BRB No. 02-0886 BLA

STANLEY C. TOPOLSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/24/2003
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0764) of Administrative Law Judge Robert D. Kaplan 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] The administrative law judge determined that claimant=s original claim was finally denied on September 27, 1999, on the ground that claimant failed

[1]The Department of Labor (DOL) 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.

to establish that he was totally disabled, and that claimant filed the present claim for benefits on January 19, 2001. The administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. ' 725.309 (2000), because the Director, Office of Workers= Compensation Programs (the Director), conceded that claimant became totally disabled after he underwent pulmonary surgery on December 7, 1998, as demonstrated by the pulmonary function studies performed on October 11, 2001. The administrative law judge further found, however, that the evidence was insufficient to establish disability causation pursuant to 20 C.F.R. ' 718.204(c).[2] Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge=s findings at Section 718.204(c). The Director responds, urging a remand for the administrative law judge to reconsider the opinion of Dr. Simelaro and, if the administrative law judge again finds the evidence insufficient to establish disability causation, to remand the case to the district director for additional medical development.

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 by 30 U.S.C. ' 932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]The parties stipulated that claimant had seven and one-half years of coal mine employment and suffered from pneumoconiosis arising out of coal mine employment.

After consideration of the administrative law judge=s Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge=s Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge properly reviewed all of the evidence of record, the qualifications of the physicians and the documentation underlying their medical opinions, and determined that on December 7, 1998, claimant had his right lung removed due to lung cancer. Decision and Order at 3-11. The administrative law judge further determined that the only conforming pulmonary function study administered shortly before the surgery revealed values which did not qualify for total disability, whereas the conforming tests administered after the surgery showed a significant decline in pulmonary function and produced qualifying values.[3] Decision and Order at 11. The administrative law judge thus reasonably accorded no weight to the medical opinions rendered before claimant=s surgery, as he found that they were of little value in evaluating the cause of the disability which manifested itself after the surgery. *Id*. Of the remaining physicians, the administrative law judge determined that Dr. Sutherland did not render a clear opinion regarding claimant=s level of disability or its cause, and that the opinions of Drs. Schaebler, Kraynak and Simelaro were not well reasoned and thus were entitled to no weight. Decision and Order at 11-12.

The Director argues that, while the administrative law judge properly discounted the opinions of Drs. Schaebler and Kraynak, the administrative law judge mischaracterized the opinion of Dr. Simelaro when he accorded it no weight on the ground that the physician attributed claimant=s total disability solely to pneumoconiosis without discussing the effects of claimant=s right pneumonectomy on his disability. The Director maintains that, because Dr. Simelaro opined that claimant=s lung cancer was Amost likely@ due to coal dust exposure since his smoking history was Atoo minimal to be considered a cause,@ *see* Director=s Exhibit 15-80, Decision and Order at 7-8, this case must be remanded for a reassessment of Dr. Simelaro=s opinion. We disagree. The record reflects that Dr. Simelaro=s opinion was not submitted in support of the present duplicate claim, but was previously found not to be well reasoned, in a final judgment issued on September 27, 1999, on the ground that, *inter alia*, Dr. Simelaro=s diagnosis of total disability due to pneumoconiosis was based on a smoking history of one pack per week for two years, which was not consistent with the evidence. *See* Director=s Exhibit 15-128 at 6-8. As the administrative law judge, in adjudicating this duplicate claim, determined that claimant=s

[3]Contrary to the administrative law judge=s findings, Dr. Kraynak testified in his deposition that because claimant Ahad problems and a severe decrease in his pulmonary function prior to the surgery and there wasn=t really a dramatic decrease after the surgery. . . .the cause of his impairment is his black lung disease and not the surgery for lung cancer.@ Claimant=s Exhibit 10 at 11; Decision and Order at 9.

actual smoking history was at least one pack per day for fifteen years, and the previous administrative law judge found that Dr. Simelaro=s opinion was not well reasoned because the physician under-reported claimant=s smoking history, the administrative law judge properly found that Dr. Similaro=s opinion merited no weight. Decision and Order at 10-11; *see generally Bobick v. Saginaw Mining* Co., 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We therefore reject the Director=s argument that the administrative law judge must reconsider Dr. Similaro=s opinion.

Next, claimant maintains that the administrative law judge failed to accord appropriate weight to the opinions of Drs. Kraynak and Schaebler, claimant=s treating physicians,[4] which claimant asserts are well reasoned, uncontradicted and sufficient to establish that pneumoconiosis is a substantial contributor to claimant=s total respiratory disability pursuant to Section 718.204(c), consistent with the standard enunciated in *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. Claimant essentially requests a reweighing of the evidence, which is beyond the scope of our review. The administrative law judge is not required to accept the testimony of any witness merely because it is uncontradicted, *see Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Knizner v.*

[4]The amended regulation at 20 C.F.R. ' 718.104(d) applies to Dr. Kraynak=s deposition testimony on February 22, 2002, *see* Claimant=s Exhibit 10, and Dr. Schaebler=s letter dated January 16, 2002, *see* Claimant=s Exhibit 4, because this evidence was developed after January 19, 2001. 20 C.F.R. ' 718.101(b). We note that the administrative law judge did not explicitly refer to the factors an adjudicator must consider when weighing the opinion of a miner=s treating physician, outlined in the amendments to the regulations at Section 718.104(d), in his consideration of the opinions of Drs. Kraynak and Schaebler. However, since the administrative law judge found these opinions to be unpersuasive, his discounting of the opinions is in accord with 20 C.F.R. ' 718.104(d)(5)(the weight given to a treating physician=s opinion shall also be based on the credibility of that physician=s opinion).

Bethlehem Mines Corp., 8 BLR 1-5 (1985), *aff=d on recon.*, 8 BLR 1-296 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985), nor is he required to credit a treating physician=s opinion if he finds that the opinion is not well reasoned. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Contrary to claimant=s arguments, the administrative law judge permissibly discounted the opinion of Dr. Schaebler, that claimant=s total disability was due to lung cancer and anthracosilicosis, because he determined that the physician did not describe the effect pneumoconiosis had on claimant=s respiratory function or explain how pneumoconiosis contributed to the disability when separated out from the right pneumonectomy, nor did Dr. Schaebler address the contributions, if any, of other diagnosed conditions to claimant=s total disability. *Id.*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 11; Claimant=s Exhibit 4.

The administrative law judge also acted within his discretion in discrediting Dr. Kraynak=s opinion, that claimant=s disability was due primarily to pneumoconiosis and that only Asome of the restrictions may be partially due to that surgery . . . but what happens is when one takes out *a piece* of lung the remaining lung expands like an accordion to fill the space . . . so really, you=re really taking *part* out and the body basically is putting something back in,@ Decision and Order at 9, Claimant=s Exhibit 10 at 10-11 (emphasis supplied), because he found that Dr. Kraynak misrepresented the extent of claimant=s lung surgery and did not explain how claimant=s left lung could Afill the space@ of the missing right lung.[5] Decision and Order at 11; *Clark*, 12 BLR 1-149.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge=s findings pursuant to Section 718.204(c) are supported by substantial evidence, and thus are affirmed.

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[5]While claimant asserts that Dr. Kraynak was aware of the full extent of claimant=s surgery because the physician reviewed the entire record, the administrative law judge accurately reviewed the deposition testimony of Dr. Kraynak and reasonably inferred that the physician merely described a partial rather than a total removal of claimant=s right lung. Decision and Order at 9, 11; Claimant=s Exhibit 10. The administrative law judge additionally determined that Dr. Kraynak opined that claimant=s lips were cyanotic and his *lungs* showed scattered wheezes, whereas Drs. Schaebler and Sutherland, who also recently examined claimant, found no evidence of cyanotic lips or scattered wheezes in claimant=s left lung. Decision and Order at 11.

Lastly, the Director requests that this case be remanded to the district director for additional medical development, as the Director argues that he failed to meet his statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. '923(b); 20 C.F.R. ''718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 ((1994); *Hall v. Director, OWCP*, 14 BLR 1-51(1990)(*en banc*); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990). Because the administrative law judge accurately determined that Dr. Sutherland, who evaluated claimant on behalf of the Department of Labor, did not provide a clear opinion regarding claimant=s level of disability, nor give an opinion on the cause of disability, *see* Decision and Order at 8, Director=s Exhibit 18, the Director maintains that Dr. Sutherland=s opinion does not fulfill the requirements for a complete and credible pulmonary evaluation. Consequently, we vacate the administrative law judge=s denial of benefits pursuant to the Director=s request, and remand this case to the district director for further development of the evidence as specifically set forth in the Director=s response brief.[6]

Accordingly, the administrative law judge=s Decision and Order Denying Benefits is

[6]In accordance with the administrative law judge=s findings and the parties= stipulations, the Director asserts that Dr. Sutherland must be instructed that claimant has a totally disabling respiratory condition, that he was employed in coal mine work for 7 2 years and has a 15 year history of smoking a pack of cigarettes per day, and that he suffers from pneumoconiosis. Director=s Brief at 6, n. 2.

affirmed in part and vacated in part, and this case is remanded to the district director for further evidentiary development.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge