BRB No. 01-0505 BLA

THOMAS GREGORY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & E COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund), Barbourville, Kentucky, for claimant.

Tab R. Turano (Greenburg Traurig LLP), Washington, D.C. for employer/carrier.

Jeffrey S. Goldberg (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (00-BLA-0491) of Administrative Law Judge Joseph E. Kane on a duplicate 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.*[1] The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2000) and 718.203 (2000), and total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c)(2000),[2] and thus, was sufficient to establish a material change in a condition of entitlement pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge awarded benefits.

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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 they 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.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3] 20 C.F.R. §725.309 (2000) has been amended. The amendments to Section 725.309 (2000) are not applicable, however, to claims such as the instant claim, which were pending

on January 19, 2001. *See* 20 C.F.R. §725.2.

The relevant procedural history of this claim is as follows: Claimant filed his first claim for benefits with the Department of Labor (DOL) on September 26, 1972. The claim was informally denied by DOL on April 10, 1981 on the basis that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis. Director's Exhibit 32. Claimant took no further action on this claim. Claimant then filed a second claim with the DOL on October 28, 1985. Director's Exhibit 32. Following a hearing, Administrative Law Judge Steven E. Halpern issued a Decision and Order dated August 21, 1992, wherein he denied the claim. Claimant then filed an appeal with the Board. The Board affirmed Judge Halpern's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203 (2000), as unchallenged on appeal, but ultimately affirmed the denial of benefits by virtue of affirming the administrative law judge's finding that the evidence failed to establish total disability due to pneumoconiosis at Section 718.204(b), (c)(2000). *Gregory v. T & E Coal Co.*, BRB No. 92-2521 BLA (June 27, 1994) (unpub.). Director's Exhibit 32, p. 130. Claimant's third claim, filed on September 20, 1995, was denied by Administrative Law Judge Paul H. Teitler on August 22, 1997 on the basis that claimant failed to establish total respiratory disability due to pneumoconiosis, and thus, a material change in conditions. Claimant took no further action on this claim following the denial. Director's Exhibit 32. Claimant then filed the instant duplicate claim on May 6, 1999. Director's Exhibit 1. This claim was adjudicated by Administrative Law Judge Joseph E. Kane, who found that all of the elements of entitlement were established, and awarded benefits.[4]

On appeal, employer initially challenges the administrative law judge's determination that the newly submitted evidence establishes a material change in conditions pursuant to Section 725.309(d)(2000). Employer contends that the newly submitted evidence does not establish total respiratory disability pursuant to Section 718.204(c)(2000), as the administrative law judge found. On the merits, employer challenges the administrative law judge's finding that the evidence of record establishes the existence of pneumoconiosis at Section 718.202(a)(4)(2000). Employer also challenges the administrative law judge's statement that the x-ray evidence is in equipoise. Employer additionally challenges the administrative law judge's finding that the evidence establishes total respiratory disability at Section 718.204(c)(2000). Finally, employer challenges the administrative law judge's weighing of the evidence at Section 718.204(b)(2000). Claimant, in response, urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief limited to the issue of the impact and applicability of the amended regulations. The Director states that the amended regulations will not affect the outcome of the case.

[4] Claimant was 79 years old at the time of the hearing.

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).

In order to establish entitlement to benefits in a living miner's claim under the 20 C.F.R. Part 718 regulations, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 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)(*en banc*).

Employer initially challenges the administrative law judge's determination that the newly submitted evidence establishes a material change in conditions pursuant to Section 725.309(d)(2000). Employer contends that the administrative law judge erred by weighing only the qualifying pulmonary function studies and medical opinions supportive of total disability. We agree. We initially note that the administrative law judge applied the correct legal standard applicable to duplicate claims filed in cases which arise within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Sixth Circuit has held that in assessing whether a material change has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the claimant has proven at least one of the elements previously adjudicated against him. *See Ross*, *supra*. Claimant's 1995 claim was denied because claimant failed to establish total respiratory disability and disability causation.

The administrative law judge considered the issue of whether the newly submitted evidence established total respiratory disability at Section 718.204(c)(1)(2000)and noted that one pulmonary function study, dated July 16, 1999, produced qualifying values. He stated further that the test's results were not challenged by the results of two other invalid studies, dated May 28, 1999 and September 23, 1999. The administrative law judge failed to explain how he determined that this test qualified when, in fact, claimant was 78 years old at the time of the test, and the tables in Appendix B only contain qualifying values for miners 71 years of age or younger. It appears that the administrative law judge utilized the values for a 71 year old, despite the fact that claimant was 78 years old at the time of the test. Rather than applying the values applicable to a 71 year old miner, the administrative law judge may extrapolate values for a miner who is older than 71 years of age at the time of the test, explaining his rationale for such extrapolation. *See Hubbell v. Peabody Coal Co.*, BRB No. 95-2333 BLA (Dec. 20, 1996)(unpub.); *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-

1279 BLA (Nov. 24, 2000)(unpub.). We reject, however, employer's contention that claimant is precluded from demonstrating total disability based upon the results of pulmonary function studies performed after he attained 72 years of age or more. *Id*. In addition, in considering the pulmonary function study evidence, the administrative law judge failed to explain why he credited Dr. Burki's invalidations over the opinions of the doctors who performed the tests dated May 28, 1999 and September 28, 1999, as he is required to do. *See McGinnins v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Tanner v. Freeman United Coal Mining Co.*, 10 BLR 1-85 (1987). We vacate, therefore, the administrative law judge's finding that the newly submitted evidence establishes total disability at 718.204(c)(1)(2000). *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge subsequently found that although all (two) of the newly submitted blood gas studies were non-qualifying, the "Act does not require that a claimant establish disability through every means under §718.202(a) (sic)." Decision and Order at 13. He also stated, *inter alia*, citing the opinions of Drs. Dahhan and Fino, that the physicians agree that claimant is totally disabled, although they dispute the cause. Decision and Order at 14.[5] Consequently, the administrative law judge concluded that claimant "is now totally disabled". *Id*. Employer correctly argues that the administrative law judge's analysis is violative of the holdings set forth in *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), which require the administrative law judge to weigh all of the newly submitted contrary probative evidence against the newly submitted evidence supportive of total disability. *Id*. On remand, therefore, the administrative law judge is instructed to weigh all of the newly submitted contrary probative evidence against the newly submitted evidence supportive of total disability at Section 718.204(c)(2000). 20 C.F.R. §718.204(b). In light of the foregoing, we vacate both the administrative law judge's finding that the newly submitted evidence establishes total disability at 718.204(c)(2000), *see* 20 C.F.R. §718.204(b), and his finding that the evidence establishes a material change in conditions pursuant to Section 725.309(d)(2000).

With respect to the administrative law judge's finding at Section 718.202(a)(4)(2000) on the merits, employer raises several challenges. Initially, employer argues that the administrative law judge arbitrarily assigned the greatest weight to the opinions of claimant's

[5] Drs. Dahhan and Fino both opined that claimant was totally disabled due to asthma, but was not totally disabled due to a respiratory impairment arising out of coal mine employment. Director's Exhibit 16; Employer's Exhibits 1, 2.

treating physicians, Drs. Baker and Vora. A properly documented report by a miner's treating physician may be given additional weight on the basis that a treating physician is more familiar with a claimant's medical condition. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). To the extent, however, that employer correctly argues that the administrative law judge must explain his basis for choosing to credit the opinion of a treating physician, and the administrative law judge has failed to provide such an explanation in the instant case, we instruct the administrative law judge to do so on remand. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We reject employer's arguments that the administrative law judge selectively analyzed the evidence as it is a request to reweigh the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We further reject employer's assertion that the administrative law judge impermissibly substituted his own opinion for those of Drs. Dahhan and Fino. Rather, the administrative law judge weighed the evidence, and discounted the opinions of Drs. Dahhan and Fino because he found that their statement that claimant's condition was reversible, and therefore that the condition could not be pneumoconiosis, was not demonstrated by the objective evidence of record. The administrative law judge relied, in part, upon the fact that the pulmonary function studies of Drs. Dahhan and Fino were invalidated, and further relied upon the opinions of Drs. Baker and Vora, claimant's treating physicians, to reach this conclusion. Decision and Order at 15. The administrative law judge has the discretion to draw inferences from the medical evidence of record. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190)1989); *Fagg, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We vacate, therefore, the administrative law judge's finding at Section 718.202(a)(4)(2000) and instruct the administrative law judge on remand to reconsider the evidence pursuant to Section 718.202(a)(4), consistent with the Sixth Circuit's holdings in *Griffith* and *Tussey*.

Employer correctly argues that the administrative law judge erred in finding the x-ray evidence in equipoise, having found that the newly submitted evidence was insufficient to establish pneumoconiosis, although the previously submitted evidence was sufficient to establish pneumoconiosis at Section 718.202(a)(1)(2000). On remand, the administrative law judge must independently weigh all of the x-ray evidence, old and new, and determine whether the record as a whole establishes the existence of pneumoconiosis at Section 718.202(a)(1). Moreover, to the extent that the administrative law judge may have relied on *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), he erred. The Board has held that Section 718.202 provides four alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Inasmuch as the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted *Compton* and *Williams*, on remand the administrative law judge should not weigh all of the evidence at Section 718.202(a)(1)-(4) together in determinating whether pneumoconiosis has been established.

Employer next challenges the administrative law judge's finding that the evidence establishes total respiratory disability at Section 718.204(c)(2000) on the merits. Employer's contentions have merit. In addition to failing to weigh the evidence in accordance with *Clark*, *Fields* and *Shedlock*, the administrative law judge relied upon his material change in conditions finding to find total respiratory disability established on the merits. Decision and Order at 14. In so doing, the administrative law judge considered only the newly submitted evidence and failed to consider all of the relevant evidence of record at Section 718.204(c)(2000). We vacate, therefore, the administrative law judge's findings that the evidence establishes total respiratory disability at Section 718.204(c)(2000) on the merits. Should the administrative law judge find a material change in conditions at Section 725.309(d)(2000) on remand, he must then weigh all of the relevant evidence in the record, old and new, to determine if the evidence establish total respiratory disability at 20 C.F.R. §718.204(b); *see Ross*, *supra*.

Finally, employer alleged error in the administrative law judge's determination that the evidence establishes total disability due to pneumoconiosis at Section 718.204(b)(2000). We agree. The administrative law judge essentially found that since pneumoconiosis and total disability were established, total disability due to pneumoconiosis was also established, despite the administrative law judge's earlier finding that both Drs. Dahhan and Fino opined that claimant was totally disabled due to asthma, and not pneumoconiosis. Decision and Order at 17. Only Dr. Baker opined that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 6. We vacate, therefore, the administrative law judge's finding that the evidence establishes total disability due to pneumoconiosis at Section 718.204(b)(2000). *See* 20 C.F.R. §718.204(c). On remand, the administrative law judge must weigh Dr. Baker's opinion against those of Drs. Dahhan and Fino, together with any relevant evidence previously submitted, in order to determine whether pneumoconiosis is "a substantially contributing cause" of claimant's total disability. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order- Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge