BRB No. 01-0108 BLA

JOHN J. ABROMITIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Jennifer U. Toth (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0242) of Administrative Law Judge Paul H. Teitler denying benefits on a miner's claim filed pursuant to the provisions of

[1]Claimant is John J. Abromitis, the miner, who filed his second claim for benefits on March 17, 1998. Director's Exhibit 1. Administrative Law Judge Paul H. Teitler denied benefits on May 11, 1999. Director's Exhibit 36. Claimant requested modification, the district director denied this request, and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 37, 42, 43. Claimant's previous claim for benefits, filed on February 28, 1980, was finally denied on June 11, 1981 because claimant failed to establish that his pneumoconiosis arose out of his coal mine employment and that he is totally disabled due to pneumoconiosis. Director's Exhibits 45-1, 45-17, 45-19.

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge credited the miner with "in excess of

[2]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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the

ten years" of coal mine employment. Decision and Order at 5. Initially, the administrative law judge noted that the parties stipulated that the miner has pneumoconiosis arising out of coal mine employment. Decision and Order at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Decision and Order at 5-8. Therefore, the administrative law judge found that claimant failed to establish a material change in conditions.[3] Decision and Order at 8. Accordingly, benefits were denied.

February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). While claimant submitted a supplemental brief in response to the Board's order, the court's decision renders moot those arguments made by claimant regarding the impact of the challenged regulations.

[3]Specifically, the administrative law judge found, after considering all of the evidence, that claimant failed to establish a change in conditions or a mistake in fact pursuant to 20 C.F.R. §725.310 (2000) and a material change in conditions. Decision and Order at 8.

On appeal, claimant contends that the administrative law judge erred in failing to find a mistake in fact established pursuant to 20 C.F.R. §725.310 (2000) based on the mistakes the administrative law judge made in his first Decision and Order in admitting certain evidence into the record and in weighing the pulmonary function study and medical opinion evidence.[4] Claimant's Brief at 6-20. Claimant asserts that the administrative law judge erred in accepting certain evidence into the record. Claimant's Brief at 8-10, 16. Claimant additionally contends that the administrative law judge erred in failing to find total respiratory disability based on the pulmonary function study evidence and the medical opinion evidence. Claimant's Brief at 23-33. Finally, claimant asserts that the administrative law judge erred in failing to find that claimant was totally disabled due to pneumoconiosis. Claimant's Brief at 30-33. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. In his Motion to Remand, the Director concedes that total respiratory disability is established and asserts that it is, therefore, unnecessary for the Board to address claimant's contentions regarding this issue. Director's Motion to Remand at 3. The Director also asserts that the Board should remand this case for the administrative law judge to reconsider whether claimant has established that his total disability was due to pneumoconiosis. Director's Motion to Remand at 3-7. Claimant has filed a response to the Director's Motion to Remand. In his response, claimant states that he agrees with the Director's concession that the evidence establishes total respiratory disability, thereby removing this issue from consideration, but maintains that the administrative law judge erred in failing to find that claimant's disability is due to pneumoconiosis.[5] Claimant's

[4]The administrative law judge rendered findings in his Decision and Order on Modification that are similar to the findings he made in his previous Decision and Order. Therefore, claimant's assertions pursuant to 20 C.F.R. §725.310 (2000) regarding the mistakes the administrative law judge rendered in his first Decision and Order are similar to the allegations of error claimant asserts regarding the administrative law judge's Decision and Order on Modification.

[5]We affirm the administrative law judge's finding regarding the length of coal mine employment as it is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30

Response Brief at 1-2.

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).

Initially, we note that this case involves modification of a duplicate claim. *See* n.1, *supra*. The miner's second claim was first denied by the administrative law judge because, after reviewing the evidence *de novo*, the administrative law judge found that claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 36. As stated above, the Director's concedes in his Motion to Remand that claimant has established total respiratory disability. Director's Motion to Remand at 3. In considering a request for modification on a duplicate claim, an administrative law judge should first address, before considering the merits, whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). To establish a material change in conditions in this case, which arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge must consider all of the new evidence to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The prior claim was denied because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 36. Because of the Director's concession regarding total respiratory disability, claimant has proven at least one of the elements of entitlement previously adjudicated against him. Therefore, a material change in conditions has been established. *See Swarrow*, *supra*; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Accordingly, we will address the assertions made by claimant and the Director regarding the merits of this case.

(1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

First, claimant asserts that the administrative law judge erred in allowing the record to remain open for the Director to submit the December 22, 1998 report of Dr. Green without first determining whether good cause existed for "the Director's dilatory claim development in this matter." Claimant's Brief at 9, 16. At the January 7, 1999 hearing, the administrative law judge left the record open to allow the Director to submit Dr. Green's medical report and permitted claimant to submit rebuttal evidence.[6] 1999 Hearing Transcript at 12-13. Claimant objected to the submission of Dr. Green's report by the Director. 1999 Hearing Transcript at 10-15. On May 11, 1999, the administrative law judge issued his first Decision and Order denying benefits in this case. Director's Exhibit 36. After the administrative law judge rendered his decision in this matter, claimant did not request reconsideration of the administrative law judge's decision to allow the Director to submit Dr. Green's medical report. Additionally, claimant did not appeal the administrative law judge's Decision and Order or specifically discuss this aspect of the administrative law judge's decision in his request for modification. Claimant waited until his present appeal to the Board to assert that the administrative law judge erred in admitting Dr. Green's report at the January 7, 1999 hearing. Inasmuch as claimant failed to raise the issue regarding the administrative law judge's admittance of Dr. Green's report earlier in these proceedings, claimant cannot now do so. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(2-1 opinion with Stage, J., dissenting); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986).

In considering the medical opinion evidence to determine whether claimant is totally disabled due to pneumoconiosis, the administrative law judge combined his disability and disability causation findings. The administrative law judge found the opinions of Drs. Matthew Kraynak and Raymond Kraynak, who opined that claimant is totally disabled due to coal workers' pneumoconiosis, to be unreliable for several reasons. Decision and Order at 7. First, the administrative law judge noted that both Drs. M. Kraynak and R. Kraynak relied on invalidated or non-qualifying[7] objective medical evidence in reaching their conclusions.[8] Second, the administrative law judge stated that both Drs. M. Kraynak and R. Kraynak failed

[6]Claimant submitted rebuttal evidence as was allowed by the administrative law judge at the 1999 hearing. Director's Exhibits 32, 33, 35.

[7]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[8]The issue in this case, however, is the cause of claimant's disability, and pulmonary function studies are "not diagnostic to the etiology of the impairment, but are diagnostic only of the severity of the impairment," *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987)(2-1 opinion with Levin, J., dissenting); *see Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).

to note that claimant had an amputation of his right index finger, leading the administrative law judge to believe that "neither [physician] conducted a thorough examination of the Claimant." *Id.* Finally, the administrative law judge noted that both Drs. M. Kraynak and R. Kraynak "relied on a questionable smoking history." *Id.* The administrative law judge found the contrary opinion of Dr. Green to be "well-reasoned and documented and entitled to great weight." Decision and Order at 7. Therefore, the administrative law judge relied on Dr. Green's opinion in determining that claimant is not totally disabled due to pneumoconiosis. Decision and Order at 7-8.

Regarding the cause of the miner's disability, claimant contends that the administrative law judge erred in relying on Dr. Green's opinion because this physician failed to diagnose pneumoconiosis and relied on an inaccurate smoking history. Claimant's Brief at 16-18, 32-33. In Dr. Green's 2000 report, he diagnosed "small airways disease on pulmonary function study with no internal change" due to "cigarette smoking" and "inhalation of dusts in relation to occupation of mining or working with cement and lime dust" and found that claimant has no impairment. Director's Exhibit 53. In 1998, Dr. Green found small airways disease likely related to smoking and found that claimant is able to perform his last coal mine employment. Director's Exhibit 34. Because Dr. Green found that claimant is able to perform his previous coal mine employment and, therefore, did not reach the issue of the cause of claimant's disability, Dr. Green's opinion is not relevant to the issue of disability causation. 20 C.F.R. §718.204(c); *see Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). Accordingly, the administrative law judge erred in finding Dr. Green's opinion sufficient to support his finding that claimant's disability was not due to his pneumoconiosis. Therefore, we vacate the administrative law judge's finding that claimant has failed to establish total disability due to pneumoconiosis and remand this case for the administrative law judge to reconsider the relevant evidence regarding this issue.

Additionally, in his discussion regarding the cause of claimant's disability, the administrative law judge did not consider Dr. Ranavaya's opinion. Dr. Ranavaya opined that coal workers' pneumoconiosis does not prevent claimant from performing his usual coal mine employment. Director's Exhibit 17. Therefore, inasmuch as the administrative law judge failed to consider this relevant piece of evidence as required by the Administrative Procedure Act, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984), we instruct the administrative law judge on remand to consider Dr. Ranavaya's opinion pursuant to 20 C.F.R. §718.204(c).

Claimant additionally contends that the administrative law judge erred in rejecting the opinions of Drs. M. Kraynak and R. Kraynak. Claimant's Brief at 18-20, 28-32. Specifically, claimant contends that it was error for the administrative law judge to reject the opinions of

Drs. M. Kraynak and R. Kraynak because they relied on inaccurate smoking histories. Claimant's Brief at 18-19, 31-32. The administrative law judge determined claimant's smoking history to be three-quarters of a pack per day for thirty-five years based on the notation made by Dr. Singzon in his opinion.[9] Decision and Order at 7. The administrative law judge reasoned that "the smoking history recorded by Dr. Singzon [is] the most credible as it was given prior to the commencement of this litigation." *Id.* Additionally, the administrative law judge found claimant's testimony regarding his smoking to be "questionable at best." *Id.*

As claimant contends and as the Director notes in his Motion to Remand, the administrative law judge erred in discrediting the opinions of Drs. M. Kraynak and R. Kraynak because these physicians relied on an inaccurate smoking history. Although Drs. M. Kraynak and R. Kraynak initially relied on a smoking history of one pack per day for fifteen years, both later reviewed the smoking history noted by Dr. Singzon's in his opinion and stated that such a smoking history would not change their conclusions. Claimant's Exhibits 10 at 11-12, 12. Therefore, as both claimant and the Director contend, it was unreasonable, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), for the administrative law judge to discredit the opinions of Drs. M. Kraynak and R. Kraynak solely on this basis. *See 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 (1983).

