BRB No. 02-0338 BLA

EUGENE KROH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
T & D TRUCKING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

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

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-BLA-1305) of Administrative Law Judge Ainsworth H. Brown 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] The instant case involves a duplicate claim filed on June 19, 1992.[2] In the initial Decision and Order, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20

[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on December 29, 1981. Director's Exhibit 38. The district director denied the claim on April 2, 1982. *Id.* There is no indication that claimant took any further action in regard to his 1981 claim.

Claimant filed a second claim on August 24, 1990. Director's Exhibit 38. The district director denied the claim on November 30, 1990. *Id.* Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* Claimant, however, subsequently filed a request to withdraw his claim. *Id.* By Order dated July 11, 1991, Administrative Law Judge David W. DiNardi granted claimant's request to withdraw his claim. *Id.*

Claimant filed a third claim on June 19, 1992. Director's Exhibit 1.

C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits.

Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge denied claimant's request for modification.

Claimant subsequently filed a second request for modification. After noting that claimant waived any contention regarding a mistake in a determination of fact, the administrative law judge found that claimant failed to demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied claimant's second request for modification. By Decision and Order dated October 20, 2000, the Board noted that the issue properly before the administrative law judge was whether the newly sufficient evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and therefore sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Kroh v. T & D Trucking Co.*, BRB No. 99-1201 BLA (Oct. 20, 2000) (unpublished). The Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000). *Id.* The Board, however, vacated the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* The Board specifically held that the administrative law judge erred in failing to consider the opinions of Dr. Abdul-Al. *Id.* The Board, therefore, vacated the administrative law judge's finding that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge, therefore, found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and, therefore, erred in finding that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[3] Employer responds in support of the administrative law judge's

[3]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant initially contends that the administrative law judge erred in finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In its Decision and Order dated October 20, 2000, the Board affirmed the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Kroh, supra*. The Board's previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address claimant's contentions of error in regard to the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also contends that the administrative law judge erred in finding that the opinions of Dr. Abdul-Al were insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, in considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge addressed (1) Dr. Abdul-Al's Office Notes from November 8, 1997 through October 16, 1998; (2) Dr. Abdul-Al's Discharge Summary dated May 29, 1998; and (3) Dr. Abdul-Al's May 27, 1999 letter.

The administrative law judge initially addressed Office Notes from Dr. Abdul-Al covering the period November 8, 1997 through October 16, 1998. *See* Employer's Exhibit 11. The administrative law judge found that Dr. Abdul-Al noted anthracosilicosis on only three of claimant's nine visits during this period. Decision and Order on Remand at 3. The administrative law judge further found that Dr. Abdul-Al provided no basis for his diagnoses of anthracosilicosis. *Id.* The administrative law judge, therefore, properly found that Dr. Abdul-Al's diagnoses of anthracosilicosis set out in his Office Notes covering the period from November 8, 1997 through October 16, 1998 were not sufficiently reasoned. *Id.*; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge next addressed Dr. Abdul-Al's Discharge Summary dated May 29, 1998. Dr. Abdul-Al treated claimant in the hospital from April 13, 1998 until his discharge on April 15, 1998. *See* Employer's Exhibit 11. Dr.

Abdul-Al noted that claimant had a "history of black lung." *Id.* In a "Discharge Summary" dated May 29, 1998, Dr. Abdul-Al diagnosed "[n]ew onset atrial fibrillation." Dr. Abdul-Al also diagnosed chronic obstructive pulmonary disease and anthracosilicosis. *Id.* The administrative law judge found that there was "no evidence that any tests or procedures were done related to the diagnosis of anthracosilicosis." Decision and Order on Remand at 4. The administrative law judge further noted that, other than mentioning COPD and anthracosilicosis, Dr. Abdul-Al's Discharge Summary "relat[ed] only to his treatment of [c]laimant's atrial fibrillation." *Id.* Inasmuch as Dr. Abdul-Al provided no explanation or documentation in support of his diagnosis of anthracosilicosis, the administrative law judge rationally found that Dr. Abdul-Al's diagnosis of anthracosilicosis set out in his Discharge Summary dated May 29, 1998 was not sufficiently documented or reasoned. *Id.*; *see Larioni*, *supra*; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Finally, the administrative law judge addressed Dr. Abdul-Al's March 27, 1999 letter. In the letter (addressed to "To Whom It May Concern"), Dr. Abdul-Al stated that:

> I have been taking care of [claimant] since November 8, 1997. He has a past medical history of chronic obstructive pulmonary disease and is complaining of chronic shortness of breath. Currently he is taking Serevent 2 puffs bid, Flovent 2 puffs bid. We did perform pulmonary function testing which included a forced vital capacity of 2.03 and that is 44.5% of the number for his age and also his FEV 1 is 1.12 which is 31% of what is expected for his age.
>
> Despite medical management, I believe [claimant] has severe obstructive pulmonary disease and I believe that this is related to his long time history of working in the mines for 25 years.

Claimant's Exhibit 54.

The administrative law judge initially noted that two physicians, Drs. Kaplan and Levinson, invalidated the pulmonary function test relied upon by Dr. Abdul-Al. Decision and Order on Remand at 4-5. Even had the study not been called into question, the administrative law judge rationally found that Dr. Abdul-Al could not rely upon the pulmonary function study results to support his diagnosis of pneumoconiosis because pulmonary function studies are not diagnostic of the presence of pneumoconiosis. *Id.* at 5; *see Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983). The administrative law judge found that there was "no other indication that Dr. Abdul-Al relied upon any other objective medical test in making his diagnosis of

anthracosilicosis." *Id*. The administrative law judge further found that Dr. Abdul-Al's opinion was not based on objective medical data and that his diagnosis was not documented since he did not list the findings, observations, and facts upon which he relied. *Id.* The administrative law judge further found that Dr. Abdul-Al's opinion could not be considered reasoned since the documentation underlying his diagnosis was inadequate. *Id.* Because Dr. Abdul-Al, in his March 27, 1999 letter, did not provide a basis for his finding that claimant's obstructive pulmonary disease was related to his coal mine employment, the administrative law judge rationally found that Dr. Abdul-Al's opinion was not sufficiently documented or reasoned. *Lucostic*, *supra*; *Hess*, *supra*.

Claimant further contends that the administrative law judge erred in not crediting Dr. Abdul-Al's opinion based upon his status as claimant's treating physician. We disagree. The administrative law judge noted that even though Dr. Abdul-Al was claimant's treating physician, his opinion was not entitled to greater weight due to its conclusory nature. Decision and Order on Remand at 5. As the Board noted in its previous consideration of this case, an administrative law judge may, but is not required to, accord additional weight to a physician's opinion based upon his status as a treating physician. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *see also Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978).

We note that the Board previously affirmed the administrative law judge's crediting of Dr. Dittman's opinion that claimant did not suffer from coal workers' pneumoconiosis over the contrary opinions of Drs. Kraynak and Kruk based upon his superior qualifications. *Kroh*, *supra*. In light of our affirmance of the administrative law judge's findings that the newly submitted opinions of Dr. Abdul-Al are insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of the Board's previous affirmance of the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge