BRB No. 01-0221 BLA

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

Appeal of the Decision and Order Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Robert M. Hodge, Chicago, Illinois, for claimant.

Timothy S. Williams (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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (98-BLA-1140) of Administrative Law Judge Rudolf L. Jansen 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 administrative law judge found sixteen years of coal mine

[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 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.

employment established, as stipulated by the parties, and noted that, because the instant claim was a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), *see* 20 C.F.R. §725.2(c), in accordance with the standard enunciated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc* rehearing), *modifying*, 94 F.3d 369 (7th Cir. 1996), *and affirming* 19

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 February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

BLR 1-45 (1995).[2] The administrative law judge adjudicated the instant claim pursuant to 20 C.F.R. Part 718 and found that the relevant, newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found that a material change in conditions was not established pursuant to Section 725.309(d)(2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge did not properly weigh the relevant, newly submitted medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c)(4), as revised at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to remand the case because the administrative law judge did not properly weigh the relevant, newly submitted medical opinion evidence and did not consider all of the relevant evidence of record.

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).

[2] Claimant has previously filed five claims, all of which were finally denied by the district director, *see* Director's Exhibit 21. Prior to the instant claim, claimant had filed a claim on July 14, 1994, which was finally denied by the district director on May 6, 1996, because claimant did not establish any element of entitlement, *id*. Subsequently, the instant, duplicate claim was filed on October 6, 1997, Director's Exhibit 1.

The Seventh Circuit has held that in order to prevail on a duplicate claim, claimant must show that something capable of making a difference has changed since the record closed in the first claim, *i.e.*, at least one element that might independently have supported a decision against the claimant has now been shown to be different, *see Spese*, *supra*.[3] In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

[3] The administrative law judge erroneously found that the final denial of claimant's previous claim occurred on December 5, 1994, as opposed to the actual date of May 6, 1996, *see* Director's Exhibit 21. Any error by the administrative law judge in this regard was harmless, however, because the administrative law judge only considered evidence dated after the correct date of the final denial of claimant's previous claim in determining whether claimant had established a material change in conditions pursuant to Section 725.309(d)(2000), *see* 20 C.F.R. §725.2(c).

Initially, the administrative law judge found that the preponderance of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) or, therefore, a material change in conditions pursuant to Section 725.309(d)(2000) because the most recent, newly submitted x-ray evidence considered by the administrative law judge included two negative readings of an x-ray dated November 17, 1998, one by Dr. Sargent, a board-certified radiologist and B-reader, and the other by Dr. Gaziano, a B-reader, Director's Exhibits 27-28. However, the Director contends that the administrative law judge erred by failing to consider relevant evidence that was apparently submitted timely by claimant, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The Director's argument has merit. The record reflects that the administrative law judge, at the hearing, set a deadline of June 30, 2000, for claimant to submit evidence, *see* Hearing Transcript at 9. The Director points to a letter dated May 24, 2000, to the administrative law judge, with copies to the Director, from claimant, apparently submitting six exhibits, Claimant's Exhibits 1-6. These exhibits include a positive reading of the x-ray dated November 17, 1998, by Dr. Ahmed, a board-certified radiologist and B-reader, Claimant's Exhibit 3, as well as a pulmonary function study and blood gas study, Claimant's Exhibits 5-6, and a treatment record indicating that claimant had a history of coal workers' pneumoconiosis, Claimant's Exhibit 1. Copies of claimant's May 24, 2000, letter addressed to the administrative law judge, and the attached exhibits, were provided by the Director in his brief on appeal. Further, a review of the record indicates that the administrative law judge granted the Director's motion for an extension of time to submit evidence in response to the evidence submitted by claimant on May 24, 2000. In addition, summaries of the evidence of record submitted by both claimant and the Director to the administrative law judge in September, 2000, list the exhibits submitted from claimant by letter dated May 24, 2000. However, the administrative law judge in his Decision and Order noted that claimant's exhibits, numbered one through six, were not contained in the record, *see* Decision and Order at 2 n. 1. Consequently, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(1) and Section 725.309(d)(2000), and remand the case for reconsideration under those Sections and for the administrative law judge to determine whether Claimant's Exhibits 1-6, including the positive reading from Dr. Ahmed of the x-ray dated November 17, 1998, Claimant's Exhibit 3, were timely submitted by claimant.[4]

[4] Because the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2)-(3) are not challenged on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, the administrative law judge considered the relevant, newly submitted medical opinion evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), Decision and Order at 9-11.[5] In weighing the evidence, the administrative law judge found that Dr. Cander opined that claimant did not have pneumoconiosis, while Dr. Sherman was equivocal on the presence of pneumoconiosis.[6] Turning to the other opinions, the administrative law judge found that while Drs. Combs and Marder provided reasoned medical opinions that claimant had pneumoconiosis, the Director provided an equally credible opinion from Dr. Cander that claimant did not have pneumoconiosis, noting that Drs. Cander, Combs and Marder were all board-certified in internal medicine and based their opinions on accurate smoking and employment histories. Finding no reason to assign more or less weight to any of their opinions, the administrative law judge found that claimant failed to establish the existence of

[5] The relevant, newly submitted medical opinion evidence includes the opinion of Dr. Combs, a board-certified physician in internal medicine who examined claimant, diagnosed the existence of pneumoconiosis arising from claimant's coal dust exposure, as well as chronic obstructive pulmonary disease, and found that claimant was totally disabled, sixty percent of which he attributed to pneumoconiosis, Director's Exhibit 5. In addition, the relevant, newly submitted medical opinion evidence includes the opinion of Dr. Marder, a board-certified physician in internal medicine, who reviewed the evidence of record and found that claimant had coal mine related chronic obstructive pulmonary disease which rendered him totally disabled, Claimant's Exhibit 8. On the other hand, Dr. Sherman, a board-certified physician in internal medicine and pulmonary disease, reviewed the evidence of record, opined that claimant's pulmonary impairment was not severe enough to warrant a diagnosis of disabling pneumoconiosis, Director's Exhibit 25. Finally, Dr. Cander, a board-certified physician in internal medicine, reviewed the evidence of record, initially found that any degree of pneumoconiosis as defined by the Act did not cause any pulmonary disability, but stated that it was "conceivable" that the minimal chronic bronchial obstruction that claimant had was causally related in part to claimant's coal dust exposure, Director's Exhibit 23. After reviewing additional evidence, however, Dr. Cander opined that claimant had no physiologically significant chronic obstructive lung disease, noting that claimant's minimally reduced FEV1/FVC results "may be the earliest indicator of physiologically insignificant chronic bronchial obstruction," and that claimant's objective test results excluded the presence of a pulmonary impairment and/or pulmonary disability from any cause, including claimant's coal mine employment, Director's Exhibit 29.

[6] The Director concedes, and the administrative law judge found, that Dr. Sherman's opinion is insufficient to defeat a finding that the claimant has "legal" pneumoconiosis. 30 U.S.C. §902(b); 20 C.F.R. §718.201. Director's Brief at 13 n.11.

pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the evidence. Similarly, pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that while Drs. Combs and Marder determined that claimant was totally disabled, the Director provided equally credible opinions from Drs. Cander and Sherman that claimant was not totally disabled and, therefore, found that claimant failed to demonstrate total disability by a preponderance of the newly submitted medical opinion evidence.

Both claimant and the Director contend that the administrative law judge did not properly weigh the relevant, newly submitted medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant properly contends that, contrary to the administrative law judge's finding, Dr. Cander's opinion, which the administrative law judge found to be reasoned, was not inconsistent with the opinion of Dr. Marder, that claimant had coal mine related chronic obstructive pulmonary disease, *i.e.*, legal pneumoconiosis,[7] because, while Dr. Cander opined that claimant did not have any pulmonary impairment arising out of his coal mine employment, he nevertheless diagnosed minimal chronic bronchial obstruction and stated that it was "conceivable" that it was causally related in part to claimant's coal dust exposure, *see* Director's Exhibits 23, 29. Thus, as claimant contends, Dr. Cander's opinion, on its face, is not necessarily contrary to Dr. Marder's opinion that claimant suffers from "legal" pneumoconiosis. Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was not established by the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4) and, remanded for reconsideration of all of the relevant, newly submitted evidence of record.[8]

In addition, both claimant and the Director contend that the administrative law judge erred in finding the conflicting medical opinion evidence under Sections 718.202 and 718.204 to be "equally credible" without considering the additional qualifications of the physicians, beyond the fact that they were all board-certified in internal medicine,[9] and/or the

[7] "Legal" pneumoconiosis includes "any chronic lung disease *or* impairment and its sequelae arising out of coal mine employment," including "*any* chronic obstructive pulmonary disease arising out of coal mine employment," *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201(a)(2)(emphasis added).

[8] Other relevant evidence apparently submitted by claimant, but not considered by the administrative law judge, *see Tackett, supra*, is a treatment record indicating that claimant had a history of coal workers' pneumoconiosis, Claimant's Exhibit 1.

[9] Claimant notes that Dr. Marder is also board-certified in occupational medicine, while the Director notes that Dr. Sherman is board-certified in pulmonary disease. The

quality of the documentation and reasoning of the medical opinions. These arguments have merit. The administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), and an administrative law judge must provide a full, detailed opinion which complies with 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), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

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administrative law judge, summarizing the evidence, noted that Dr. Cander has published works on the cardio-pulmonary system and pneumoconiosis.

Thus, because the administrative law judge did not adequately explain his determination that the conflicting medical opinion evidence was "equally credible," *see* 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); *Tenney, supra*, we vacate the administrative law judge's findings and remand the case for the administrative law judge to reconsider his findings and provide further explanation of his assessment of the quality of the physicians' reasoning and documentation in support of their conclusions, *see Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).[10] Moreover, the administrative law judge should weigh all of the relevant, newly submitted evidence, like and unlike, pursuant to Section 718.204, *i.e.*, all of the newly submitted

[10] Specifically, claimant contends that the administrative law judge did not consider the fact that, while Dr. Marder found that claimant's diffusion capacity and pulmonary function study results indicated that claimant was totally disabled, Dr. Sherman did not discuss claimant's diffusing capacity results and Dr. Cander found that claimant's diffusion capacity results to be normal based on different standards and re-read the tracings of the pulmonary function study relied on by Dr. Marder as yielding different results. Claimant also contends that Drs. Cander and Sherman were not familiar, as Dr. Marder was, with the fact that claimant's last coal mine employment required very heavy exertion and, therefore, did not share Dr. Marder's opinion that claimant's diffusion capacity results and even non-qualifying pulmonary function study results nevertheless indicated that claimant would be unable to perform his last coal mine employment.

The significance of even non-qualifying objective tests is for a physician to determine and a physician may find that such test results indicate that a claimant would be unable to perform his last coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). Where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, such an opinion may be sufficient to allow the administrative law judge to reach a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, because the ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984).

pulmonary function study and blood gas study evidence as well, including the pulmonary function study and blood gas study submitted by claimant, but not, apparently, specifically considered by the administrative law judge pursuant to Section 718.204(c)(1)-(2), as revised at 20 C.F.R. §718.204(b)(2)(i)-(ii), *see* Director's Exhibits 3, 7; Claimant's Exhibits 5-6. *See Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge