BRB No. 98-1527 BLA

EDWARD F. JOHNSON Claimant-Petitioner v. CRACKER COAL COMPANY and STATE WORKMEN'S INSURANCE FUND Employer/Carrier-Respondents and HORSEHEAD COAL COMPANY Employer/Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/19/99 DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand from the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Edward F. Johnson, Ashland, Pennsylvania, *pro se*.

George E. Mehalchick (Lenahan & Dempsey), Scranton, Pennsylvania, for Cracker Coal Company/State Workmen's Insurance Fund.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order Denying Benefits (95-BLA-1601) of Administrative Law Judge Robert D. Kaplan with respect to 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 relevant procedural history of this case is as follows: The first application for benefits, filed on June 11, 1980, was finally denied by the district director on April 20, 1981, on the ground that claimant did not establish any of the elements of entitlement. Director's Exhibit 32. Claimant took no further action until filing a second claim on December 12, 1989. Director's Exhibit 1. The administrative law judge considered, therefore, whether the newly submitted evidence demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard adopted by the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).[1] The administrative law judge found that the newly submitted evidence was insufficient to support either a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) or a finding of total disability under 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. With respect to identification of the responsible operator, the administrative law judge determined that the record did not contain sufficient evidence upon which he could base a finding.

Claimant filed an appeal with the Board which, in a Decision and Order issued on March 10, 1998, affirmed the administrative law judge's determination that the newly submitted evidence did not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4). *Johnson v. Cracker Coal Co.*, *et al*., BRB No. 97-0823 BLA (Mar. 10, 1998)(unpub.), *slip opinion at 3-4*. The Board also affirmed the administrative law judge's findings that claimant failed to establish total disability pursuant to Section 718.204(c)(1)-(3). *Id. at 4*. The Board further held, however, that the administrative law judge's findings under Section 718.204(c)(4) could not be affirmed, as the

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Under the standard set forth in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), in order to establish a material change in conditions, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

administrative law judge did not provide a valid rationale for his decision to discredit the opinions of Drs. Kraynak, Kruk, and Karlavage. *Id. at 5-6*. The Board remanded the case to the administrative law judge for reconsideration of total disability pursuant to Section 718.204(c)(4).

On remand, the administrative law judge determined that the opinions of Drs. Kraynak, Kruk, and Karlavage were insufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment under Section 718.204(c)(4). The administrative law judge concluded, therefore, that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied and claimant's appeal followed. Cracker Coal Company has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we affirm the administrative law judge's finding under Section 718.204(c)(4), as it is rational and supported by substantial evidence. The administrative law judge considered the newly submitted medical opinions of Drs. Rashid, Dittman, Karlavage, Kruk, and Kraynak and acted within his discretion in according greater weight to the opinions in which Drs. Rashid and Dittman concluded that claimant is not totally disabled on the ground that their opinions are better supported by the objective evidence of record. Decision and Order Denying Benefits at 3; Director's Exhibits 16, 24, 34; Claimant's Exhibits 2, 4; Employer's Exhibit 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In rendering this finding, the administrative law judge rationally determined that the probative value of the opinions of Drs. Karlavage, Kruk, and Kraynak was diminished by their reliance upon pulmonary function studies that were invalidated by Dr. Levinson, a physician who possesses superior qualifications.[2] Decision and Order Denying Benefits at 3; Director's Exhibits 15, 25, 37, 38; Claimant's Exhibits 3, 8, 9; Employer's Exhibits

[2]Dr. Levinson is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 37. Dr. Kruk is Board-certified in Internal Medicine. Claimant's Exhibit 2. Dr. Kraynak is Board-eligible in Family Medicine. Claimant's Exhibit 11. Dr. Karlavage's qualifications are not of record.

9, 11; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *see also 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).

Inasmuch as the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish that claimant is totally disabled pursuant to Section 718.204(c)(4) is rational and supported by substantial evidence, it is affirmed. Moreover, in light of our prior affirmance of the administrative law judge's determination that the newly submitted evidence did not demonstrate the existence of pneumoconiosis under Section 718.202(a)(1)-(4) or total disability under Section 718.204(c)(1)-(3), we affirm the administrative law judge's finding that claimant has not established a material change in conditions pursuant to Section 725.309(d). *See Swarrow*, *supra*. The denial of benefits is also, therefore, affirmed.[3] *See Swarrow*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[3]The administrative law judge was not required to reach the issue of the proper identification of the responsible operator in the present case inasmuch as he determined that claimant is not entitled to benefits.

REGINA C. McGRANERY Administrative Appeals Judge