

BRB No. 99-1003 BLA

BENJAMIN WITMER)		
)		
Claimant-Respondent)		
)		
v.)		
)		
BARREN CREEK COAL COMPANY)	DATE	ISSUED:
)		
Employer-Petitioner)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order - Award of Benefits on Remand of
Ralph A. Romano, Administrative Law Judge, United States
Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Richard Davis (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (87-BLA-0091) of Administrative Law Judge Ralph A. Romano awarding 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). This case is on appeal before the Board for the third time. In his initial Decision and Order, the administrative law judge credited claimant with nineteen years of qualifying coal mine employment as stipulated by the parties and supported by the record, and adjudicated the claim, filed on October 5, 1984, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record established the existence

of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(4), (b), thus modification pursuant to 20 C.F.R. §725.310 was appropriate based on a change in conditions following the district director's denial of the claim. Accordingly, benefits were awarded.

On appeal, the Board rejected employer's argument that the administrative law judge was required to make a threshold modification analysis pursuant to Section 725.310 before adjudicating the merits of the claim. The Board affirmed the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(1), 718.203(b) as unchallenged on appeal, and affirmed his findings pursuant to Section 718.204 as supported by substantial evidence. Consequently, the Board affirmed the award of benefits. *Witmer v. Barren Creek Coal Co.*, BRB No. 89-3412 BLA (Apr. 28, 1993) (unpub.). Upon employer's appeal, however, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that the administrative law judge's findings pursuant to Section 718.204 did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), and therefore vacated these findings and remanded the case for the administrative law judge to reweigh the evidence and provide a sufficient rationale for his decision. *Barren Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997).

On remand, the administrative law judge again found that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(c)(4), (b), and consequently awarded benefits. On the second appeal, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3), but vacated his findings pursuant to Section 718.204(c)(4), (b), and remanded the case for the administrative law judge to examine the validity of the reasoning of the medical opinions in light of the studies conducted and the objective indications upon which the conclusions were based, and to provide a sufficient rationale for his weighing of the medical opinions at Section 718.204(c)(4). The Board further instructed the administrative law judge to weigh the contrary probative evidence in determining whether total respiratory disability was established pursuant to Section 718.204(c), and to resolve the evidence regarding the presence or absence of heart disease in order to assess the probative value of the disability causation opinions at Section 718.204(b), if reached. The Board also vacated the administrative law judge's Supplemental Decision and Order awarding attorney fees, and instructed the administrative law judge on remand to address employer's specific objections and provide a rationale for his findings. *Witmer v. Barren Creek Coal Co.*, BRB No. 98-

0288 BLA (Nov. 13, 1998)(unpub.)(*Witmer II*).

In his Decision and Order issued on May 27, 1999, the administrative law judge again awarded benefits, finding the weight of the evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c)(4), (b).

In the present appeal, employer challenges the administrative law judge's findings pursuant to Section 718.204(c)(4), (b).¹ Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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

¹Employer additionally asserts that the administrative law judge has never determined whether the proof establishes a basis for modification pursuant to 20 C.F.R. §725.310, and argues that current law requires the administrative law judge to make threshold modification findings prior to adjudicating the merits of the claim. Employer's arguments are without merit. In his initial Decision and Order, the administrative law judge determined that the weight of the evidence of record established a change in claimant's condition, which comports with the decision of the United States Court of Appeals for the Third Circuit in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), requiring the administrative law judge to review all evidence of record, not just the evidence which was newly submitted in support of modification, and determine whether it establishes either a change in conditions or a mistake in the ultimate fact of entitlement.

this Board and may not be disturbed. 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).

Employer maintains that, in failing to independently analyze and weigh the conflicting medical evidence at Section 718.204(c)(4), (b), the administrative law judge did not provide a reasoned analysis of his own which comports with the APA. We agree. The administrative law judge accurately summarized the conflicting medical evidence of record, see Decision and Order at 3-6, but then transcribed claimant’s remand brief almost word-for-word, with only minor editing changes, see Decision and Order at 6-8, instead of providing an independent rationale for accepting or rejecting specific medical opinions. Because claimant’s brief presents a view of the evidence which is biased in support of claimant’s position,² the

²For example, regarding total respiratory disability at Section 718.204(c)(4), the administrative law judge was instructed to examine the validity of the reasoning of the medical opinions in light of the studies conducted and the objective indications upon which the conclusions were based. *Witmer II*, slip op. at 5; see *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Claimant’s remand brief, incorporated by the administrative law judge, asserted that “Dr. Kraynak did not base his medical opinion on ‘unreliable’ pulmonary function test (PFT) results,” as “Dr. Kraynak testified in great detail about the test results and how they affected his opinion of total disability;” three of the four PFTs conducted by Dr. Kraynak were deemed valid; and of the three valid studies, two produced qualifying values and the third was obviously not a normal study as it was interpreted as demonstrating a moderately severe restrictive impairment. Claimant’s Brief on Remand at 4-5; Decision and Order at 6. Claimant’s brief and the administrative law judge’s Decision and Order, however, do not address the issue of whether the invalid test results affected the reliability of the opinions of Drs. Kraynak and Kruk. See *Siwiec*, *supra*. Additionally, at Section 718.204(b), the Board instructed the administrative law judge to resolve the conflicting evidence regarding the presence of heart disease, which was diagnosed by Dr. Dittman and ruled out by Drs. Kraynak and Kruk, in order to assess the probative value of the opinions of Drs. Kraynak and Kruk on the issue of disability causation. *Witmer II*, slip op. at 6-7. Claimant’s analysis of the evidence, incorporated by the administrative law judge, included the assertion that Dr. Dittman’s diagnosis of angina pectoris was predicated exclusively on claimant’s symptoms of shortness of breath and the like which Dr. Dittman refused to relate to a pulmonary problem despite his admission that the symptoms which he related to angina could also be attributed to pneumoconiosis. Claimant’s Brief on

administrative law judge's verbatim incorporation of the analysis therein conflicts with the administrative law judge's duty to impartially evaluate the evidence in his role as neutral adjudicator. See *generally Hall v. Director, OWCP*, 12 BLR 1-80 (1988)(*en banc*); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). We therefore vacate the administrative law judge's Decision and Order and remand this case for the administrative law judge to perform independent factfinding based on the record, in accordance with our previous remand instructions. We decline, however, to direct, pursuant to employer's request, that this case be reassigned to a different administrative law judge on remand, as employer has demonstrated no evidence of bias or recalcitrance on the part of the administrative law judge. See *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits on Remand is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

Remand at 10; Decision and Order at 8. Employer correctly notes, however, that Dr. Kraynak also admitted that claimant's symptoms were non-specific, see Claimant's Exhibit 20 at 8; that Dr. Dittman's diagnoses of atherosclerotic vascular disease and angina pectoris were not, in fact, based exclusively on symptoms but also on examination findings and electrocardiogram results, see Employer's Exhibit 6 at 10-11, 18-19; and that Dr. Kruk also reported physical examination findings consistent with heart disease, which could undermine his conclusion that there was "[n]o evidence whatsoever of any ischemic cardiac disease." Claimant's Exhibit 8.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge