BRB No. 99-0946 BLA

ANDREW BARKUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNDERKOFFLER COAL SERVICE	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order-Denying Benefits of Lawrence P. Donnelly, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (98-BLA-0865) of Administrative Law Judge Lawrence P. Donnelly 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 found that the instant claim constituted a duplicate claim[1] pursuant to 20 C.F.R. §725.309 and

[1]Claimant previously filed a claim on January 24, 1992 which was finally denied by the district director on June 25, 1992, as claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 37.

was thus governed by the standard enunciated by the United States Court of Appeals for Third Circuit, within whose jurisdiction this case arises, in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge law judge concluded that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), elements previously decided against claimant. The administrative law judge therefore concluded that claimant failed to establish a material change in conditions, and benefits were, accordingly, denied.

On appeal, claimant contends that the interpretations of the most recent x-ray evidence establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Claimant further contends that the pulmonary function study of August 20, 1997 establishes the existence of total disability pursuant to Section 718.204(c)(1) and that the administrative law judge erred in discrediting this study. Claimant further contends, that the medical opinion of Dr. Kraynak was entitled to the greatest weight based on the physician's status as claimant's treating physician. Finally, claimant asserts that the medical opinion of Dr. Kruk was erroneously accorded less weight than the opinions of Drs. Galgon and Rashid. Employer, in response, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[2]

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).

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3), and the determination that claimant failed to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In *Swarrow, supra*, the Third Circuit held that, in order to establish a material change in conditions pursuant to Section 725.309, a claimant must establish at least one of the elements of entitlement previously adjudicated against him. *See Swarrow, supra.*

Claimant contends that the interpretations of the most recent x-ray of record, that of December 23, 1997, establish the presence of pneumoconiosis. Claimant asserts that, of the eight interpretations of this x-ray by physicians with the dual qualifications of B-reader and board-certified radiologist,[3] five were positive for the existence of pneumoconiosis and three were negative. Claimant thus asserts that, inasmuch as the most recent x-ray evidence is the most probative evidence regarding the existence of pneumoconiosis, these positive interpretations of the December 23, 1997 x-ray support a finding of the presence of the disease.

In finding that the newly submitted x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge considered the thirteen interpretations of the two newly submitted x-rays. Director's Exhibits 25, 28, 29, 36; Claimant's Exhibits 1, 2, 10. The administrative law judge found that the two x-rays were taken within a six and one-half month time period, *i.e.*, on June 18, 1997 and December 23, 1997, and that both x-rays had been read as positive and negative by the dually qualified B-readers and board-certified radiologists. The administrative law judge thus found the newly submitted x-ray evidence to be in "equipoise" and

[3]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

found that such evidence therefore failed to affirmatively establish the existence of pneumoconiosis. Decision and Order at 5.

In order to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), a claimant must affirmatively establish that the weight of the x-ray evidence supports a finding of the presence of the disease. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). It is well-established that the administrative law judge is not duty-bound to accord greatest weight to the interpretations of the most recent x-ray particularly when, as here, there is a relatively short amount of time between the dates of the x-rays. *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984); *see generally Wilt v. Wolverine Mining Company*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge has considered the entirety of newly submitted x-ray evidence and has provided an affirmable basis for concluding that claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Accordingly we affirm the administrative law judge's determination in this regard, *see Ondecko, supra*, and affirm the determination that the newly submitted x-ray evidence failed to establish a material change in conditions pursuant to Section 725.309, *see Swarrow, supra*.

Claimant further contends that the medical opinion of Dr. Kraynak, that claimant suffers from pneumoconiosis and is totally disabled as a result, Claimant's Exhibits 4, 9, was entitled to greater weight based on the physician's status as claimant's treating physician. Claimant also asserts that the administrative law judge erred in rejecting the well-reasoned and well-documented medical opinion of Dr. Kruk, who found that claimant suffered from pneumoconiosis and was totally and permanently disabled as a result, Claimant's Exhibit 5. Finally, with regard to the medical opinion evidence, claimant contends that the administrative law judge erred in crediting the opinions of Drs. Galgon and Rashid, that claimant did not suffer from pneumoconiosis and was not totally disabled from a pulmonary or respiratory standpoint, Director's Exhibits 11, 26; Employer's Exhibit 1, as these physicians only examined claimant one time and their opinions were not as complete as Dr. Kraynak's opinion.

In considering the newly submitted medical opinion evidence pertaining to the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge permissibly accorded greatest weight to the opinion of Dr. Galgon based on his superior qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*

10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). The administrative law judge further concluded, in a permissible exercise of his discretion, that the opinions of Drs. Galgon and Rashid were best supported by the underlying documentation of record and that Dr. Kraynak's opinion was not as well-supported. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*., 8 BLR 1-46 (1985). Further, the administrative law judge permissibly accorded less weight to the opinion of Dr. Kruk as the physician failed to fully explain the bases of his conclusions. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Further still, contrary to claimant's assertion, the administrative law judge need not accord greatest weight to the opinion of a treating physician, in this case Dr. Kraynak, merely based on that status. *See Onderko v. Director,* OWCP, 14 BLR 1-2 (1989); *see Lango v. Director, OWCP,* 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Accordingly, we affirm the administrative law judge's determination that the newly submitted medical evidence failed to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), *see Ondecko, supra*, and we therefore affirm the determination that such evidence failed to establish a material change in conditions pursuant to Section 725.309, *see Swarrow, supra*.

Claimant further asserts that the pulmonary function study dated August 20, 1997, produced qualifying values,[4] and that the administrative law judge erred in discrediting the study based upon medical opinions which called into question the validity of the study, Director's Exhibits 8, 24, 26. Claimant contends that the physician performing the study, Dr. Kraynak, validated the study, Director's Exhibit 7, and that such validation gives rise to a "presumption of validity" pursuant to 20 C.F.R. §718.103.

The administrative law judge considered the newly submitted evidence pursuant to Section 718.204(c)(1) and discredited the qualifying pulmonary function study of August 20, 1997 based upon the consultation reports of Dr. Ranavaya, Director's Exhibit 8, Dr. Long, Director's Exhibit 24, and Dr. Fino, Director's Exhibit

[4]A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1).

26, whom the administrative law judge found to be better qualified and all of whom concluded that the study was invalid based upon, among other reasons, claimant's lack of optimal effort. Consultive opinions by better qualified physicians which call into question the validity of a pulmonary function study constitute relevant evidence and may be used, if credible, to discredit the study. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see generally Siegel v. Director, OWCP*, 8 BLR 1-156 (1985) (2-1 opinion with Brown, J. dissenting). Accordingly, we affirm the administrative law judge's determination that claimant has failed to demonstrate, through the newly submitted evidence, the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1), and we therefore affirm the determination that such evidence failed to establish a material change in conditions pursuant to Section 725.309, *see Swarrow, supra*.

Lastly, we reject claimant's general contentions regarding the medical opinion evidence pursuant to Section 718.204(c)(4), *see* discussion, *supra*. In finding that the opinions of Drs. Kraynak and Kruk failed to affirmatively demonstrate the presence of a totally disabling respiratory impairment pursuant to subsection (c)(4), the administrative law concluded that these physicians' opinions were not as well supported as the opinions of Drs. Rashid and Galgon as Drs. Kraynak and Kruk relied, in part, on invalid pulmonary function studies. As discussed, *supra*, an administrative law judge may accord less weight to those opinions he determines to be not as well supported by the underlying documentation. *See Clark, supra*; *Peskie*, *supra*; *Lucostic*, *supra*. We therefore affirm the administrative law judge's determination that the newly submitted evidence failed to demonstrate total disability pursuant to Section 718.204(c)(4), and we therefore affirm the determination that such evidence failed to establish a material change in conditions pursuant to Section 725.309, *see Swarrow, supra*.

We therefore affirm the administrative law judge's determination that claimant has failed to establish either of the elements of entitlement upon which claimant's previous claim was denied, the administrative law judge's determination that claimant has failed to establish a material change in conditions pursuant to Section 725.309, *see Swarrow, supra*, and the administrative law judge's denial of benefits.

Accordingly the administrative law judge's Decision and Order-Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge