BRB No. 98-1338 BLA

BRUCE M. ERDMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MERCURY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 7/16/99
	)	
AMERICAN MINING INSURANCE 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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1243) of Administrative Law Judge Paul H. Teitler 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). The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the evidence sufficient to establish total

disability pursuant to 20 C.F.R. §718.204(c),[1] the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded that the evidence is insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310,[2] and thus, he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Neither employer nor the Director, Office of Workers' Compensation Programs, has

[1]The administrative law judge stated that "Claimant's previous claim was...denied for failure to establish pneumoconiosis." Decision and Order at 5. The administrative law judge also stated that although "[t]he issue of total disability was not reached,...a weighing of the previous evidence does show that Claimant was totally disabled at that time." *Id*. The administrative law judge further stated that "the issue is whether there was a mistake of fact in the previous determination that Claimant does not have pneumoconiosis." *Id*. at 6.

[2]Claimant filed his claim for benefits on February 22, 1994. Director's Exhibit 1. On June 14, 1995, the administrative law judge issued a Decision and Order denying benefits based on claimant's failure to establish the existence of pneumoconiosis, Director's Exhibit 60, which the Board affirmed, *Erdman v. Mercury Coal Co.*, BRB No. 95-1776 BLA (Mar. 22, 1996)(unpub.). Claimant filed a request for modification on November 12, 1996. Director's Exhibit 69.

participated in this appeal.[3]

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).

[3]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Claimant's contention has merit. The administrative law judge considered the x-ray evidence of record which consists of the thirty-two interpretations of five x-rays. Twenty-one readings are positive for pneumoconiosis,[4] Director's Exhibits 15, 19, 20, 37, 38, 40, 41, 43, 44, 52-55, 69; Claimant's Exhibits 2-4, 6-8, and eleven readings are negative, Director's Exhibits 15, 18, 31, 33-36; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge stated that "[f]rom the start, the readings were both negative and positive, and the positive readings spanned from 1/0 to 2/1 with no shown progression." Decision and Order at 9. The administrative law judge also stated that "[e]qually-qualified physicians have read the x-rays as both negative and positive." *Id*. at 8. Further, the administrative law judge stated that "[n]o x-ray is entitled to any greater weight based on its date as all the x-rays were taken within a three year period, after exposure to coal dust ceased." *Id*. at 8-9. Hence, the administrative law judge concluded that "the readings are in equipoise."[5] *Id*. at 8.

[4]The newly submitted August 13, 1996 x-ray was read as positive for pneumoconiosis on two separate occasions by Dr. Smith. Dr. Smith read this x-ray on September 11, 1996, Director's Exhibit 69, and December 4, 1997, Claimant's Exhibit 8.

[5]The administrative law judge stated that "while the x-ray readings do not establish the absence of pneumoconiosis, they equally do not establish its presence." Decision and Order at 9.

Claimant asserts that the administrative law judge violated the Administrative Procedure Act (APA) by failing to provide an adequate explanation for rejecting the positive x-ray readings by B-readers and Board-certified radiologists, and that the administrative law judge mischaracterized the x-ray evidence of record. In the administrative law judge's previous decision, the administrative law judge, citing *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993),[6] considered the conflicting interpretations of x-rays dated March 1, 1994, June 29, 1994 and August 30, 1994, and found the evidence insufficient to establish the existence of pneumoconiosis.[7] The x-rays dated March 1, 1994, June 29, 1994 and August 30, 1994 were read both as negative and positive for pneumoconiosis by physicians who are dually qualified as B-readers and Board-certified radiologists. However, the two newly submitted x-rays dated August 13, 1996 and February 4, 1997 were both read as positive for pneumoconiosis by physicians who are dually qualified as B-readers and Board-certified radiologists, with the exception of one negative reading of the 1997 x-ray by a physician who is a B-reader.[8]

An administrative law judge must provide a sufficient rationale which explains the relationship between the relevant evidence, and his findings and conclusions. *See Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Although we may in certain circumstances affirm findings that lack clarity, *see Markus v. Old Ben Coal Co.*, 712 F.2d 322, 327, 5 BLR 2-130, 2-137 (7th Cir. 1983)(if the administrative law judge's reasoning may reasonably be discerned, remand is not required); *see*

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[6]In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the United States Supreme Court held that when evidence is equally balanced, claimant must lose.

[7]As previously noted, the Board affirmed the administrative law judge's weighing of the previously submitted x-ray evidence. *Erdman v. Mercury Coal Co.*, BRB No. 95-1776 BLA (Mar. 22, 1996)(unpub.).

[8]Drs. Bassali, Mathur and Smith, who are B-readers and Board-certified radiologists, read the August 13, 1996 x-ray as positive for pneumoconiosis. Director's Exhibit 69; Claimant's Exhibits 6-8. Whereas Dr. Galgon, who is a B-reader, read the February 4, 1997 x-ray as negative for pneumoconiosis, Claimant's Exhibit 1; Employer's Exhibit 1, Drs. Brandon, Bassali, Marshall, Mathur and Smith, who are B-readers and Board-certified radiologists, reread the same x-ray as positive, Claimant's Exhibits 2-4, 6, 8.

also Newport News Shipbuilding and Dry Dock Co. v. Tann, 841 F.2d 540, 543, 21 BRBS 10, 16 (CRT)(4th Cir. 1988), we may not speculate where there are insufficient findings to permit appellate review, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (CRT)(2d Cir. 1982). Thus, as claimant asserts, since the administrative law judge did not provide an adequate explanation for finding that the conflicting x-ray readings of record are in equipoise, we vacate the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of all of the relevant x-ray evidence of record.

Next, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. Whereas Dr. Kraynak opined that claimant suffers from coal workers' pneumoconiosis, Director's Exhibit 77; Claimant's Exhibit 5, Dr. Galgon opined that claimant does not suffer from coal workers' pneumoconiosis,[9] Claimant's Exhibit 1; Employer's Exhibits 1, 2. The administrative law judge stated, "Weighing these opinions, along with the ones previously submitted,[10] I find that Claimant has not established pneumoconiosis." Decision and Order at 13. The administrative law judge also stated, "I adopt my previous reasoning and add that

[9]Although Dr. Galgon opined that claimant suffers from an obstructive lung disease, he also opined that this condition was not related to coal workers' pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibits 1, 2.

[10]Although the administrative law judge did not specifically identify the previously submitted medical opinions of record, the administrative law judge indicated that he did consider all of these medical opinions. The administrative law judge stated that "[t]he previously submitted medical opinions are summarized in the June 14, 1995 Decision and Order. (DX 60 at pp. 6-8)." Decision and Order at 10. In the previous decision, the administrative law judge considered the medical opinions of Drs. Cable, Kaplan and Kraynak. Whereas Dr. Kraynak opined that claimant suffers from coal workers' pneumoconiosis, Director's Exhibits 48, 49, Drs. Cable and Kaplan opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibits 15, 31. The administrative law judge accorded determinative weight to the opinions of Drs. Cable and Kaplan over the contrary opinion of Dr. Kraynak because he found their opinions to be better reasoned and documented. In addition, the administrative law judge accorded greater weight to the opinions of Drs. Cable and Kraynak because of their superior qualifications. The Board affirmed the administrative law judge's weighing of the conflicting medical opinion evidence. *Erdman*, slip op. at 4-5.

Dr. Galgon is also highly qualified in the field of pulmonary medicine." *Id*. Further, the administrative law judge stated, "I find Dr. Galgon's opinion to be well-documented and well-reasoned." *Id*. The administrative law judge properly accorded greater weight to the opinion of Dr. Galgon than to the contrary opinion of Dr. Kraynak because he found Dr. Galgon's opinion to be better reasoned and documented.[11] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly accorded greater weight to the opinion of Dr. Galgon than to the contrary opinion of Dr. Kraynak because of Dr. Galgon's superior qualifications.[12] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we reject claimant's assertions that the administrative law judge violated the APA by failing to provide an adequate explanation for discounting Dr. Kraynak's opinion, and that the administrative law judge mischaracterized the medical opinion evidence.

Claimant also asserts that Dr. Galgon's opinion is hostile to the Act. Since claimant did not assert that Dr. Galgon's opinion is hostile to the Act at the hearing or otherwise while the case was pending before the administrative law judge, we reject

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[11]Dr. Galgon based his opinion on an examination, cigarette smoking and coal mine employment histories, a pulmonary function study, an arterial blood gas study, and an x-ray reading. Claimant's Exhibit 1; Employer's Exhibits 1, 2. The administrative law judge stated that Dr. Galgon "obtained a pulmonary function study post-bronchodilator which showed some reversibility and a normal vital capacity." Decision and Order at 13. The administrative law judge also stated that Dr. Galgon "persuasively explained how those changes are not consistent with coal workers' pneumoconiosis, which every physician of record agrees does not respond to bronchodilators and causes primarily a restrictive defect." *Id*. Further, the administrative law judge stated that "[t]he results of the pulmonary function study, as well as [the results] of the other tests, provide a solid basis for Dr. Galgon's finding that Claimant does not have pneumoconiosis and that the obstruction is related to cigarette smoking." *Id*.

[12]The administrative law judge stated that "Dr. Galgon is...highly qualified in the field of pulmonary medicine." Decision and Order at 13. Dr. Galgon is Board-certified in internal medicine, pulmonary medicine and sleep disorders. Employer's Exhibit 2. Dr. Kraynak is Board-eligible in family medicine. Director's Exhibit 49; Claimant's Exhibit 5.

claimant's assertion as untimely raised. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199 (1984). In addition, claimant asserts that the administrative law judge should have accorded determinative weight to Dr. Kraynak's opinion because he is claimant's treating physician. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *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). Therefore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant suffers from pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Therefore, on remand, if the administrative law judge finds the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1), he must then determine whether the relevant evidence of record is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) in accordance with *Williams*.

Finally, on remand, if the administrative law judge finds the existence of pneumoconiosis established at 20 C.F.R. §718.202(a), he must determine whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge