BRB No. 98-1361 BLA

VARIS CANFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAJESTIC MINING, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1653) of Administrative Law Judge Clement J. Kennington (the administrative law judge) awarding 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). The administrative law judge credited claimant with eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R.

§718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred by failing to render a threshold determination of whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Lastly, employer contends that the administrative law judge erred in finding the onset date of disability to be April 10, 1986. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[1]

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, employer contends that the administrative law judge erred by failing to render a threshold determination of whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The relevant procedural history of this case is as follows: Claimant filed his first claim with the Social Security Administration (SSA) on January 8, 1972. Director's Exhibit 28. After several denials by the SSA, this claim was finally denied by a Department of Labor (DOL) claims examiner on June 26, 1981 based on claimant's failure to establish total disability due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim with the DOL on January 29, 1986. *Id*. On November 7, 1991, Administrative Law Judge Thomas M. Burke issued a Decision and Order denying benefits based on claimant's failure to establish total disability due to pneumoconiosis. *Id*. The

[1]Inasmuch as the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Board affirmed Judge Burke's denial of benefits. *Canfield v. Majestic Mining, Inc.*, BRB No. 92-0642 BLA (May 28, 1993)(unpub.). Further, the Board denied claimant's request for reconsideration. *Canfield v. Majestic Mining, Inc.*, BRB No. 92-0642 BLA (Order)(Aug. 10, 1993)(unpub.). Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim with the DOL on December 14, 1995. Director's Exhibit 1. Since claimant's 1995 claim for benefits was filed more than one year after the final denial of his prior claim for benefits, the 1995 claim constitutes a duplicate claim. *Compare* 20 C.F.R. §725.309 *with* 20 C.F.R. §725.310.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the pertinent regulation at 20 C.F.R. §725.309 "directs that [a new claim] shall be denied based on the earlier denial, absent a threshold showing of a material change in conditions." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Further, the court adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

In the instant case, the administrative law judge considered all of the evidence of record on the merits and found claimant entitled to benefits under 20 C.F.R. Part 718. However, the administrative law judge did not render a threshold determination of whether the newly submitted evidence of record is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and thus, a material change in conditions at 20 C.F.R. §725.309. Therefore, we vacate the administrative law judge's award of benefits and remand the case to the administrative law judge to render a threshold determination of whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See* 20 C.F.R. §725.309; *Rutter, supra*. If the administrative law judge finds the newly submitted evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309, the administrative law judge must consider whether claimant is entitled to benefits under 20 C.F.R. Part 718 on the merits.

Employer also raises several assertions of error by the administrative law judge with regard to the issues of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),[2] (a)(4), total disability due to pneumoconiosis at 20 C.F.R.

[2]As employer asserts, since Administrative Law Judge Thomas M. Burke

§718.204(b) and onset of disability.

With regard to 20 C.F.R. §718.202(a)(1), employer asserts that the administrative law judge violated 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), 30 U.S.C. §919(d) and 30 U.S.C. §932(a), by failing to specifically address and discuss the x-ray interpretations and credentials of Drs. Franke, Leef, Ranavaya, Shipley, Spitz and Wiot. We hold that employer's assertion has merit. The administrative law judge noted that six of the x-rays of record were read as positive for pneumoconiosis by Drs. Deardorff, Gaziano, Smith and Speiden, and that "[a]ll other readings were negative." Decision and Order at 14. Further, the administrative law judge found that "Drs. Deardorff, Smith, and Speiden are [B]oard certified radiologist[s] and B readers and possess equal if not better qualifications than the other x-ray readers." *Id*. The administrative law judge also found that "Dr. Gaziano is a B reader." *Id*. However, the administrative law judge did not specifically identify and discuss the interpretations and credentials of the physicians who provided negative x-ray readings. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must identify and discuss all of the relevant evidence of record. *See Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Therefore, we hold that the administrative law judge erred in failing to specifically identify and discuss the interpretations and credentials of the physicians who provided negative x-ray readings in his weighing of the conflicting x-ray evidence of record. The record reflects that many of the physicians who provided negative x-ray readings are B-readers and/or Board-certified radiologists. Director's Exhibits 12, 13, 19-21, 23, 26, 28.

With regard to 20 C.F.R. §718.202(a)(4), employer asserts that the

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applied the true doubt rule in weighing the conflicting x-ray evidence of record, Judge Burke's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) cannot stand. *See Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

administrative law judge erred by relying on Dr. Craft's opinion since Dr. Craft based his diagnosis of occupational pneumoconiosis solely on claimant's coal mine employment history. The administrative law judge stated that "[i]n Dr. Craft's opinion Claimant's 20+ years of coal mine employment suggest occupational pneumoconiosis as the etiology of his chronic obstructive pulmonary disease." Decision and Order at 10. The United States Court of Appeals for the Fourth Circuit held that "the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Further, the United States Court of Appeals for the Seventh Circuit declared that "[o]ccupational exposure is not evidence of pneumoconiosis,...but merely a reason to expect that evidence might be found." *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 2-387 (7th Cir. 1994). Thus, if reached on remand, the administrative law judge must determine whether Dr. Craft's opinion is a reasoned opinion at 20 C.F.R. §718.202(a)(4). Director's Exhibit 14. We note that Dr. Craft treated claimant with respect to his pulmonary condition. Director's Exhibits 14, 27; Employer's Exhibit 3.

Employer also asserts that the administrative law judge erroneously gave a mechanical preference to Drs. Boggs and Stewart because of their status as claimant's treating physicians. Contrary to employer's assertion, the administrative law judge, within his discretion, provided a reasoned basis which indicates that he reflected on why the treating physicians' medical opinions should be accorded greater weight than some of the other medical opinions of record. *See Hicks, supra; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge stated that "[a]ll of Claimant's treating physicians including Drs. Stewart, Craft and Boggs who have treated Claimant from 1977 to 1996 indicated that Claimant suffered from clinical pneumoconiosis in addition to other lung diseases including chronic obstructive pulmonary disease (emphysema, asthma), acute obstructive bronchitis, pneumonia." Decision and Order at 14-15. The administrative law judge also stated that "[t]his treatment is documented by multiple hospital admissions as well as personal treatment records." *Id*. at 15. Hence, the administrative law judge properly explained that he relied on the opinions of claimant's treating physicians because of the extensive period of time that they treated him for his pulmonary condition and because their treatment of his pulmonary condition is well documented by the medical evidence of record.

Further, inasmuch as Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985), we hold that the administrative law judge erred by weighing the x-ray evidence and the

medical opinion evidence together in finding the existence of pneumoconiosis established. The administrative law judge stated, "When considering the multiple positive readings in conjunction with the reports from Claimant's treating physicians as detailed above I am convinced by a preponderance of credible evidence that Claimant suffers from pneumoconiosis as well as chronic obstructive pulmonary disease including emphysema, bronchitis, asthma and on occasion pneumonia." Decision and Order at 14. Additionally, the administrative law judge stated, "Claimant has established by a preponderance of the evidence that he has pneumoconiosis based upon x-ray readings and physicians exercising sound medical judgment based on objective data including x-ray evidence, pulmonary function or blood gas studies, physical examinations, medical and work histories including symptoms." *Id*. at 15. Therefore, if reached on remand, the administrative law judge must provide separate and distinct findings on the merits with respect to the x-ray evidence at 20 C.F.R. §718.202(a)(1) and the medical opinion evidence at 20 C.F.R. §718.202(a)(4).

Next, employer asserts that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). In so finding, the administrative law judge accorded determinative weight to Dr. Rasmussen's opinion, that claimant suffers from a totally disabling respiratory impairment due to pneumoconiosis, over the contrary opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress and Loudon. The administrative law judge properly accorded determinative weight to the opinion of Dr. Rasmussen over the contrary opinions of record because he found that Dr. Rasmussen's opinion was corroborated by Dr. Gaziano's opinion, that claimant suffers from pneumoconiosis and total disability due to pneumoconiosis, as well as the opinions of Drs. Boggs and Stewart, that claimant suffers from pneumoconiosis.[3] *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject employer's assertion that the administrative law judge erred by relying on the opinions of Drs. Boggs and Stewart. Further, since the administrative law judge relied on the opinion of Dr. Gaziano in

[3]The administrative law judge stated that "[a]lthough Judge Burke declined to follow Dr. Rasmussen's opinion because of an incorrect assessment of the amount of Claimant's smoking, I find, that subsequent evidence by treating physicians as well as Dr. Gaziano, who better understood the extent of Claimant's smoking, supports Dr. Rasmussen's ultimate conclusion that both smoking and pneumoconiosis contributed to Claimant's lung impairment." Decision and Order at 16.

support of a finding of pneumoconiosis and total disability due to pneumoconiosis, by inference, he found the doctor's opinion sufficiently documented and reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Consequently, we reject employer's assertion that Dr. Gaziano's opinion is not well reasoned. The administrative law judge observed that "[o]n cross [examination] Dr. Crisalli admitted...that Dr. Gaziano had good and hard scientific evidence to support his conclusion of pneumoconiosis." Decision and Order at 15; Director's Exhibit 8.

In addition, since the administrative law judge properly discredited the opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress and Loudon concerning the cause of claimant's disability because the underlying premise of the doctors, that claimant does not suffer from pneumoconiosis, is inaccurate, *see Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), we reject employer's assertion that the administrative law judge violated the APA by failing to explain why he discredits the opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel and Loudon. We also reject employer's assertion that the administrative law judge erred by failing to explain why he accorded greater weight to the opinions of Drs. Gaziano and Rasmussen than to the contrary opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel and Loudon, in view of their superior qualifications. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Furthermore, since the administrative law judge considered the smoking histories referenced in the reports of Dr. Rasmussen and yet did not find that Dr. Rasmussen's opinion should be discredited,[4] *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988), we reject employer's argument that the opinion of Dr. Rasmussen must be discredited because Dr. Rasmussen relied on an inaccurate smoking history. Moreover, we reject employer's assertion that Judge Burke's credibility findings with respect to Dr. Rasmussen's opinion cannot be disturbed since Judge Burke's factual finding that Dr. Rasmussen's opinion was not credible because it was based on an inaccurate smoking history constituted the "law of the case."

[4]The administrative law judge observed that Dr. Rasmussen's "first exam incorrectly reported a smoking history of 1/2 pack for 25 years with Claimant quitting smoking in 1980." Decision and Order at 7. The administrative law judge also observed that Dr. Rasmussen "considered Claimant's smoking history to be only light." *Id*. at 8.

Contrary to employer's assertion, an administrative law judge may consider the entirety of the evidentiary record if the administrative law judge finds that claimant has established the threshold requirement of a material change in conditions at 20 C.F.R. §725.309. *See Rutter, supra*; *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

However, we hold that employer's assertion that the administrative law judge erred in finding bias on the part of Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress and Loudon because they were hired by employer has merit. The administrative law judge stated, "Employer relies upon...reports from various **paid** consulting physicians who reviewed the medical records including Drs. Bellotte, Hippensteel, Loudon, Fino, Kress, and Crisalli." Decision and Order at 15 (emphasis added). Inasmuch as the identity of the party who hires an expert does not, by itself, demonstrate partiality or partisanship on the part of the physician, we hold that the administrative law judge erred by attributing bias to Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress and Loudon. *See Urgolites v. Bethenergy Mines, Inc.*, 20 BLR 1-20 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Finally, inasmuch as Judge Burke's prior denial of benefits is a final adjudication that claimant was not disabled by pneumoconiosis as of the date of its issuance on November 7, 1991, we hold that the administrative law judge erred in finding the date from which benefits commence to be April 10, 1986. *See Rutter*, 86 F.3d at 1364, 20 BLR at 2-239. If reached on remand, the administrative law judge must consider all of the relevant evidence of record submitted since Judge Burke's prior denial of benefits in determining the date from which benefits commence.[5] *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see also Rutter, supra*.

[5]Benefits can commence no earlier than November 7, 1991, the date of Judge Burke's denial of benefits. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1364, 20 BLR 2-227, 2-239 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge