BRB No. 93-0584 BLA

EDWARD C. BARNES	)	
	)	
Claimant-Petitioner	)	Date Issued:
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on
Respondent	)	RECONSIDERATION *EN BANC*

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Edward Waldman (Thomas S. Williamson, Jr., 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, BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

By Motion for Reconsideration, the Director, Office of Workers' Compensation Programs (the Director) requests *en banc* review of the Board's Decision and Order of February 22, 1994, affirming the Decision and Order (91-BLA-1429) of Administrative Law Judge Richard D. Mills denying benefits in the above-captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). In his Decision and Order, issued on October 30, 1992, the administrative law judge credited the miner with five years of coal mine employment, concluded that a material change in conditions was established pursuant to 20 C.F.R. §725.309 and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Accordingly, benefits were denied. Claimant appealed, generally asserting that he was entitled to benefits. The Director responded urging the Board to vacate and remand the

case to the administrative law judge for further consideration. On appeal, the Board affirmed the administrative law judge's denial of benefits as claimant failed to identify any error made by the administrative law judge in his evaluation of the evidence or his application of law pursuant to 20 C.F.R. Part 718. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). The Board further held that the Director's response brief was not a cross-appeal and did not provide an alternative basis upon which the Board could review the ultimate disposition of the administrative law judge. *Barnes v. Director, OWCP*, 18 BLR 1-55 (1994). By Motion for Reconsideration, the Director asserts that the Board should reconsider its holding wherein it declined to consider the contentions raised by the Director in her response brief. Claimant did not participate on reconsideration.

After consideration of the Director's contentions, we grant the Motion for Reconsideration and modify our prior Decision and Order affirming the administrative law judge's denial of benefits.

The Director specifically takes issue with our statement that "where a party who did not file a petition for review seeks to amend the final order below, those contentions must be raised in the form of a cross-appeal." *See Barnes*, 18 BLR at 1-58. As noted in *Barnes*, pursuant to 20 C.F.R. §802.212, arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief or those in support of the decision below. Other arguments will not be considered by the Board.[1] *See* 20 C.F.R. §802.212(b); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *see also Whiteman v. Boyle Land and Fuel Company*, 15 BLR 1-11 (1991)(*en banc*). In the instant case, claimant asserted that the administrative law judge erred in failing to find that claimant's pneumoconiosis arose out of his coal mine employment, and further erred in finding the evidence insufficient to establish the existence of total disability. Petition for Review at 1. While claimant failed to raise an allegation of error with sufficient specificity to invoke our review, the Director's brief responds to claimant's general allegation that the administrative law judge erred in failing to award benefits and thus we will address the Director's contentions. 20 C.F.R. §802.212; *King*, *supra*.

[1] We note that the Director concedes that her arguments in the instant case were not "in support of the decision below" within the meaning of 20 C.F.R. §802.212(b). *See* Director's Brief on Reconsideration at 5.

The Director asserts that the administrative law judge erred in finding that claimant failed to establish that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c).[2] The Director specifically asserts that the administrative law judge impermissibly rejected the medical opinions of Drs. Clarke and Fritzhand because each relies on a coal mine employment history of ten years, while claimant established only five years of qualifying employment. Director's Response Brief at 2. The Director's argument is not without merit. However, we initially note that the administrative law judge found the existence of pneumoconiosis established through application of the principle of true doubt.[3] Subsequent to the Decisions and Orders of both the administrative law judge and the Board, the United States Supreme Court held in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), that the true doubt rule violates Section 7 of the Administrative Procedure Act, 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). As the administrative law judge initially found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) based on the true doubt rule which is no longer valid, we must vacate the administrative law judge's findings pursuant to Section 718.202(a)(1) and remand this case for further consideration. *Ondecko, supra*. Consequently, we further vacate the administrative law judge's related finding that claimant's pneumoconiosis did not arise out of his coal mine employment pursuant to Section 718.203(c). On remand, the administrative

[2] The Director contends that the administrative law judge's evaluation of this duplicate claim is contrary to the standard enunciated in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), as the administrative law judge considered the newly submitted evidence in isolation, rather than in conjunction with the evidence submitted with the prior claim. Decision and Order at 5-6; Director's Response Brief at 2; *Shupink*, *supra.* Subsequent to the Director's Motion for Reconsideration in the instant case, however, the United States Court of Appeals for the Sixth Circuit issued *Sharondale Corp. v. Ross*, No. 93-3644, 1994 U.S. App. LEXIS 35172 (6th Cir. Dec. 16, 1994), which held that to assess whether a material change is established pursuant to Section 725.309, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change, and the administrative law judge must then consider whether all the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Ross* at *11, *15 (6th Cir. Dec. 16, 1994). As the administrative law judge in this case weighed all the newly submitted x-ray evidence in determining that claimant established a material change in conditions, his application of Section 725.309 is in accord with the Sixth Circuit's interpretation in *Ross*. Decision and Order at 5-6; *see* Director's Exhibits 11, 15, 21, 22, 25, 26; *Ross, supra*.

[3] "True doubt" was said to arise when equally probative but contradictory evidence was presented in the record, where selection of one set of facts would resolve the case against claimant, but selection of the contradictory set of facts would resolve the case for claimant. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Provance v. United States Steel Corp.*, 1 BLR 1-483 (1978). If conflicting evidence was found equally probative, the administrative law judge was required to resolve the issue in favor of the claimant. *See Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984).

law judge should reconsider all of the evidence of record in determining whether claimant has established the existence of pneumoconiosis pursuant to any of the available methods at 20 C.F.R. §718.202(a)(1)-(4), and, if necessary, in determining whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c).[4] *Sharondale Corp. v. Ross*, No. 93-3644, 1994 U.S. App. LEXIS 35172 (6th Cir. Dec. 16, 1994). Furthermore, we note that while the discrepancy between an administrative law judge's own finding of coal mine employment and the history relied upon by a physician is a factor affecting the weight to be given to that medical opinion, and that it is within the administrative law judge's discretion to accord an opinion less weight on this basis, *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1988); *Robel v. Director, OWCP*, 6 BLR 1-775 (1985), in reconsidering the evidence relevant to Section 718.203(c) on remand, the administrative law judge should additionally consider whether the record contains any documentary or testimonial evidence to suggest any causal factors other than coal dust exposure as a cause of claimant's pneumoconiosis. *See Smith v. Director, OWCP*, 12 BLR 1-156 (1989); Hearing Transcript at 14, 24.

The Director further asserts that the administrative law judge erred in his evaluation of the evidence regarding the existence of total disability pursuant to 20 C.F.R. §718.204(c). Specifically, the Director contends that the administrative law judge failed to consider any of the evidence pursuant to 20 C.F.R. §718.204(c)(1)-(3) and mischaracterized the opinions of Drs. Clarke and Fritzhand pursuant to Section 718.204(c)(4). Director's Response Brief at 2. We agree. In finding that claimant failed to prove that he is totally disabled pursuant to Section 718.204(c), the administrative law judge considered the four newly submitted medical opinions of record, and accorded little weight to the opinions of Drs. Clarke and Fritzhand, each of whom opined that claimant suffers from a totally disabling pulmonary impairment, as they had "concluded that claimant was totally disabled in spite of normal objective test results and neither explain adequately their reasoning for their conclusion." Decision and Order at 6; Director's Exhibit 21. Contrary to the administrative law judge's finding, however, a review of the record reveals that both Dr. Clarke and Dr. Fritzhand based their opinions in part on qualifying pulmonary function studies.[5] Director's Exhibit 21. Furthermore, consistent with the Director's assertions, we note that the record contains pulmonary function studies and blood gas studies, some of which are favorable to claimant, which the administrative law judge did not consider. Director's Exhibits 10, 12, 21, 23, 28. Consequently, as the administrative law judge mischaracterized the opinions of Drs. Clarke and Fritzhand, and failed to

[4] In considering all of the evidence of record *de novo* pursuant to *Sharondale Corp. v. Ross*, No. 93-3644, 1994 U.S. App. LEXIS 35172 (6th Cir. Dec. 16, 1994), the administrative law judge should be mindful of the fact that some of the evidence submitted with claimant's prior claim may no longer be relevant. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values.

consider all of the relevant evidence of record, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(4), and remand this case for further consideration of all the medical evidence of record pursuant to Sections 718.204(c)(1)-(4). *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Goode v. Eastern Associated Coal Co.*, 6 BLR 1-1064 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

Consequently, our decision in this case is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority opinion. In *Barnes v. Director, OWCP*, 18 BLR 1-55 (1994), we addressed the issue of whether the Director's brief supported the holding below and we held that it did not. I would decline to disturb this holding. However, in *Barnes* we did not specifically touch upon whether the Director's response brief responded to the contentions raised in claimant's petition for review. *See Barnes, supra*. I would note that in the instant case claimant's petition for review failed to raise any specific allegations of error by the administrative law judge and thus provided the Board with no basis for reaching the merits of the appeal. *See Barnes, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). I would hold that as claimant raised no specific error, the Director was precluded from responding within the meaning of 20 C.F.R. §802.212(b). The Director's brief, advocating that the Board vacate and remand the case to the administrative law judge, goes beyond merely responding to specific contentions raised by claimant but rather seeks consideration of issues that claimant has not put before the Board. While I do not take issue with the Director's contention that a response, as contemplated in 20 C.F.R. §802.212(b), need not oppose claimant's contentions, I think the Director reads the regulation too broadly. The Director argues in her response brief that the administrative law judge impermissibly rejected the medical opinions of Drs. Clarke, Baker, Myers and Fritzhand because each relies on an inaccurate length of coal mine employment. Director's Response Brief at 2. The Director further asserts that the administrative law judge erred in failing to consider evidence favorable to claimant and by improperly discrediting other evidence which is favorable to claimant. Director's Response Brief at 2. Claimant's petition for review does not touch on either of these issues. Clearly, in this case, the Director is not responding to contentions raised by claimant but is instead attempting to forge a new path of contention. Section 21(b)(4) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §921(b)(4), as incorporated into the Act by Section 422(a) of the Act, 30 U.S.C. §932(a), provides the Secretary, who is represented before the Board by the Director, with a statutory right to request a remand. 33 U.S.C. §921(b)(4); 30 U.S.C. §932(a); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994). In the instant case, as the Director has successfully litigated the issues in defense of the Fund, in her capacity as fiduciary and administrator of the Act, she is free to withdraw her controversion and request a remand for payment of benefits at any time during the proceedings. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989). Inasmuch as the Director declined to file a motion to remand, the Board, in its original decision, acted within its scope of review in declining to consider the Director's contentions raised in her response brief as they failed to respond to arguments raised in petitioner's brief and were not supportive of the decision below. Consequently, I would affirm the denial of benefits in this case.

ROY P. SMITH
Administrative Appeals Judge