BRB Nos. 98-1638 BLA
and 98-1638 BLA-A

EARL MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INC.	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision on Remand-Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Dorothy L. Page (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision on Remand (95-BLA-1590) of Administrative Law Judge Edward Terhune Miller 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). This case is on appeal before the Board for a second time. In his initial Decision and Order issued on February 27, 1996, the administrative law judge credited claimant with fifteen years of qualifying coal mine employment, and adjudicated the claim, filed on July 25, 1994, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge determined that the claim was subject to the duplicate claim provisions at 20 C.F.R. §725.309, as it was filed more than one year after the final denial of claimant's earlier claims.[1] The administrative law judge found that claimant established a material change in conditions at Section 725.309 pursuant to the standard articulated by the Board in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), but further found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, the Board vacated the administrative law judge's findings pursuant to Section 725.309 inasmuch as, subsequent to the issuance of the administrative law judge's decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, rejected the *Spese* standard for establishing a material change in conditions. The Board remanded the case for the administrative law judge to apply the standard enunciated by the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997) and to determine whether the newly submitted evidence established a material change in conditions under Section 725.309; if so, the Board instructed the administrative law judge to consider all the medical evidence of record to determine whether it established entitlement to benefits. The Board additionally instructed the administrative law judge to consider and apply the decisions in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), in weighing the medical opinions of record at Section 718.202(a)(4). *Mullins v. Buffalo Coal Co.*, BRB No. 96-0834 BLA (Dec. 19, 1996)(unpub.).

[1]The full procedural history of this case up to the time of the last appeal is set forth in *Mullins v. Buffalo Coal Co.*, BRB No. 96-0834 BLA (Dec. 19, 1996)(unpub.).

On remand, the administrative law judge found that employer was properly designated as the responsible operator herein, and that the newly submitted evidence established a material change in conditions at Section 725.309 by establishing the existence of pneumoconiosis at Section 718.202(a)(4) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Weighing all of the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), and total respiratory disability pursuant to Section 718.204(c)(1), (4), but failed to establish that pneumoconiosis was a contributing cause of his disability at Section 718.204(b). Consequently, the administrative law judge denied benefits.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(b). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, challenging the administrative law judge's findings pursuant to Section 718.202(a)(4) and his finding that employer was properly designated the responsible operator herein. The Director, Office of Workers' Compensation Programs (the Director), has declined to take a position on the merits, but urges a remand for further findings on the responsible operator issue in the event that the Board vacates or reverses the denial of benefits.[2]

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

[2]The administrative law judge's finding that the new evidence of record was sufficient to establish total respiratory disability pursuant to Section 718.204(c)(1), (4), and thus sufficient to establish a material change in conditions pursuant to Section 725.309, is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis at Section 718.204(b) pursuant to *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990). Claimant argues that the administrative law judge incorrectly stated that only Drs. Rasmussen and Carrillo related claimant's disability to coal mine employment, when in fact the physicians of the West Virginia Occupational Pneumoconiosis Board also concluded that claimant suffered a forty percent pulmonary functional disability due to occupational pneumoconiosis.[3] Claimant's Brief at 6; Director's Exhibit 4. Claimant asserts that no weight should be accorded to the opinions of employer's physicians because they did not diagnose the presence of pneumoconiosis and concluded that claimant could not suffer any coal mine employment-related condition since his impairment was obstructive in nature. Claimant thus maintains that the opinions of Drs. Rasmussen and Carrillo are entitled to determinative weight and that the administrative law judge provided no valid reason for relying on the opinions of Drs. Ranavaya, Acosta, Jarboe and Fino to find that claimant's disability was attributable solely to smoking. We agree that the administrative law judge's analysis on the issue of disability causation is flawed.

[3]Employer asserts that the opinion of the West Virginia Occupational Pneumoconiosis Board is not well reasoned and thus is not entitled to any weight. Employer's Brief at 17-19; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). It is the administrative law judge's function, however, to address all relevant evidence and accord it appropriate weight. Additionally, we note that the administrative law judge did not address the opinion of Dr. Zaldivar, that claimant's disability was due to emphysema caused by smoking, at Section 718.204(b). Employer's Exhibit 9A.

In finding that the weight of the evidence showed that claimant's disability resulted entirely from smoking, the administrative law judge credited the opinions of Drs. Ranavaya and Acosta,[4] who examined claimant, and the consultative opinions of Drs. Fino and Jarboe, who are board certified in pulmonary disease, "[e]ven though I give less weight to the opinions of Drs. Fino and Jarboe because of their assumption that an obstructive disease can not be caused by coal mine employment...." Decision on Remand at 10. The administrative law judge, however, did not initially determine whether each medical report of record relevant to the issue was reasoned and documented, and he provided no reason for discounting the contrary opinions of Drs. Carrillo and Rasmussen, thereby failing to satisfy the requirements of 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), 30 U.S.C. §932(a). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999). Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case for a reevaluation of all relevant medical opinions of record and their underlying documentation in accordance with the principles enunciated by the Fourth Circuit in *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).

Turning to employer's cross-appeal, employer challenges the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4). Specifically, employer argues that the administrative law judge failed to adequately explain why he concluded that the opinions of Drs. Carrillo and Rasmussen, that claimant had pneumoconiosis, were reasoned and entitled to greater weight than the contrary opinion of Dr. Zaldivar. Employer also maintains that the opinions of Drs. Fino and Jarboe are not based on an erroneous assumption and are not contrary to the Act, and that the administrative law judge misapplied the holdings in *Warth* and *Stiltner* in discounting these opinions. Employer's arguments have merit.

In finding the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge initially gave limited weight to

[4]The reports of Drs. Acosta and Ranavaya were submitted in conjunction with claimant's second and third claims for benefits. While both opinions were previously found insufficient to establish entitlement, a review of Dr. Acosta's report reveals that, contrary to the administrative law judge's finding, the physician did not attribute claimant's disability to smoking, but listed limitations that may be due to pulmonary disease and diagnosed pneumoconiosis related to dust exposure in coal mine employment. Director's Exhibit 40.

the previously submitted opinions of Drs. Manuel, Acosta and Ranavaya because he found that Dr. Manuel's diagnosis was unclear or equivocal and that Drs. Acosta and Ranavaya provided inadequate explanations for how they arrived at their diagnoses. Decision on Remand at 8. The administrative law judge reviewed the newly submitted evidence and gave reduced weight to the opinions of Drs. Fino and Jarboe on the ground that they were inconsistent with the Act and the holdings in *Warth* and *Stiltner,* in that the physicians found insufficient radiographic evidence of pneumoconiosis and diagnosed a purely obstructive ventilatory disease. Decision on Remand at 6. While a physician's opinion is undermined by an erroneous assumption that coal mine employment can never cause obstructive lung disorders, *see Warth, supra*, employer correctly notes that a medical opinion which concludes that a purely obstructive impairment was caused by smoking rather than coal dust exposure is not necessarily based on an assumption that contravenes the Act and regulations. If the physician has not relied on an erroneous premise, and bases his opinion not only on the absence of a restrictive impairment, but also on a thorough review of all of the medical evidence, his opinion may be credited. *See Stiltner, supra*. We therefore agree with employer's argument that the administrative law judge must reassess the opinions of Drs. Fino and Jarboe on remand.

The administrative law judge next concluded that the reports of Drs. Carrillo and Rasmussen were reasoned, after determining that the physicians, "while relying to some degree on positive x-ray interpretations, also go beyond the x-ray results and include the results of other tests and examinations." Decision on Remand at 5-6. The administrative law judge found that Dr. Zaldivar's opinion of no pneumoconiosis was not inconsistent with *Warth* and *Stiltner* and was entitled to greater weight based on the physician's credentials as a pulmonary expert, but further found that Dr. Carrillo's opinion "also is given greater weight, because he had the opportunity to examine Claimant, and not just to review the reports of other doctors." Decision on Remand at 6. Weighing all of the opinions together, the administrative law judge found that "the medical opinion evidence continues to be borderline, but the best reasoned medical opinions, on balance, establish the existence of pneumoconiosis." Decision on Remand at 8. Employer accurately notes, however, that Dr. Zaldivar not only reviewed the medical records, but also examined claimant, thus the administrative law judge mischaracterized Dr. Zaldivar's status. Employer's Exhibit 9A; *see generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Additionally, the administrative law judge did not explain why he found Dr. Carrillo's opinion was reasoned on remand when he considered it conclusory in his original Decision and Order. As the administrative law judge should not automatically credit an opinion merely because the physician personally examined the miner, but must also address the qualifications of the respective physicians, the explanation of their medical findings, the documentation underlying their medical

judgments, and the sophistication and bases of their diagnoses, *Akers, supra*, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) for a reevaluation and weighing of the medical opinions on remand.

Lastly, employer and the Director challenge the administrative law judge's analysis in concluding that employer, Buffalo Coal Company, was the last employer in the coal mining industry for which claimant had his most recent period of coal mine employment of at least one year, including one day after December 31, 1969, and thus was properly designated the responsible operator herein pursuant to 20 C.F.R. §§725.492(a), 725.493(a). The administrative law judge determined that even though the Social Security records showed that subsequent to his employment with employer, claimant worked for Triadelphia Coal Corporation (Triadelphia) during the fourth quarter of 1975 and the first three quarters of 1976, "a comparison of the amounts Claimant earned each quarter clearly shows that he did not work for four full quarters, and thus did not work for the required one year." Decision on Remand at 3. Employer and the Director correctly maintain, however, that the amount of claimant's earnings reflected in the Social Security records are not relevant to a determination of whether claimant was employed by Triadelphia for a cumulative period of at least one calendar year. Section 725.493(b) uses a two-tiered analysis to determine whether a miner was regularly employed by an operator for a cumulative period of not less than one year. First, the administrative law judge must calculate the duration of employment by ascertaining both the beginning and ending dates of all relevant periods. 20 C.F.R. §725.493(b); *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986). If the threshold requirement of one cumulative year of employment is met, the administrative law judge must determine whether the evidence shows that the miner worked "regularly" during the year; this facet may be disproved if the miner worked fewer than 125 days during the year. 20 C.F.R. §725.493(b). Inasmuch as the administrative law judge did not ascertain the beginning and ending dates of claimant's employment with Triadelphia, and the record contains conflicting evidence on this issue, we vacate the administrative law judge's finding that employer was properly designated the responsible operator. If, on remand, the administrative law judge finds that claimant is entitled to benefits, the administrative law judge must weigh all relevant evidence pursuant to Section 725.495(b) and determine whether employer is the responsible operator herein.

Accordingly, the administrative law judge's Decision on Remand-Rejection of Claim is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge