BRB No. 00-0452 BLA

ALBERT REPELLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE 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 Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus and Amy E. Suski (Arter & Hadden LLP), Washington, D.C., for employer.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-BLA-0171) of Administrative Law Judge Robert D. Kaplan 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 administrative law judge credited claimant with thirty-three and three-quarters years of coal mine employment based on a stipulation of the parties, and noted that this case involved a duplicate claim.[2] The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis, and therefore, found that claimant established a material change in conditions. The administrative law judge then considered all of the evidence of record and found it sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, and that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge denied employer its right to a fair hearing by rejecting some of the x-ray and pulmonary function study evidence, and by then relying on the remaining "uncontradicted" evidence. Employer also challenges the administrative law judge's finding that the evidence establishes a material change in conditions, the existence of pneumoconiosis, total disability and that claimant's total disability is due to pneumoconiosis.

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim for benefits on December 4, 1981. The claims examiner denied benefits in 1982 because claimant failed to establish that he had pneumoconiosis, that the disease was caused at least in part by his coal mine work, or that he was totally disabled by the disease. Director's Exhibit 28.

Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter, indicating that, with one exception, it takes no position on the issues raised by employer. The Director specifically disagrees with employer's assertion that claimant cannot be awarded benefits in this case because he has a pre-existing knee injury.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. Claimant maintains that the regulations will not affect the outcome of this case. Employer asserts that this case must be held in abeyance because of the changes to 20 C.F.R. §718.204(a), regarding disability causation. In all other regards, employer states that the amended regulations have no impact on this case. The Director states that the amended regulations have no impact on any of the issues presented in this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.[4] Therefore, the Board will proceed to adjudicate the

[3] We affirm the administrative law judge's finding that claimant worked as a miner for thirty-three and three-quarters years, as this finding is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] We note that only in a case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit would claimant's totally disabling non-respiratory impairment have prevented entitlement. Inasmuch as the instant case arises within the jurisdiction of the United States Court of Appeals for the

merits of 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 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).

Initially, we consider employer's arguments regarding its right to due process. Employer refers to *North American Coal Co. v. Miller,* 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), in support of its assertion that the opportunity for a fair hearing requires that all parties have an opportunity to fully present their cases, and urges that the administrative law judge's decision is at odds with *Miller*. Employer states:

> the ALJ held that he would not consider the x-ray readings obtained by both the coal company and the Director, OWCP because the films were not available to the claimant for re-reading. Tr. At 6-20. Employer does not challenge that finding, but having struck those re-readings from the record, it was error for the ALJ to consider any of the x-ray readings....It makes no sense to cure one due process violation by creating another. That is what the ALJ did when he considered Dr. Kraynak's reading of the March 16, 1998 film and when he relied on it as uncontradicted under [S]ection 718.202(a)(1) and [S]ection 725.309.

Employer's Brief at 8-9. Employer also contends that that the administrative law judge committed a similar error by refusing to allow employer to have the July 29, 1999 pulmonary function study test result reviewed by its experts.

Third Circuit, the amended regulations do not impact the outcome of this case.

In view of the circumstances surrounding the administrative law judge's refusal to admit the interpretations of the December 1981 and the October 1998 x-rays,[5] and employer's failure to object to their exclusion at the hearing, *see* Hearing Transcript, or on appeal, we reject employer's assertion that the administrative law judge's consideration of the x-ray evidence of record violates its right to due process. This case is distinguishable from *Miller* since employer, in the instant case, had ample time prior to the hearing, to develop evidence responding to the March 1998 x-ray interpretation, relied upon by the administrative law judge. *See* Director's Exhibit 12. Inasmuch as the only x-ray interpretation of record is the positive interpretation of Dr. Kraynak, we hold that the administrative law judge properly relied upon this interpretation to find the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1)(2000).

We agree with employer, however, that, regarding the issue of total respiratory disability, the administrative law judge should have allowed it the opportunity to have the July 1999 pulmonary function study reviewed, in order to insure a full presentation of the case and in order to protect employer's right to due process. *See generally Miller, supra*. Accordingly, we vacate the administrative law judge's total disability finding. On remand, the administrative law judge must allow employer the opportunity to have this pulmonary function study reviewed prior to rendering total disability findings.

[5] The administrative law judge rejected the x-ray interpretations because the administrative law judge determined that employer had been "dilatory" in providing claimant with the original films. Hearing Transcript at 18.

We now turn to employer's assertions concerning the administrative law judge's findings on the merits of entitlement. Employer asserts that the administrative law judge erred by failing to consider Dr. Dittman's opinion regarding the existence of pneumoconiosis, which he had received in evidence without objection from claimant's counsel. Hearing Transcript at 20, 22. We agree. Dr. Dittman's opinion, which employer submitted in response to the duplicate claim, *see* Employer's Exhibit 23, was not considered by the administrative law judge in his material change in conditions finding, nor was it considered in his evaluation of the evidence at 20 C.F.R. §718.202(a)(4)(2000) and 20 C.F.R. §718.202(a)(2000) in determining the merits of entitlement.[6] Since the administrative law judge's failure to consider all of the relevant evidence constitutes reversible error, *see* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-42 (1987), we vacate the administrative law judge's material change in conditions finding and the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), and Section 718.202(a)(2000), *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). On remand, the administrative law judge must consider all of the relevant evidence in making his findings regarding a material change in conditions and the existence of pneumoconiosis.

Employer also challenges the administrative law judge's reliance on Dr. Kraynak's report, urging that the administrative law judge overlooked the inconsistencies in this opinion. Employer asserts that Dr. Kraynak noted wheezing and reported that claimant's lips were cyanotic which indicated a lowered blood oxygen level, but testified that claimant's blood gas studies were normal. Employer notes that in a later examination Dr. Dittman did not observe wheezing or find claimant's lips to be cyanotic. We reject employer's assertion and hold that Dr. Kraynak's opinion merely reports his assessment of claimant's appearance on the date of his examination.

Employer contends that Dr. Kraynak relied upon a positive x-ray interpretation although he is not a B-reader and argues that Dr. Kraynak's statement that even in the absence of the x-ray, he would diagnose pneumoconiosis based on claimant's clinical presentation and history of exposure, is irrational, because there is nothing in claimant's clinical presentation connected to pneumoconiosis. Inasmuch as Dr. Kraynak based his

[6] We note that 20 C.F.R. §718.202(a) has not been revised in pertinent part.

medical opinion on more than an interpretation of radiographic evidence, there is no requirement that the administrative law judge address Dr. Kraynak's credentials for interpretation of radiographic evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, we reject employer's assertion that there is nothing in claimant's clinical presentation connected to pneumoconiosis. The determination of whether claimant's clinical presentation indicates the existence of pneumoconiosis is a medical determination to be made by a physician, and it would be inappropriate for the administrative law judge to make such a medical determination. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Next, we turn to employer's assertions regarding the administrative law judge's total disability findings. Employer asserts that the administrative law judge mischaracterized Dr. Dittman's opinion, and maintains that Dr. Dittman's opinion "clearly found no respiratory or pulmonary disability for work," although employer is unable to support its argument with a quotation from the doctor's opinion. Employer's Brief at 13. The administrative law judge found that "none of [Dr. Dittman's] statements constitutes a clear opinion regarding whether claimant is totally disabled due to a respiratory or pulmonary condition, the standard under §718.204(c)." Decision and Order at 9. We reject employer's contention and hold that the administrative law judge properly considered Dr. Dittman's opinion in this regard. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Employer's Exhibit 23.

Employer correctly points out that the administrative law judge erred in summarizing Dr. Kraynak's opinion. The administrative law judge wrote, "Dr. Kraynak stated that he would be of the same opinion in the absence of those ventilatory studies." Decision and Order at 9. The doctor testified, however, that his opinion would be the same regardless of the legal interpretation of the studies as qualifying or non-qualifying, Claimant's Exhibit 5 at 20-22, not regardless of the studies themselves. Employer fails to explain how the administrative law judge's error undermines his decision to credit Dr. Kraynak's opinion, and we hold that the administrative law judge's error in summarizing Dr. Kraynak's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also contends that Dr. Kraynak is not Board-certified or Board-eligible in internal medicine or pulmonary diseases, and that because he started treating claimant for this litigation he does not have any advantage in this situation. Further, employer notes that Dr. Kraynak's opinion does not reflect an understanding of the sedentary nature of claimant's usual coal mine employment. Employer also contends that the administrative law judge should reject Dr. Kraynak's opinion because it is at odds with the objective clinical evidence.

We reject employer's assertion that Dr. Kraynak's opinion is entitled to less weight because he is not Board-certified or Board-eligible in internal medicine or pulmonary diseases. While the administrative law judge may give greater weight to a physician's opinion based upon the physician's qualifications, he is not required to do so. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Further, we reject employer's assertion that Dr. Kraynak does not have an "advantage" because he started treating claimant for this litigation. The administrative law judge does not refer to Dr. Kraynak as claimant's treating physician. In addition, we hold that Dr. Kraynak was aware of the physical requirements of claimant's coal mine employment. Dr. Kraynak indicates, on the first page of his report, that claimant's job is a "Dozer operator/truck Driver," Director's Exhibit 8; s*ee generally Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). We also reject employer's assertion that Dr. Kraynak's opinion is insufficient to support a finding of total disability because his opinion is at odds with the objective evidence. While the objective evidence relied upon by Dr. Kraynak does not meet the regulatory standards for establishing total disability under the respective subsections of the regulations, Dr. Kraynak has explained the basis for his opinion regarding the extent of claimant's disability. *See* Claimant's Exhibit 5; *see generally Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986).

Turning to Section 718.204(b), employer asserts that the administrative law judge erred by discrediting Dr. Dittman's opinion because it differed from the administrative law judge's finding on the issue of the existence of pneumoconiosis. We disagree. The administrative law judge may properly accord less weight to a physician's opinion when the administrative law judge finds that an underlying premise of the medical opinion is erroneous. *See Kertesz v. Crescent Hills Coal Co.,* 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *see also Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Employer, relying on the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), maintains that claimant is not entitled to benefits even if he is able to establish disability due to pulmonary problems, because of claimant's non-respiratory disability, *i.e.* his knee problem. No other circuit court has adopted this standard and the Board has consistently declined to extend the holding of the Seventh Circuit in *Vigna* to cases arising outside the Seventh Circuit. Inasmuch as the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, we will not apply

the holding in *Vigna* to this case.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge