BRB No. 02-0744 BLA

ANDREW BARKUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNDERKOFFLER COAL SERVICES,	)	DATE ISSUED:
		_____
INCORPORATED	)	
	)	
and	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0115) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) denying benefits on a

duplicate 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] This case involves a request for modification of a duplicate claim. The pertinent procedural history of this case is as follows: Claimant filed his initial claim on January 24, 1992. Director's Exhibit 38. This claim was denied by the district director on June 25, 1992 because claimant failed to establish the existence of pneumoconiosis and total disability. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on May 29, 1997. Director's Exhibit 1. On May 20, 1999, Administrative Law Judge Lawrence P. Donnelly issued a Decision and Order denying benefits based upon claimant§s failure to establish a material change in conditions, Director's Exhibit 54, which the Board affirmed, *Barkus v. Underkoffler Coal Serv.*, BRB No. 99-0946 BLA (May 31, 2000)(unpub.).

Claimant filed a request for modification on March 7, 2001. Director's Exhibit 65. In a Decision and Order dated July 23, 2002, the administrative law judge credited the miner with 30.65 years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the

[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.

evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[2] and therefore, he found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits.

[2]The administrative law judge noted that "[c]laimant alleges that no mistake occurred in the previous denial, and contends only that a change in condition has occurred since the denial." Decision and Order at 5. The administrative law judge therefore stated, "I now review the newly submitted evidence to determine whether [c]laimant is able to establish a change in condition in regards to any of these elements of entitlement." *Id*.

[3]The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv). 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.[4]

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).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Donnelly denied benefits because claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Director's Exhibit 54. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The United

[4]Since the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has adopted the standard that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Claimant's prior claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 38. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability.

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We disagree. Of the six interpretations of the two newly submitted x-rays dated September 20, 2000 and May 31, 2001, three readings are positive for pneumoconiosis, Director's Exhibits 64, 68; Claimant's Exhibit 2, and three readings are negative for pneumoconiosis, Director's Exhibit 71; Employer's Exhibits 1, 2. Drs. Smith and Mathur read the September 20, 2000 x-ray as positive for pneumoconiosis while Dr. Barrett read the same x-ray as negative for pneumoconiosis. Further, whereas Drs. Fino and Galgon read the May 31, 2001 x-ray as negative for pneumoconiosis, Dr. Mathur read the same x-ray as positive for pneumoconiosis. The administrative law judge stated that "[t]he September 20, 2000 [x]-ray film is positive for pneumoconiosis, because more B-readers read it as positive than negative." Decision and Order at 7. The administrative law judge also stated that "the May 31, 2001 [x]-ray is negative for pneumoconiosis because more B-readers read it as negative than positive." *Id*. Based upon his findings that the September 20, 2000 x-ray is positive for the existence of pneumoconiosis and that the May 31, 2001 x-ray is negative for the existence of pneumoconiosis, the administrative law judge concluded that "the [x]-ray evidence is in equipoise and does not support a positive finding of pneumoconiosis." *Id*.

Claimant asserts that the administrative law judge erred by only relying on the B reader status of the physicians, rather than relying on the additional qualifications of the physicians who are both B readers and Board-certified radiologists. Claimant is correct in suggesting that had the administrative law judge factored in the dual qualifications of the physicians who are both B readers and Board-certified radiologists, he would have found both the September 20,

2000 and May 31, 2001 x-rays positive for pneumoconiosis.[5] However, the administrative law judge was not required to do so. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In the case at bar, the administrative law judge, within his discretion as trier-of-fact, accorded greater weight to the x-ray readings which were provided by physicians who are at least qualified as B readers. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Thus, we reject claimant's assertion that the administrative law judge erred by only relying on the B reader status of the physicians, rather than relying on the additional qualifications of the physicians who are B readers and Board-certified radiologists. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[6] *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512

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[5]The record reflects that Dr. Barrett, a B reader and Board-certified radiologist, read the September 20, 2000 x-ray as negative for pneumoconiosis, while Drs. Mathur and Smith, B readers and Board-certified radiologists, read the same x-ray as positive for pneumoconiosis. Further, Drs. Fino and Galgon, B readers, read the May 31, 2001 x-ray as negative for pneumoconiosis, while Dr. Mathur, a B reader and a Board-certified radiologist, read the same x-ray as positive for pneumoconiosis.

[6]The record also consists of Dr. Galgon's negative reading of an x-ray dated May 19, 2000. Director's Exhibit 76. Since Dr. Galgon's negative reading of this x-ray supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), we hold that any error by the administrative law judge in failing to consider this x-ray is harmless. *See Larioni v. Director, OWCP*, 6

U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

BLR 1-1276 (1984).

Next, claimant contends that the administrative law judge erred in finding the newly submitted 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 pneumoconiosis, Claimant's Exhibit 4, Drs. Fino and Galgon opined that claimant does not suffer from pneumoconiosis, Employer's Exhibits 1, 2, 4. 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.[7] *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Galgon because of their superior qualifications.[8] *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 assertion that the administrative law judge erred in finding that the opinions of Drs. Fino and Galgon outweigh Dr. Kraynak's opinion.

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[7]The administrative law judge determined that "Dr. Kraynak's diagnosis of pneumoconiosis is outweighed by the better supported report of Dr. Galgon." Decision and Order at 10. The administrative law judge stated that "Dr. Kraynak's general statements that [c]laimant's complaints have gotten worse and that his condition has worsened are not sufficient to establish any change in condition especially in light of the improvement demonstrated on [c]laimant's pulmonary function studies." *Id*. The administrative law judge therefore stated, "I find that Dr. Kraynak's opinion that [c]laimant has pneumoconiosis is entitled to weight, but that his opinion regarding the fact that [c]laimant's condition is 'worsening' to be unexplained." *Id*. at 9 In contrast, the administrative law judge stated that "Dr. Galgon's examination findings were thorough, specific, and well-supported both in his written report and in his deposition testimony." *Id*. at 10. The administrative law judge therefore stated, "I find that [Dr. Galgon's] opinion is supported by objective data and is well-reasoned and detailed, and I give it significant weight." *Id*.

[8]In his consideration of the reports of Drs. Fino, Galgon and Kraynak, the administrative law judge stated that "both Dr. Galgon and Dr. Fino have superior credentials." Decision and Order at 10. The administrative law judge noted that Drs. Fino and Galgon are "Board-certified in Internal Medicine and Pulmonary Disease." *Id.* at 9-10. In a deposition dated January 11, 2002, Dr. Kraynak indicated that he is neither Board-certified nor Board-eligible in the field of pulmonary medicine. Claimant's Exhibit 4 at 4-5.

Further, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Kraynak's opinion based upon his status as 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 Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel, supra*; *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

As previously noted, the initial claim was denied by the district director because claimant failed to establish, *inter alia*, the existence of pneumoconiosis. Director's Exhibit 38. The record in the prior claim does not contain any evidence of pneumoconiosis. Drs. Gibbs and Sargent provided negative readings of a February 11, 1992 x-ray. *Id*. Further, in a medical report, Dr. Green opined that claimant suffers from hypertension. *Id*. With regard to the duplicate claim, Judge Donnelly found that claimant failed to establish the existence of pneumoconiosis based upon the newly submitted evidence at 20 C.F.R. §718.202(a)(1)-(4) (2000). Director§s Exhibit 54. The Board affirmed Judge Donnelly's finding at 20 C.F.R. §718.202(a)(1)-(4) (2000). *Barkus v. Underkoffler Coal Service*, BRB No. 99-0946 BLA (May 31, 2000)(unpub.). Since the evidence submitted prior to claimant's request for modification is insufficient to establish the existence of pneumoconiosis, and since we affirm the administrative law judge's finding in the case at bar, that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, we hold that claimant is precluded from establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a) on the merits.

Since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), an essential element of entitlement, the administrative law judge properly denied benefits under 20 C.F.R. Part 718.[9] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[9]In view of our disposition of this case at 20 C.F.R. §718.202(a) on the merits, we decline to address claimant's contentions with respect to 20 C.F.R. §718.204(b)(2)(i) and (b)(2)(iv). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).