BRB No. 02-0168 BLA

VARIS CANFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
MAJESTIC MINING, INCORPORATED	)	
	)	
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 on Second Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Eugene Scalia, 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (97-BLA-1653) of Administrative Law Judge Clement J. Kennington 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] This case, which involves a duplicate claim filed on December 18, 1995, has been before the Board previously.[2] In a Decision and Order dated July 9, 1998, the administrative law judge credited claimant with approximately eighteen years of coal mine employment and considered the claim under the applicable regulations at 20 C.F.R. Part 718 (2000). The administrative law judge found that a preponderance of the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). The administrative law judge further found claimant entitled to the presumption that

[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]Claimant filed an initial claim for benefits on January 8, 1972, which the district director denied on June 26, 1981. Director's Exhibit 28. Claimant took no further action thereafter until filing a second claim on January 29, 1986. In a Decision and Order dated November 7, 1991, Administrative Law Judge Thomas M. Burke found that claimant established approximately eighteen years of coal mine employment, and considered the 1986 claim under the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Burke found the x-ray evidence of record sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000), stating that he resolved any doubt posed by the conflicting evidence in claimant's favor. Judge Burke further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. Judge Burke then found the evidence sufficient to establish total disability under 20 C.F.R. §718.204(c) (2000), but further found that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Consequently, Judge Burke denied benefits. Claimant appealed, and employer filed a cross-appeal. The Board affirmed, as unchallenged on appeal, Judge Burke's length of coal mine employment finding and findings under Sections 718.202(a) (2000), 718.203(b) (2000) and 718.204(c) (2000). *Canfield v. Majestic Mining, Inc.*, BRB Nos. 92-0642 BLA and 92-0642 BLA-A (May 28, 1993)(unpublished). The Board further affirmed Judge Burke's finding at Section 718.204(b) (2000) and, consequently, affirmed the denial of benefits. *Id*. In affirming the denial of benefits, the Board found it unnecessary to address employer's contentions raised in its cross-appeal with regard to Judge Burke's consideration of the x-ray evidence. *Id*. Subsequently, the Board summarily denied claimant's request for reconsideration. *Canfield v. Majestic Mining, Inc.*, BRB Nos. 92-0642 BLA and 92-0642 BLA-A (Aug. 10, 1993)(unpublished Order).

Thereafter, claimant took no further action in pursuit of benefits until filing the instant duplicate claim on December 18, 1995. Director's Exhibit 1.

his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000), and that the presumption was not rebutted. The administrative law judge then found the evidence of record sufficient to establish total disability under 20 C.F.R. §718.204(c) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Consequently, the administrative law judge awarded benefits. Employer appealed.

The Board vacated the administrative law judge's award, holding that the administrative law judge erred in considering the instant claim on the merits without making a threshold determination of whether the newly submitted evidence submitted in connection with the duplicate claim was sufficient to establish total disability due to pneumoconiosis under Section 718.204(b) (2000), and, thus, a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Canfield v. Majestic Mining, Inc.*, BRB No. 98-1361 BLA (Dec. 3, 1999)(unpublished). The Board also vacated the administrative law judge's finding at Section 718.202(a)(1) (2000), because in his weighing of the conflicting x-ray interpretations of record, the administrative law judge applied the true doubt rule, and he failed to specifically identify and discuss the interpretations and credentials of the physicians who provided negative readings. *Id*. The Board further vacated the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(4) (2000). *Id*. In addition, the Board held that the administrative law judge improperly found bias on the part of employer's physicians when weighing the evidence under Section 718.204(b) (2000) simply because the physicians were paid experts. *Id*. Finally, the Board vacated the administrative law judge's finding regarding the onset date of total disability.[3] *Id*.

In a Decision and Order on Remand dated April 12, 2000, the administrative law judge found that inasmuch as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and that claimant was totally disabled thereby, claimant established a material change in conditions under Section 725.309 (2000). Turning to the merits of the claim, the administrative law judge found that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis. The administrative law judge thus awarded benefits, commencing on February 16, 1996, the date from which the evidence established totally disabling pneumoconiosis. Employer appealed, and claimant filed a cross-appeal. The Board vacated the administrative law judge's weighing of the x-ray evidence

[3]The Board affirmed, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding. *Canfield v. Majestic Mining, Inc.*, BRB No. 98-1361 BLA (Dec. 3, 1999)(unpublished), slip opn. at 2, n.1.

under Section 718.202(a)(1) (2000), holding that the administrative law judge failed to adequately consider the radiological qualifications of the physicians of record. *Canfield v. Majestic Mining, Inc.*, BRB Nos. 00-0815 BLA and 00-0815 BLA-A (June 20, 2001)(unpublished). The Board further vacated the administrative law judge's finding of pneumoconiosis under Section 718.202(a)(4) (2000), instructing the administrative law judge to clarify his finding with regard to Dr. Craft's medical opinion indicating that claimant suffers from pneumoconiosis. *Id*. The Board also vacated the administrative law judge's finding regarding total disability causation in light of its decision to vacate the administrative law judge's weighing of the evidence of record regarding the existence of pneumoconiosis. *Id*. In addition, the Board vacated the administrative law judge's finding under Section 725.309 (2000), and instructed the administrative law judge to reconsider whether the newly submitted evidence establishes either the existence of pneumoconiosis or that pneumoconiosis was at least a contributing cause of claimant's totally disabling respiratory impairment and thus whether a material change in conditions was established. *Id*. The Board instructed that if the administrative law judge were to find a material change in conditions established, he must then reconsider the claim on the merits. *Id*. Finally, the Board held that, inasmuch as it was remanding the case for reconsideration on the issues of pneumoconiosis and total disability causation, the administrative law judge's finding as to the date of onset of claimant's total disability due to pneumoconiosis was also vacated. *Id*.

In his Decision and Order on Second Remand dated October 17, 2001, the administrative law judge found the weight of the x-ray interpretations sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). The administrative law judge also found claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) because the presumption described at 20 C.F.R. §718.305 applied. The administrative law judge further found the weight of the medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), and that, when the evidence was weighed together under Section 718.202(a)(1)-(4), claimant established the existence of the disease. The administrative law judge then found claimant established pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), and total disability pursuant to Section 718.204(b). With regard to disability causation, the administrative law judge found claimant entitled to the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 and found that, in addition to the irrebuttable presumption, the medical reports of Drs. Gaziano and Rasmussen were sufficient to establish that pneumoconiosis is a contributing cause of claimant's totally disabling respiratory impairment. On these bases, the administrative law judge determined that claimant established total disability due to pneumoconiosis and, consequently, awarded benefits. Finally, the administrative law judge determined that claimant's benefits should commence as of February 16, 1996. On appeal, employer raises several arguments in support of its contention that the administrative law judge erred in finding that claimant established

the existence of pneumoconiosis and total disability due to pneumoconiosis.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in which he agrees with several arguments raised by employer.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

In challenging the administrative law judge's finding that claimant established the existence of pneumoconiosis, employer first argues that the administrative law judge erred by discounting the negative x-ray interpretations of Drs. Wiot and Spitz[6] on the ground that the two radiologists were biased against claimant. Employer also contends that the administrative law judge improperly used film quality as a basis upon which to discount several of the negative x-ray readings of record. Employer's contentions have merit. A finding that a physician is biased cannot be made based upon an alleged pattern of prejudice in previous cases. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991). An administrative law judge can discount evidence as biased only if there is specific evidence establishing bias in the record before him. *Id*. In the instant case, the administrative law judge did not identify any specific evidence in the record establishing bias on the part of Drs. Wiot and Spitz, but rather found that these physicians were biased based upon a pattern of negative x-ray readings in other cases. Decision and Order on Second Remand at 10-13. We

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[4]In addition, employer contends that the revised regulations, specifically the revised provisions with respect to treating physicians' opinions at 20 C.F.R. §718.104(d) and the definition of pneumoconiosis at 20 C.F.R. §718.201, cannot be applied in the instant case because applying them would be impermissibly retroactive. As the Director, Office of Workers' Compensation Programs (the Director), notes in his brief, however, the revised regulation at Section 718.104 applies only to medical opinion evidence developed after January 19, 2001. Section 718.104 is thus inapplicable in this case since there was no medical opinion evidence of record developed after that date.

[5]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to the presumption of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Second Remand at 24-25.

[6]Drs. Wiot and Spitz, Board-certified radiologists and B readers, interpreted as negative films dated February 26, 1997and October 14, 1988. Director's Exhibits 23, 28. Dr. Wiot also interpreted a February 16, 1996 film as negative. Director's Exhibit 21.

vacate, therefore, the administrative law judge's decision to accord less weight to the interpretations of Drs. Wiot and Spitz on that ground.

In addition, the administrative law judge improperly discounted twelve negative readings of x-ray films dated April 10, 1986, June 13, 1986, January 11, 1990, February 16, 1996 and February 26, 1997 on the basis that these films were of poor quality. *Id*. at 5-6. As employer argues, none of these films was considered by the readers to be of poor quality or unreadable, but only of less than optimal quality.[7] The regulations require that an x-ray be of suitable quality for interpretation, not that it be of optimal quality. *See Preston v. Director, OWCP*, 6 BLR 1-1229 (1984). We hold, therefore, that the administrative law judge improperly discounted the negative readings of the above-mentioned films on the basis of the films' quality. Accordingly, we vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), and remand the case for the administrative law judge to reconsider the x-ray evidence of record thereunder.

Employer also correctly contends that the administrative law judge improperly found claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(3) by application of the presumption set forth at Section 718.305. The presumption that a totally disabled miner who has more than fifteen years of coal mine employment suffers from coal workers' pneumoconiosis applies only to claims filed before January 1, 1982. *See* 20 C.F.R. §718.305(e). As the instant claim was filed on December 18, 1995, the presumption at Section 718.305 is inapplicable. Accordingly, we reverse the administrative law judge's

[7]With regard to the x-ray taken on April 10, 1986, Dr. Kress indicated that the film was "underexposed," Dr. Sargent noted the film was "foggy," and Dr. Gogineni characterized the film as "light." Director's Exhibit 28. The administrative law judge noted that, on a scale of one to four, these readers gave the film a "two." Decision and Order on Second Remand at 6. The administrative law judge stated that because these three readings represent a majority of the five readings of the April 10, 1986 film, all five readings, which were negative, were entitled to little weight. *Id*. The administrative law judge also gave less weight to the negative readings by Drs. Gaziano and Sargent of the film dated June 13, 1986 because the two radiologists found the quality to be less than optimal. *Id*. The administrative law judge found with regard to the January 11, 1990 film, that because two of the three readers found that the film was "light," all three interpretations, *i.e.*, negative interpretations which were submitted by Drs. Duncan, Abramaowitz and Wershba, were entitled to less weight. *Id*. Finally, the administrative law judge discounted the negative readings of Dr. Wiot of the February 16, 1996 and February 26, 1997 films because Dr. Wiot gave the films a "two" quality rating. *Id*.

finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(3) by application of the Section 718.305 presumption.

In challenging the administrative law judge's finding under Section 718.202(a)(4), employer contends that the administrative law judge erred in giving less weight to the opinions of Drs. Crisalli, Fino, Bellotte, Hippensteel, Loudon and Kress on the ground that these doctors relied on negative x-ray readings in opining that claimant does not have pneumoconiosis. Employer argues that the administrative law judge mechanically discounted the opinions of these physicians because the physicians did not share his conclusion that the weight of the x-ray evidence was positive for pneumoconiosis. Employer's argument has merit. *See Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986). Inasmuch as we have vacated the administrative law judge's finding that the weight of the x-ray evidence establishes the existence of pneumoconiosis, as discussed *supra*, we vacate the administrative law judge's decision to discount the opinions of Drs. Crisalli, Fino, Bellotte, Hippensteel, Loudon and Kress on the ground that the doctors relied on negative x-ray interpretations. Decision and Order on Second Remand at 24.

In addition, we agree with employer that the administrative law judge improperly discounted the opinions of Drs. Crisalli, Fino and Bellotte on the ground that these physicians relied on inaccurate smoking histories. While an administrative law judge may discount the opinions of physicians who rely on inaccurate smoking histories, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining, Inc.*, 12 BLR 1-11 (1989)(*en banc*), it was irrational for the administrative law judge to find in the instant case that Drs. Crisalli, Fino and Bellotte did not have an accurate understanding of claimant's smoking history. After determining that claimant smoked one half pack of cigarettes per day for forty years, Decision and Order on Second Remand at 17, the administrative law judge discounted Dr. Crisalli's opinion because Dr. Crisalli relied on "an inaccurate smoking history of a pack a day for forty years." *Id*. at 19; Employer's Exhibit 6 at 55. The administrative law judge did not consider, however, that Dr. Crisalli stated, in his June 12, 1997 report, that he was aware of the various smoking histories provided by claimant to other physicians, including claimant's indication to Dr. Stewart, for instance, that claimant smoked a half pack per day for most of his adult life, a history consistent with the administrative law judge's determination. Director's Exhibit 19. As employer contends, Dr. Fino stated that claimant smoked a half pack per day for most of his adult life; the doctor also noted the various other histories of record provided by claimant. Employer's Exhibit 7 at 30-31. Similarly, in his report dated July 28, 1997, Dr. Bellotte's statement, that claimant had smoked a half pack per day for a period of anywhere between eight to ten years up to fifty years, is not markedly inconsistent with the administrative law judge's determination that claimant smoked a half pack of cigarettes per day for forty years. Employer's Exhibit 1. Thus, we hold that the administrative law judge's finding that Drs. Crisalli, Fino and Bellotte did not have an accurate understanding of claimant's smoking history was irrational and not

supported by substantial evidence. Consequently, we vacate the administrative law judge's finding that Drs. Crisalli, Fino and Bellotte relied upon inaccurate smoking histories which entitled their opinions to less weight. On remand, the administrative law judge should avoid selectively discussing each physician's opinion and consider the entirety of the various opinions of record.

Employer further argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Gaziano in finding the existence of pneumoconiosis established at Section 718.202(a)(4). Employer contends that these opinions are unreasoned as a matter of law and should not have been credited over the contrary opinions of record. We disagree. The administrative law judge correctly stated that Dr. Rasmussen, who examined claimant in 1989 and reviewed the medical evidence of record, indicated that he considered claimant's smoking and coal mine employment histories, x-ray changes consistent with pneumoconiosis, and pulmonary function and arterial blood gas studies which indicate a severe pulmonary insufficiency. Decision and Order on Second Remand at 23-24; Director's Exhibits 27, 28. The administrative law judge properly found that Dr. Gaziano, who examined claimant in 1986 and 1996, diagnosed pneumoconiosis and chronic obstructive pulmonary disease due to smoking in equal measure, in light of claimant's smoking and coal mine employment histories, positive x-ray changes for pneumoconiosis, medical history, and pulmonary function and arterial blood gas studies. Decision and Order on Second Remand at 23-24 Director's Exhibits 8, 28. An administrative law judge may properly find such opinions to be well-reasoned and documented. *See Clark, supra; Tackett, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). We are unable to affirm, however, the administrative law judge's finding that the opinions of Drs. Rasmussen and Gaziano are well-reasoned and entitled to determinative weight inasmuch as the administrative law judge reached this conclusion, in part, by considering that Drs. Rasmussen and Gaziano based their opinions, in part, on positive x-ray findings. Inasmuch as we have vacated the administrative law judge's finding under Section 718.202(a)(1) with respect to the x-ray evidence, we thus vacate the administrative law judge's findings with respect to the opinions of Drs. Rasmussen and Gaziano. On remand, the administrative law judge should reconsider these opinions in addition to reconsidering the medical opinions of Drs. Crisalli, Fino, Bellotte, Hippensteel, Loudon and Kress under Section 718.202(a)(4), and make a determination with regard to the relative merits of all of the relevant evidence thereunder. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Accordingly, we vacate the administrative law judge's finding under Section 718.202(a)(4). On remand, after considering the relevant evidence under each subsection at Section 718.202(a), the administrative law judge must weigh together all of the relevant evidence, like and unlike, under Section 718.202(a)(1)-(4) prior to making his ultimate determination as to whether claimant has established the existence of pneumoconiosis under Section 718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Finally, employer argues that the administrative law judge erred in finding claimant entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 718.304. Employer's contention has merit. To establish invocation of the presumption at Section 718.304, claimant must present evidence establishing the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304. The record in the instant case does not include any evidence that claimant suffers from complicated pneumoconiosis. We reverse the administrative law judge's finding, therefore, that claimant established total disability due to pneumoconiosis by application of the presumption at Section 718.304. On remand, if the administrative law judge determines that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), he must then consider whether the evidence of record is sufficient to establish that claimant's total disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1995).

Inasmuch as we are remanding this case for reconsideration of the evidence on the existence of pneumoconiosis and total disability causation, we vacate the administrative law judge's finding with regard to the date of onset of claimant's total disability due to pneumoconiosis.[8] On remand, the administrative law judge must make a new determination. If a miner is found entitled to benefits, he is entitled to benefits beginning with the first day of the month of onset of his total disability due to pneumoconiosis.[9] *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should the administrative law judge find claimant entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless there is credited evidence which establishes that claimant was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

[8]The administrative law judge determined that claimant was entitled to benefits as of February 16, 1996, based upon Dr. Gaziano's opinion. Decision and Order on Second Remand at 26. This was the date on which Dr. Gaziano examined claimant and indicated claimant is totally disabled due to pneumoconiosis. Director's Exhibit 8.

[9]We emphasize that benefits are to be awarded as of the first *day* of the month in which a miner first becomes totally disabled due to pneumoconiosis, not another specific *date* within the month. *See* 20 C.F.R. §725.503(b).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge