BRB No. 07-0818 BLA

M.L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 07/30/2008
	)	
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 Denying Benefits on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand (2002-BLA-05339) of Administrative Law Judge Janice K. Bullard on a subsequent 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 is before the Board for the third time. The procedural history of the case was set forth in [*M.L.B.*] *v. Jeddo Highland Coal Co.*, BRB No. 05-0872 BLA, slip op. at 2-3 (Aug. 15, 2006) (unpub.). The Board previously affirmed the administrative law judge's finding that claimant established a

totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 9-12. Pursuant to 20 C.F.R. §718.202(a)(1), the Board also affirmed the administrative law judge's finding that the x-ray evidence was in equipoise as to the presence or absence of pneumoconiosis, and therefore, that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence under 20 C.F.R. §718.202(a)(1). *Id*. at 5-6. The Board, however, agreed with claimant that the administrative law judge erred in failing to explain the basis for her rejection of Dr. Kraynak's opinion, that claimant suffers from pneumoconiosis, under 20 C.F.R. §718.202(a)(4).[1] *Id*. at 6-7. To the extent that the administrative law judge's finding that claimant did not have pneumoconiosis influenced her consideration of the issue of disability causation, the Board also vacated her finding that claimant was not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id*. at 13. Therefore, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration.

In her Decision and Order on Remand Denying Benefits issued on June 13, 2007, the administrative law judge noted that, insofar as the Board had affirmed her finding that claimant is totally disabled, claimant had satisfied his burden to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 6 n.5. The administrative law judge, however, also determined that claimant was unable to establish that he had pneumoconiosis based on Dr. Kraynak's opinion at 20 C.F.R. §718.202(a)(4). Decision and Order at 6-9. Weighing all of the evidence together, she further concluded that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 9. Because claimant did not have pneumoconiosis, the administrative law judge found that claimant was unable to establish that he was totally disabled due to pneumoconiosis pursuant to 20

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[1] There are four medical opinions addressing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Drs. Kruk, Talati and Kraynak opined that claimant has pneumoconiosis, while Dr. Dittman opined that he does not have the disease. The Board has affirmed, as unchallenged, the administrative law judge's finding that Dr. Dittman's opinion was not reasoned or documented. [*M.L.B.*] *v. Jeddo Highland Coal Co.*, No. 05-0872 BLA, slip op. at 7 n.8. (Aug. 15, 2006) (unpub.). The Board has also specifically rejected claimant's assertion that the administrative law judge erred in assigning less weight to the opinions of Drs. Kruk and Talati because they did not record a smoking history for claimant, contrary to other record evidence indicating that claimant had a history of smoking one pack of cigarettes per week for thirty-three years. *Id*. at 7-8. Thus, the only issue for resolution on remand was the weight to accord Dr. Kraynak's opinion.

C.F.R. §718.204(c). Decision and Order at 9-10. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to find the x-ray evidence and medical opinions of Drs. Kruk, Talati and Kraynak to be sufficient to establish that he has pneumoconiosis pursuant to Section 718.202(a)(1), (4). Claimant further asserts that the administrative law judge erred in failing to find total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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.[2] 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).

In his brief, claimant resurrects arguments, raised in the prior appeal, that the administrative law judge erred in finding the x-ray evidence to be in equipoise as to the existence of pneumoconiosis, and in rejecting the diagnoses of pneumoconiosis by Drs. Kruk and Talati. Although claimant's prior arguments were specifically rejected by the Board, [*M.L.B.*], BRB No. 05-0872 BLA, slip op. at 5, 8, claimant indicates that he wishes to preserve those arguments "for further appeal purposes." Claimant's Brief at 7, 13. We note that claimant has not set forth any valid exception to the law of the case doctrine,[3] *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993). Therefore, we adhere

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] The doctrine of "the law of the case" is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter; therefore, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (*en banc*) (Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

to our previous holdings under Section 718.202(a)(1), (4), as to the propriety of the weight the administrative law judge accorded the x-ray evidence and the medical opinions of Drs. Kruk and Talati.[4] *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

With respect to the administrative law judge's current decision, claimant asserts that the administrative law judge erred in concluding that Dr. Kraynak's opinion was "compromised by a number of factors, all of which … are innocuous, insignificant and inadequate to reject Dr. Kraynak's opinion." Claimant's Brief at 15. We disagree. In accordance with the Board's remand directive, the administrative law judge reconsidered Dr. Kraynak's opinion at Section 718.202(a)(4) and found that Dr. Kraynak's lack of Board-certification and his failure to adequately address all of the potential causative factors for claimant's respiratory condition, compromised the reliability of his opinion. She specifically explained:

> Dr. Kraynak is not Board-certified in any field of medicine, while other physicians of record hold Board certifications in medical fields, such as Dr. Ditman's certification in Internal Medicine. The lack of professional credentials diminishes the persuasiveness of Dr. Kraynak's opinions compared to the other more qualified physicians of record. . . .
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> Dr. Kraynak's opinion is [also] based upon an erroneous or vague smoking history. In his report, Dr. Kraynak listed that claimant "tried smoking as a teenager for a few months." He then acknowledged at his deposition that other physicians documented much lengthier and substantial smoking histories. However, Dr. Kraynak never stated that he *accepted* those other physicians' accounts. He only affirmatively stated that he relied upon a

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[4] Citing *Wisniewski v. Director, OWCP*, 929 F.2d 952, 959, 15 BLR 2-57, 2-70 (3d Cir. 1991), claimant argues that while Drs. Kruk and Talati may have recorded an inaccurate smoking history, the administrative law judge erred in discounting their opinions since the Third Circuit has recognized that "smoking is incapable of causing radiographic impressions characteristic of pneumoconiosis." Claimant's Brief at 14. Claimant's reliance on *Wisniewski* is misplaced, as that decision addressed the relevancy of a smoking history in determining whether a miner's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). *Id.* In this case, the administrative law judge did not find clinical pneumoconiosis to be established based on the x-ray evidence, so she committed no error in considering whether claimant's respiratory condition, as demonstrated by claimant's symptoms and other objective evidence, was attributable to smoking or coal dust exposure, in her consideration of the medical opinion evidence at Section 718.202(a)(4).

> smoking history of a few months during Claimant's teenage years. This is contrary to the preponderance of the credible evidence which establishes a much lengthier smoking history. . . . Dr. Kraynak then testified that even if he were to assume that claimant had a lengthier smoking history . . . he still would not attribute any significance [to that lengthier smoking history] to [the development of claimant's] breathing problems. However, Dr. Kraynak failed to offer any explanation for this assertion. Smoking a pack per week for thirty-three (33) years is a substantially greater consumption of cigarette smoke than smoking for a few months in one's teenage years. It was imperative for Dr. Kraynak to offer an adequate explanation that would reconcile the disparity between the documented smoking histories and discuss the significance [of claimant's smoking history in relation to] the objective evidence. The probative value of his opinion is reduced by his failure to address this issue.

Decision and Order at 8-9 (emphasis in the original) (citations omitted).

Contrary to claimant's assertion, although Dr. Kraynak treated claimant, the administrative law judge had discretion to consider Dr. Kraynak's qualifications in assessing what weight, if any, to assign his opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 9. Furthermore, the question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *Clark*, 12 BLR at 151; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). While the United States Court of Appeals for the Third Circuit has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997), the court has also indicated that automatic preferences are disfavored, *Mancia*, 130 F.3d at 590-91 21 BLR at 2-238; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to a treating physician's opinion, when warranted. *See* 20 C.F.R. §718.104(d); [5] *Mancia*, 130 F.3d at 590-91, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-201. In this case the administrative law judge acted within her discretion in determining that Dr.

[5] The regulation at 20 C.F.R. §718.104(d)(5) also provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Kraynak's opinion was not sufficiently reasoned, despite his treatment of clamant.[6] *See* 20 C.F.R. §718.104(d)(5); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

Because the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We also affirm, as rational and supported by substantial evidence, the administrative law judge's overall finding at Section 718.202(a) that, when considered together, the medical opinions and the inconclusive x-ray evidence fail to support a finding that claimant has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d at 22, 21 BLR at 2-104 (3d Cir. 1977). Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, benefits are precluded. *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[6] In addition, the administrative law judge noted that "since claimant's treatment records were not fully in evidence," she was unable to ascertain "the nature, duration, frequency and extent of Dr. Kraynak's treatment of claimant" as required by Section 718.104(d). Decision and Order at 7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand 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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JUDITH S. BOGGS
Administrative Appeals Judge