Moreover, regarding claimant's smoking history, the Director contends that the administrative law judge's reliance on the smoking history given in Dr. Singzon's opinion, three-quarters of a pack per day for thirty-five years, does not take into account claimant's smoking history since 1981, the date of Dr. Singzon's report. Director's Motion to Remand at 3-5. At the May 10, 2000 hearing, as noted by the Director, Director's Motion to Remand at 4, claimant testified that he started smoking when he was sixteen or seventeen years old and at that time he smoked "maybe a pack or half a pack [a day], something like that." 2000 Hearing Transcript at 13. Claimant further testified that he quit smoking fifteen or twenty years before the hearing, *i.e.*, 1980 or 1985, and that when he quit he was smoking about a pack a day, 2000 Hearing Transcript at 14. Thus, the Director reasons that claimant's testimony suggests that "he may have smoked up to a pack of cigarettes a day for over thirty years," which is roughly consistent with the smoking history provided to Dr. Singzon. Claimant's Brief at 4-5. However, the Director asserts that claimant's testimony may not accurately portray his entire smoking history. Director's Motion to Remand at 5.

[9]Dr. Singzon did not render an opinion regarding the cause of the miner's total respiratory disability. Director's Exhibit 45-12.

The Director contends that claimant's assertion that he quit smoking in 1980 or 1985 is inconsistent with the statements he made to both Drs. M. Kraynak and R. Kraynak, that he did not quit smoking until around 1996.[10] The Director also notes that the smoking history claimant reported to Dr. Green[11] and claimant's testimony at the 1999 hearing[12] are "wildly out of line" with claimant's recent testimony and the smoking histories he gave to Drs. M. Kraynak and R. Kraynak and to Dr. Singzon. Director's Motion to Remand at 5 n.3. Thus, the Director reasons that "the ALJ could reasonably assume that the claimant smoked up to a

[10]In their 1998 opinions, both Drs. M. Kraynak and R. Kraynak noted that claimant had a smoking history of one pack per day for fifteen years and that claimant quit smoking two years prior. Director's Exhibits 11, 26.

[11]In 1998, Dr. Green noted a smoking history of one-half pack per **week** from 1951-1961. Director's Exhibit 34. In 2000, Dr. Green noted a smoking history of one-half pack per **day** from 1951-1961. Director's Exhibit 53.

[12]At the January 7, 1999 hearing, claimant testified that he stopped smoking eight to ten years ago, that he smoked from age 21-24 when he was in the service, and that he started smoking again when he was 52 years old. 1999 Hearing Transcript at 40. Claimant also testified that from ages 52-69, he smoked one-half a pack to one pack per week. 1999 Hearing Transcript at 41. Claimant's response when asked about the smoking history that he reported to Drs. M. Kraynak and R. Kraynak (one-half pack per day for fifteen years), was that he did not believe it was that long, but was eight to ten years at most. 1999 Hearing Transcript at 41-42.

pack of cigarettes a day continuously from 1945 until 1996, a total of [about] 50 years." We therefore instruct the administrative law judge on remand to reconsider whether the smoking history provided by claimant to Dr. Singzon represents the most accurate picture of claimant's smoking history, specifically taking into consideration the statements regarding claimant's smoking history discussed above.

Claimant additionally contends that the administrative law judge erred in finding the opinions of Drs. M. Kraynak and R. Kraynak to be unreasoned and undocumented because these physicians failed to note claimant's right index finger amputation. Claimant's Brief at 19, 30. In his April 12, 2000 report, Dr. M. Kraynak stated that the knowledge of the removal of a finger tip from claimant's right hand does not alter his opinion that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 12. At his deposition, Dr. R. Kraynak testified that the removal of the tip of claimant's finger has no effect on his pulmonary condition. Claimant's Exhibit at 9-10. Therefore, the record reflects that Drs. M. Kraynak and R. Kraynak considered the amputation of claimant's finger tip in rendering their opinions. Accordingly, the administrative law judge erred in stating that these physicians did not consider this information. *See generally Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991), *aff'd*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). However, it is unclear why the administrative law judge considered the notation by Drs. M. Kraynak and R. Kraynak of the amputation of claimant's finger tip to be important, given that these physicians rendered findings regarding claimant's pulmonary condition. Thus, we hold that the administrative law judge's determination that these opinions are less reliable, because Drs. M. Kraynak and R. Kraynak failed to note claimant's amputated finger tip, is unreasonable when considering the credibility of these physicians' opinions on the issue of claimant's respiratory system. *See Tackett*, 12 BLR at 1-14; *Calfee, supra*.

Finally, we instruct the administrative law judge on remand to consider all the relevant evidence of record under the revised disability causation regulation at 20 C.F.R. § 718.204(c). The disability causation standard established by the revised regulation at 20 C.F.R. §718.204(c) is as follows:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge