BRB No. 02-0463 BLA

RALPH BANKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAG AMERICAN COAL COMPANY	)	
	)	DATE ISSUED:
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1317) of Administrative Law Judge Rudolf L. Jansen 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] The instant case involves a duplicate claim filed November 3, 1998.[2] The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer responds in support of the administrative law judge's denial of benefits. Employer also contends that claimant's claim was not timely filed. Employer further argues that claimant's claim is precluded by the district director's 1995 finding that claimant was totally disabled due to cigarette smoking. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

We initially address employer's contention that claimant's 1998 claim was

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[1]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 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 relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on July 25, 1994. Director's Exhibit 29. In a Memorandum of Informal Conference dated May 5, 1995, the district director denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

Claimant filed a second claim on November 3, 1998. Director's Exhibit 1.

untimely filed. Employer, citing the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), argues that claimant's 1998 application for benefits is barred by the time limitations set forth in Section 725.308. Section 725.308 provides in relevant part that:

> (a) A claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

The Sixth Circuit indicated in *Kirk* that the three year limitations period set forth in Section 725.308 applies to all claims, not just the first application for benefits. This interpretation stands in contrast to the Board's holdings in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), in which the Board indicated that the statute of limitations contained in Section 422(f) of the Act, as implemented by Section 725.308, applies only to the filing of a claimant's initial Part C claim.

Because the present case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, we are not obliged to apply the Sixth Circuit's reasoning in *Kirk* in the present case. Although decisions rendered by a circuit court can provide guidance in cases that do not arise within its geographical jurisdiction, the Board has declined to apply the language in *Kirk* regarding Section 725.308 beyond the jurisdiction of the Sixth Circuit, as it is not apparent that the court's holding is mandated by the Act and the implementing regulations.

We now turn our attention to claimant's contention that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Section 725.309 (2000) provides that a duplicate claim is

[3]Although Section 725.309 has been revised, these revisions only apply to claims filed

subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Seventh Circuit has held that in order to establish a material change in conditions, a miner "must show that something capable of making a difference has changed since the record closed on the first application," *i.e.*, "at least one element that might independently have supported a decision against the [miner] has now been shown to be different." *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-1009, 21 BLR 2-113, 2-127-128 (7th Cir. 1997); *see also Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The administrative law judge determined that claimant's prior 1994 claim was denied because claimant failed to establish that he suffered from pneumoconiosis. Decision and Order at 11, 14. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Spese*, *supra*.

The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 12-14.

Claimant contends that the administrative law judge committed numerous errors in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] The record contains newly submitted medical opinions from seven physicians. Although Drs. Sanjabi and Cohen diagnosed pneumoconiosis, Director's Exhibit 7, Claimant's Exhibits 1, 21, Drs. Selby, Castle, Fino, Renn and Tuteur opined that claimant did not suffer from the disease. Employer's Exhibits 1, 24, 26, 29, 32, 46, 48-52, 54.

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after January 19, 2001.

[4]Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Co.*, 6 BLR 1-710 (1983).

In his consideration of the newly submitted medical opinion evidence, the administrative law judge properly found that the opinions of Drs. Cohen, Selby, Castle, Fino, Renn, and Tuteur were entitled to greater weight than that of Dr. Sanjabi based upon their superior qualifications.[5] *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 13.

The administrative law judge next found that the opinions of Drs. Cohen, Castle, Fino, Renn and Tuteur regarding whether claimant suffered from pneumoconiosis, while different, were each supported by epidemiological studies on the effect of coal dust inhalation. Decision and Order at 13. The administrative law judge further noted that while Dr. Cohen had criticized the studies relied upon by Drs. Castle, Fino, Renn, and Tuteur to support their opinions, Drs. Castle, Fino, Renn and Tuteur had criticized the studies relied upon by Dr. Cohen to support his opinion. *Id*. at 13-14. Because highly qualified physicians, each citing

[5]The administrative law judge noted that Drs. Cohen, Selby, Castle, Fino, Renn, and Tuteur are "highly qualified pulmonologists." Decision and Order at 13. Drs. Cohen, Selby, Castle, Fino, Renn and Tuteur are Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 1; Employer's Exhibits 2, 41-43. The administrative law judge properly noted that Dr. Sanjabi's qualifications are not found in the record. Decision and Order at 13.

Claimant contends that the administrative law judge erred by not taking into account the fact that Dr. Cohen is, *inter alia*, a professor of medicine and the director of a large black lung clinic. An administrative law judge, in evaluating the relative weight of medical opinion evidence, is not limited to considering the Board-certification status of the various physicians. However, while an administrative law judge is not barred from considering other factors relevant to the level of a physician's competence, such as a professorship in the field of medicine, he is not obligated to do so. *See generally Worach v. Director, OWCP*, 17 BLR 1-105 (1993).

Citing *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), claimant notes that the Seventh Circuit has recognized Dr. Cohen's superior qualifications. Claimant's Brief at 7. In *Summers*, the Seventh Circuit held that, under the facts of that case, the administrative law judge acted rationally in according great weight to Dr. Cohen's views based upon his clinical experience and knowledge of cutting-edge research. *Summers, supra*. However, it is within the discretion of an administrative law judge to accord weight to the evidence and he is not bound by credibility determinations of other judges in separate matters. *See generally Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Under the facts of this case, we hold that the administrative law judge acted within his discretion in finding that Drs. Cohen, Selby, Castle, Fino, Renn and Tuteur were all "highly qualified pulmonologists."

supportive epidemiological studies, had arrived at differing conclusions as to whether or not claimant suffered from pneumoconiosis, the administrative law judge found that the newly submitted medical opinion evidence was "equally probative" and, therefore, insufficient to establish the existence of pneumoconiosis. *Id.* at 14.

Claimant initially contends that the administrative law judge, in his consideration of the newly submitted medical opinion evidence, erred in failing to make a distinction between "clinical" and "legal" pneumoconiosis.[6] While claimant accurately notes that the administrative law judge failed to make such a distinction, we hold that the administrative law judge's error is harmless in light of the fact that while Dr. Cohen diagnosed both "clinical" pneumoconiosis and "legal" pneumoconiosis,[7] Drs. Selby,[8] Castle,[9] Fino,[10] Renn,[11] and Tuteur[12] each effectively ruled out the presence of each of these types of

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[6]A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[7]Dr. Cohen diagnosed "coal workers' pneumoconiosis," a finding that constitutes "clinical" pneumoconiosis. Claimant's Exhibits 1, 21. Dr. Cohen also diagnosed severe obstructive lung disease which he attributed to claimant's coal dust exposure and cigarette smoking, a diagnosis that constitutes a finding of "legal" pneumoconiosis. *Id.*

[8]Dr. Selby opined that claimant did not suffer from coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Selby opined that claimant suffered from severe chronic obstructive pulmonary disease secondary to his cigarette smoking and asthma. *Id.*

[9]Dr. Castle opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 29. Dr. Cohen also opined that claimant did not suffer from any chronic disease of the lungs, or the sequelae thereof, that had been caused, contributed to, or substantially aggravated, by coal mine dust exposure. *Id.*

[10]Dr. Fino opined that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 26. Dr. Fino further opined that claimant did not suffer from an occupationally acquired pulmonary condition. *Id.*

[11]Dr. Renn opined that claimant did not suffer from any disease process that developed as a result of either coal workers' pneumoconiosis or a coal mine dust-induced disease of his respiratory system. Employer's Exhibit 24.

[12]Dr. Tuteur opined that there was no convincing evidence that claimant had clinically

pneumoconiosis.

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significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis or any other coal mine dust-induced disease process. Employer's Exhibit 32.

Claimant next argues that the administrative law judge erred in relying upon the opinions of Drs. Selby, Castle, Fino, Renn and Tuteur because they erroneously assumed that coal dust exposure does not cause a purely obstructive impairment. In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, the Fourth Circuit subsequently clarified its holding. Specifically, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment *can never cause* chronic obstructive pulmonary disease. Unlike the physicians in *Warth*, Drs. Selby,[13] Castle,[14] Fino,[15] Renn[16] and Tuteur[17] did not assume that coal dust exposure can never cause an obstructive lung disease. Consequently, the administrative law judge could properly rely upon their opinions.

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[13]In attributing claimant's severe obstructive pulmonary disease to his cigarette smoking and asthma, Dr. Selby did not address the issue of whether an obstructive impairment could be caused by coal dust exposure. *See* Claimant's Exhibit 1.

[14]Dr. Castle opined that when coal workers' pneumoconiosis causes an impairment, it does so by causing a mixed, irreversible, obstructive and restrictive ventilatory defect. Employer's Exhibit 29. In the instant case, Dr. Castle found that claimant had a pure obstructive defect with a significant degree of reversibility consistent with tobacco smoke induced airway obstruction. *Id.*

[15]Dr. Fino opined that it is possible to differentiate the obstruction caused by coal mine dust from the obstruction caused by other factors such as smoking and asthma. Employer's Exhibit 26. Dr. Fino acknowledged that some miners can have significant obstruction as a result of coal mine inhalation, but explained that such a situation is expected in cases of severe fibrosis where a combined obstructive and restrictive defect is present. *Id.*

[16]Dr. Renn acknowledged that a miner can have an obstructive impairment from coal dust exposure. Employer's Exhibit 54 at 34.

[17]Dr. Tuteur acknowledged that coal mine dust can produce chronic obstructive pulmonary disease. Employer's Exhibit 51 at 18.

Claimant also contends that the administrative law judge failed to consider the fact that there is nothing in the record to support Dr. Selby's diagnosis of an asthmatic condition. Dr. Selby opined that claimant's severe chronic obstructive pulmonary disease was mostly attributable to his cigarette smoking history. Employer's Exhibit 1. Although Dr. Selby found that there was also an asthmatic component to claimant's impairment, he opined that its effects were largely reversible by use of a bronchodilator. *Id.* Contrary to claimant's contention, Dr. Selby was not alone in finding that there was an asthmatic component to claimant's impairment. For example, Dr. Renn opined that there was an "asthmatic component" to claimant's chronic bronchitis. Employer's Exhibit 54 at 9. We, therefore, reject claimant's contention.

Claimant also argues that the administrative law judge erred in failing to adequately resolve the conflicts among the physicians in their interpretation of the medical literature. The administrative law judge found that Dr. Cohen's opinion that claimant suffered from pneumoconiosis was "supported by epidemiological studies on the effect of coal dust inhalation." Decision and Order at 13. The administrative law judge, however, found that the highly qualified physicians who came to the opposite conclusion, that claimant did not suffer from pneumoconiosis, also provided epidemiological studies in support of their conclusions. *Id.* The administrative law judge further noted that while Dr. Cohen relied upon studies criticized by Drs. Castle, Fino, Renn, and Tuteur, these latter physicians relied upon studies criticized by Dr. Cohen. *Id.* at 13-14. Given this state of the evidence, the administrative law judge reasonably found that the medical opinion evidence regarding whether claimant suffered from pneumoconiosis was "equally probative." Decision and Order at 14.

Claimant notes that, in adopting a revised definition of pneumoconiosis, the Department of Labor (DOL) discussed and rejected Dr. Fino's assessment of the medical literature. Claimant's Brief at 11. The revised regulations recognize that "legal" pneumoconiosis includes chronic obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In the comments to this revised regulation, the DOL noted, *inter alia*, that Dr. Fino's opinion that coal miners do not have an increased risk of developing chronic obstructive pulmonary disease was "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed. Reg. 79,939 (2000). The DOL's comments, however, do not foreclose an administrative law judge from making his own assessment of the credibility of Dr. Fino's opinion in any given case. The administrative law judge properly considered the credibility of Dr. Fino's opinion and, when weighed along with the other newly submitted medical opinion evidence, found that the newly submitted medical opinion evidence regarding the existence of pneumoconiosis was equally probative.

We finally reject claimant's contention that the administrative law judge's analysis of the previously submitted medical opinion evidence does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge reviewed all of the relevant newly submitted medical opinion evidence and provided explanations for his weighing of the evidence and his conclusions. Having reasonably found that the newly submitted medical opinion evidence was "equally probative," the administrative law judge properly found that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1 (1994). We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[18] *Spese*, *supra*; *McNew*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[18]In light of our affirmance of the administrative law judge's denial of benefits, we need not address employer's argument that claimant's claim is precluded by the district director's 1995 finding that claimant was totally disabled due to cigarette smoking. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).