BRB No. 04-0336 BLA

THADDEUS E. STYKA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/30/2004
	)	
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-0009) of Administrative Law Judge Robert D. Kaplan 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).[1] This case involves a petition for modification of a duplicate claim filed on April 5, 2001.[2] Director's Exhibit 88. In a Decision and Order dated August 30, 2002, the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. 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.

[2] The record indicates that claimant filed an application for benefits on September 24,

administrative law judge found that the newly submitted evidence was insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and therefore, was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that the March 8, 2001 pulmonary function study was not in substantial compliance with the quality standards, but vacated his findings regarding the July 27, 2001 pulmonary function study, and the disability opinions of Drs. R. Kraynak and Dittman. Also, the Board affirmed the administrative law judge's implicit finding that claimant failed to establish a mistake of fact as of the June 19, 2000, denial of benefits. *Styka v. Jeddo-Highland Coal Co.*, BRB No. 02-0871 BLA (July 31, 2003)(unpub.).

On remand, the administrative law judge again found that claimant's newly submitted evidence failed to demonstrate a totally disabling respiratory impairment at Section 718.204(b), or a change in conditions at Section 725.310. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the medical evidence is insufficient to establish a totally disabling respiratory impairment arising out of coal mine employment, pursuant to Section 718.204(b)(2)(i) and (iv). Claimant also argues that the administrative law judge erred in failing to find a change in conditions or a mistake of fact pursuant to Section 725.310. Employer and the Director, Office of Workers' Compensation Programs, have not participated 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 this Board and may not be

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1987, which was denied on April 11, 1989 by Administrative Law Judge Robert D. Kaplan, due to claimant's failure to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), although claimant established the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203 (2000). Director's Exhibit 35. Claimant took no further action regarding this claim, and filed a second claim on October 1, 1996. Director's Exhibit 1. Administrative Law Judge Ralph A. Romano denied the duplicate claim on May 18, 1998, as claimant failed to establish total respiratory disability at Section 718.204(c) (2000), or a material change in condition pursuant to 20 C.F.R. §725.309(d) (2000). Claimant filed an appeal with the Board on June 15, 1998, but subsequently requested that the case be remanded for modification proceedings. Director's Exhibits 55, 59, 61. On June 19, 2000, Administrative Law Judge Paul H. Teitler denied benefits, finding that claimant's newly submitted evidence failed to establish total disability at Section 718.204(c) (2000), or a material change in condition at Section 725.309(d) (2000).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(i). Specifically, claimant argues that the administrative law judge applied an "inconsistent standard of review" by finding that the July 27, 2001 pulmonary function study conformed to the applicable quality standards, but did not establish total respiratory disability. Claimant's Brief at 6. Claimant further maintains that the administrative law judge erred in rejecting the March 8, 2001 study as invalid. Claimant also contends that the administrative law judge failed to provide a rationale for his findings sufficient to satisfy the provisions of the 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). We disagree.

The record indicates that the March 8, 2001 pulmonary function study produced qualifying values both before and after the administration of a bronchodilator.[3] Claimant's Exhibit 2. In our prior Decision and Order, issued on July 31, 2003, we held that the administrative law judge rationally determined that the March 8, 2001 pulmonary function study was not in substantial compliance with the quality standards based upon the study's invalidation by Dr. Levinson, who is a Board-certified pulmonologist. Claimant's Exhibit 2; Director's Exhibit 88. The Board's prior disposition of this issue constitutes the law of the case, as claimant has advanced no new argument to alter the Board's previous holding, and no exception to the law of the case doctrine has been demonstrated. *Coleman v. Ramey Coal Co.,* 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Bridges v. Director, OWCP,* 6 BLR 1-988 (1984). Accordingly, we reject claimant's contention.

The July 27, 2001 pulmonary function study, administered by Dr. Dittman, produced

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[3] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set forth in the table appearing at Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

non-qualifying values before bronchodilators were administered, and produced qualifying post-bronchodilator values. Employer's Exhibit 3. Dr. Dittman indicated that claimant's effort was "less than maximum" which would "falsely lower the results obtained." Employer's Exhibit 3. In contrast, Dr. Simelaro found this study acceptable, Claimant's Exhibit 3, and Dr. R. Kraynak found it valid and indicative of a severe obstructive and restrictive defect. Claimant's Exhibit 1. The administrative law judge found that the study conformed to the applicable quality standards, but that "without a doctor's explanation of the import or significance of [the] conflicting results" of the pre- and post-bronchodilator values, the study did not support a finding of total disability. Decision and Order on Remand at 4. We hold that it was within the administrative law judge's discretion as the fact finder to determine that this study is insufficient to establish total disability. *Marcum v. Director, OWCP,* 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Thus, the administrative law judge properly concluded that claimant did not meet his burden to establish this element by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994). We further hold that the administrative law judge has provided a rationale for his findings that is consistent with the provisions of the APA. *See North American Coal Co. v. Miller,* 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989);[4] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we affirm the administrative law judge's finding that the pulmonary function study evidence cannot establish total respiratory disability. *See Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

We similarly reject claimant's contention pursuant to Section 718.204(b)(2)(iv), that the administrative law judge erred by rejecting the opinion of Dr. R. Kraynak that claimant suffers from a totally disabling respiratory impairment. Claimant's Exhibit 1. The administrative law judge permissibly found this opinion unreasoned as it was unsupported by the objective medical evidence of record and was outweighed by Dr. Dittman's report finding no total disability, which the administrative law judge found was reasoned, supported by the objective evidence, and entitled to substantial weight based upon Dr. Dittman's superior qualifications.[5] Decision and Order on Remand at 4-5; Claimant's Exhibit 1; Employer's

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 3; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[5] The record indicates that Dr. Dittman is Board-certified in internal medicine. Employer's Exhibit 5. Dr. R. Kraynak is Board-eligible in family medicine. Claimant's Exhibits 1, 3.

Exhibits 3, 5; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987).

The administrative law judge was not required to accord greater weight to Dr. R. Kraynak's opinion due to his status as a treating physician, and was not required to specifically discuss the results of the July 27, 2001 non-qualifying arterial blood gas study, since the administrative law judge rationally credited the opinion of Dr. Dittman, the administering physician, who did not indicate that the results were abnormal. *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994). We also hold that the administrative law judge has provided an adequate basis for his findings, and therefore, the Decision and Order satisfies the provisions of the APA. *Wojtowicz*, 12 BLR 1-162. As we find that the administrative law judge's findings at Section 718.204(b) are supported by substantial evidence, they are affirmed. Moreover, as claimant has failed to establish the existence of a totally disabling respiratory impairment, a finding of a change in conditions is precluded. *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).

Pursuant to Section 725.310, claimant also argues that remand is required because the administrative law judge failed to follow the Board's instructions on remand to consider whether the evidence established a mistake of fact since the date of Administrative Law Judge Teitler's June 19, 2000 Decision and Order. We disagree. The August 30, 2002 Decision and Order and the Decision and Order on Remand reflect the administrative law judge's consideration of all the record evidence, both old and new, and the administrative law judge's rational determination that this evidence is insufficient to establish total respiratory disability. Decision and Order at 4-10; Decision and Order on Remand at 3-5; *see Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Trent*, 11 BLR 1-26. Thus, the administrative law judge properly determined that claimant could not establish the prerequisites for modification pursuant to Section 725.310. *Nataloni*, 17 BLR 1-82; *Kovac*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge