judge therefore found that Dr. Kraynak's opinion was not as well-reasoned as those of Drs. Corazza and Levinson. Based on his determinations that Drs. Levinson and Corazza were more highly qualified and that their opinions were better-reasoned, the administrative law judge found their opinions entitled to greater weight. He further determined that Dr. Kraynak's opinion was not entitled to controlling weight based on his status as claimant's treating physician. The administrative law judge concluded that the new medical opinion evidence did not establish the existence of pneumoconiosis.

Claimant contends that the administrative law judge erred in finding Dr. Kraynak less qualified than Drs. Levinson and Corazza, because the administrative law judge mistakenly stated that Dr. Corazza is a Board-certified pulmonologist, when he is Board-certified in Internal Medicine only. As claimant notes, the record indicates that Dr. Corazza is Board-certified in Internal Medicine, not Pulmonary Disease. Director's Exhibit 7. However, any error by the administrative law judge on this point is harmless, as substantial evidence still supports the administrative law judge's permissible finding that Drs. Corazza and Levinson are better qualified than Dr. Kraynak, who lacks Board-certification in any area. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Claimant further contends that the administrative law judge erred in finding that Dr. Kraynak's opinion discounted the impact of Claimant's cardiac condition and smoking history, when Dr. Kraynak reviewed and considered claimant's cardiac condition and smoking history. Claimant's Brief at 4. While claimant is correct that Dr. Kraynak reviewed and considered these histories, the administrative law judge did not find that Dr. Kraynak had not considered them; he found that while all three doctors had considered the relevant medical histories, Drs. Levinson and Corazza "discussed Claimant's occupational and medical, and social histories in relation to his physical complaints and presentation," and therefore rendered better reasoned opinions. Decision and Order at 17. This finding was within the administrative law judge's discretion and is supported by substantial evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, contrary to claimant's contention, the administrative law judge was not required to accord greater weight to Dr. Kraynak because of his status as the miner's treating physician, as the administrative law judge properly assessed the credibility of the opinion in light of its reasoning and documentation, and in light of the other evidence of record. *See* 20 C.F.R. §718.104(d)(5). We therefore affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as it is supported by substantial evidence.

Claimant contends that the administrative law judge did not explain his finding that the x-rays and medical opinions, when weighed together as required by *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 21 BLR 2-104 (3d Cir. 1997), did not establish the existence of pneumoconiosis. Contrary to claimant's contention, the administrative law judge explained his determination:

> I previously found that [c]laimant established the existence of pneumoconiosis through the chest x-ray evidence but did not establish the presence of pneumoconiosis through the better reasoned medical opinion evidence. . . . Although the chest x-ray evidence was slightly more favorable to the [c]laimant in terms of the number of positive readings . . . the most recent chest x-ray evidence is in equipoise and when considered with the better reasoned opinions by the more qualified physicians, it is less probative. Accordingly, weighing all of the pneumoconiosis evidence together, I find that [c]laimant has not established the existence of pneumoconiosis pursuant to § 718.202(a) . . . .

Decision and Order at 17. Since the administrative law judge weighed the evidence together and reasonably explained why it did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Williams*, 114 F.3d at 25, 21 BLR at 2-111.

Claimant contends that the administrative law judge mischaracterized the pulmonary function study evidence and thus, erred in finding that the studies did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). There are six new pulmonary function studies of record. The administrative law judge found that the studies dated April 25, 2002 and September 3, 2002 produced qualifying values[4] and were valid, and that the studies dated September 18, 2001 and November 8, 2001 produced non-qualifying values, and were invalid and valid, respectively. The administrative law judge found that the studies dated November 18, 2004 and December 3, 2004 produced non-qualifying values. Decision and Order at 18; Director's Exhibits 9, 24, 35; Employer's Exhibit 2; Claimant's Exhibit 4. The administrative law judge concluded that the pulmonary function studies did not establish total disability, because the majority of the studies, including the most recent, produced non-qualifying values.

[4] A "qualifying" pulmonary function 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, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant contends that the two most recent pulmonary function studies, dated November 8, 2004 and December 3, 2004, produced qualifying values, and that the administrative law judge mischaracterized these studies by finding that they produced non-qualifying values. Based on claimant's argument on appeal, we are unable to conclude that the administrative law judge mischaracterized these studies, because claimant does not explain his statement that they are qualifying. Claimant was seventy-six years old and was measured at sixty-eight inches in height when he took both of these studies. Employer's Exhibit 2; Claimant's Exhibit 4. For a man of claimant's height who is seventy-one years old, which is the maximum age listed in the Appendix B tables, an FEV1 value equal to or less than 1.73 would be required for a qualifying study. The FEV1 values of 1.70 and 1.71 obtained on claimant's two pulmonary function studies would thus be qualifying for a seventy-one year-old man. But since the table values decrease with age, the required qualifying value for a seventy-six year-old man would be below that for a seventy-one year-old, and from the table values, it appears that the qualifying value would fall even below 1.70. Given this factor, and the lack of explanation from claimant as to how the studies are qualifying, we are unable to conclude that the administrative law judge mischaracterized these studies. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant contends that the administrative law judge erred in finding that the medical opinions did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Kraynak opined that claimant is totally disabled. Claimant's Exhibit 6 at 14. Dr. Corazza opined that claimant had a slight impairment. Director's Exhibit 6. Dr. Levinson opined that claimant was not suffering from any pulmonary impairment and had the capacity to perform his previous coal mining work. Director's Exhibit 24; Employer's Exhibit 2. The administrative law judge found that Dr. Levinson's opinion was the best reasoned, as he "explicitly discussed Claimant's respiratory capacity in relation to his coal mine employment or similar employment," and his opinion was better supported by all of the medical evidence of record, including the non-qualifying objective studies. Decision and Order at 19. He therefore found that Dr. Levinson's opinion was entitled to greater weight than Dr. Kraynak's opinion. The administrative law judge found that Dr. Corazza's opinion was not well reasoned, as the physician did not discuss his finding of a "slight" level of impairment in relation to claimant's ability to perform work.

Claimant argues that the administrative law judge did not adequately explain his reasons for crediting Dr. Levinson's opinion over that of Dr. Kraynak. Upon review, we conclude that the administrative law judge rationally accorded greater weight to Dr. Levinson's opinion as better reasoned and better supported by the evidence of record. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155. We therefore affirm the administrative law judge's finding that the evidence did not establish total disability

pursuant to 20 C.F.R. §718.204(b)(iv). We further affirm the administrative law judge's finding that the new evidence weighed together did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), as it is supported by substantial evidence.

Because the administrative law judge properly found that the new evidence failed to establish the existence of pneumoconiosis and total disability at 20 C.F.R. §§718.202(a), 718.204(b)(2), we affirm his findings that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and did not establish a mistake of fact or change in conditions.[5] *See* 20 C.F.R. §725.310. Additionally, in view of our decision to affirm both the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a), and the denial of benefits, we need not address employer's cross-appeal alleging that the administrative law judge failed to consider a relevant x-ray reading under 20 C.F.R. §718.202(a)(1).

[5] Contrary to claimant's contention, the administrative law judge addressed the issue of whether a mistake of fact occurred in the prior determination. Decision and Order at 4, 17, 19.

Accordingly, the administrative law judge's Decision and Order-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