BRB No. 97-1616 BLA

WILLIAM A. DISHMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

H. Patrick Cline (Cline, Adkins & Cline), Norton, Virginia, for claimant.

Gary K. Stearman (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-1456) of Administrative Law Judge John C. Holmes with respect to 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 is the third time that this case has been before the Board.[1] In the Board's prior Decision and Order, issued on November 30,

[1]The relevant procedural history of this case is as follows: Claimant filed a Part B claim on May 16, 1970, which was denied by the Social Security Administration (SSA) on April 1, 1971 and August 28, 1973. Director's Exhibit 57. After claimant elected SSA review of his Part B claim, SSA denied it a third time on June 20, 1979. *Id.*. Claimant filed a Part C claim with the Department of Labor on September 26, 1977. Director's Exhibit 1. This claim was denied by Administrative Law Judge Robert J.

1993, the Board affirmed Administrative Law Judge Giles J. McCarthy's finding that the medical opinion of Dr. Robinette, the pulmonary function study obtained by Dr. Robinette, and the lay testimony of record were insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). *Dishman v. Director, OWCP*, BRB

Shea in a Decision and Order issued on December 10, 1984, on the grounds that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Accordingly, benefits were denied. The Board, in a Decision and Order issued on February 24, 1988, affirmed the denial of benefits. *Dishman v. Director, OWCP*, BRB No. 88-2858 BLA (Feb. 24, 1988)(unpublished); Director's Exhibit 77. Claimant then filed another application for benefits on March 7, 1988. Director's Exhibit 80. The district director treated this claim as a request for modification, pursuant to 20 C.F.R. §725.310, and determined that claimant failed to establish a mistake in a determination of fact or a change in conditions. By Order dated October 6, 1989, Administrative Law Judge Clement J. Kichuk granted claimant's request for withdrawal of the most recent application for benefits in anticipation of developing additional evidence. Director's Exhibit 87. Claimant then filed a third claim on October 16, 1989. Director's Exhibit 88. The district director also construed this application for benefits as a request for modification and denied it on the grounds that claimant did not demonstrate either a mistake of fact or change in conditions. Director's Exhibit 91. Administrative Law Judge Giles J. McCarthy issued a Decision and Order on December 3, 1991, in which he determined that claimant did not establish the prerequisites for modification. Director's Exhibit 102. Accordingly benefits were denied. Claimant appealed the denial to the Board.

No. 92-0757 BLA (Nov. 30, 1993)(unpublished); Director's Exhibit 109. The Board further held, however, that it was required to vacate Judge McCarthy's finding that claimant failed to establish the grounds for modification under 20 C.F.R. §725.310, as Judge McCarthy neglected to consider adequately whether the report of Dr. Kanwal, dated July 29, 1980, could support a finding of a mistake in a determination of fact in the prior denial. *Id.*; Director's Exhibit 90. The Board, therefore, remanded the case for reconsideration of invocation under Section 727.203(a)(4) and the issue of modification. *Id.*.

Following remand of the case to the Office of Administrative Law Judges, an Order was issued in which the parties were notified that the case would be assigned to a different administrative law judge due to Judge McCarthy's unavailability. Director's Exhibit 110. On September 21, 1994, Administrative Law Judge Daniel L. Stewart issued an Order remanding the case to the district director to allow claimant to submit additional medical evidence. Director's Exhibit 115. The district director found that the evidence eventually proffered by claimant did not support modification of the initial finding of no entitlement. Director's Exhibit 133. The case was transferred to Administrative Law Judge John C. Holmes (the administrative law judge) for a hearing.

In a Decision and Order dated July 21, 1997, the administrative law judge credited claimant with at least twenty-five years of coal mine employment and considered whether the evidence submitted since the denial issued by Judge McCarthy on December 3, 1991 supported a finding of a change in claimant's condition and whether the prior adjudication contained a mistake in a determination of fact. The administrative law judge found that Judge McCarthy's disposition of the claim did not reflect any mistake in fact. The administrative law judge further determined that the newly submitted evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(1)-(4). The administrative law judge concluded, therefore, that claimant did not demonstrate a change in conditions pursuant to Section 725.310. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 727.203(a)(1) and (a)(4). The Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand and contends that remand is necessary, as the administrative law judge did not apply the appropriate standard in considering invocation pursuant to Section 727.203(a)(4) and did not consider Dr. Kanwal's opinion in accordance with the Board's remand instructions.[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 applicable law. 33 U.S.C. §921(b)(3), as incorporated into the

[2]We affirm the administrative law judge's findings under 20 C.F.R. §727.203(a)(2) and (a)(3), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the administrative law judge's finding that the newly submitted x-ray readings did not support invocation under Section 727.203(a)(1), claimant asserts that the administrative law judge should have determined that the existence of pneumoconiosis was established based upon the readings of Drs. Robinette, Gaziano, and Francke of an x-ray obtained on December 22, 1994. Director's Exhibits 123-125. Claimant also alleges that the administrative law judge, and the Board, are required to take note of claimant's limited ability to match the resources expended by the Department of Labor in obtaining re-readings. These contentions are without merit. The administrative law judge was not required to treat the interpretations proffered by Drs. Gaziano and Francke as evidence of pneumoconiosis under Section 727.203(a)(1), as neither physician classified the film as positive for pneumoconiosis under the ILO/UICC system recognized in the regulations.[3] 20 C.F.R. §410.428(a); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986). In addition, the administrative law judge acted within his discretion in finding that the two remaining interpretations of this film did not establish, by a preponderance of the evidence, that the x-ray was positive for pneumoconiosis, as Dr. Sargent, a Board-certified radiologist and B reader, determined that the film was unreadable while Dr. Robinette, a B reader, found the film positive for pneumoconiosis.[4] Decision and Order at 5; Director's Exhibits 123, 129; *see Director, OWCP v. Greenwich Collieries [Ondecko],* 114 S.Ct. 2251, 18 BLR 2A-1 (1994); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In light of the fact that the administrative law judge did not merely rely upon the numerical superiority of the rereadings submitted by the Director, claimant's allegation of error regarding the Director's superior resources is also without merit. *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).[5]

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[3]Dr. Francke read the film as 0/1 and Dr. Gaziano noted the presence of pleural thickening consistent with pneumoconiosis, but indicated that the film did not contain any opacities consistent with the disease. Director's Exhibits 124, 125.

[4]The administrative law judge stated that Dr. Robinette, like Dr. Sargent, is a Board-certified radiologist in addition to being a B reader. Decision and Order at 5. There is no indication in the record, however, that Dr. Robinette is a Board-certified radiologist. The forms on which Dr. Robinette recorded his x-ray interpretations merely include a notation identifying him as a "Certified 'B' reader." Director's Exhibits 99, 123. The administrative law judge's misstatement does not constitute an error requiring remand, as it does not affect the administrative law judge's ultimate finding that the preponderance of the evidence does not demonstrate that the x-ray dated December 12, 1994 is positive for pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. Director's

Concerning the administrative law judge's determination that the newly submitted medical reports do not support a finding of invocation pursuant to Section 727.203(a)(4), claimant asserts that the administrative law judge erred in according little weight to the opinion in which Dr. Robinette determined that claimant is totally disabled due to pneumoconiosis. Claimant also maintains that the administrative law judge was required to reject Dr. Paranthaman's contrary opinion, inasmuch as Dr. Paranthaman is biased due to his long term association with employers seeking to oppose miners' claims for black lung benefits. The Director alleges that remand is required on the ground that under Section 727.203(a)(4), the administrative law judge considered whether the newly submitted medical reports supported a finding of pneumoconiosis, rather than considering whether this evidence established that claimant is suffering from a totally disabling respiratory or pulmonary impairment. The Director also contends that the administrative law judge's error is not harmless, as the administrative law judge did not provide valid reasons for his decision to discredit Dr. Robinette's opinion and did not weigh Dr. Kanwal's opinion dated July 29, 1980.

Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

As an initial matter, we concur with the Director and hold this case must be remanded to permit the administrative law judge to consider whether Dr. Kanwal's July 29, 1980 opinion is sufficient to establish invocation under Section 727.203(a)(4) and, therefore, sufficient to establish a mistake in a determination of fact in Judge Shea's 1984 Decision and Order denying benefits. The administrative law judge must first determine whether the opinion at issue, which was in existence but was apparently not made available to Judge Shea at the time he issued his Decision and Order, is admissible. Under 20 C.F.R. §725.456(d), which governs the submission of late evidence, withheld evidence must be excluded in the absence of extraordinary circumstances. 20 C.F.R. §725.456(d); *see Wilkes v. F&R Coal Co.*, 12 BLR 1-1 (1988). Inasmuch as Judge McCarthy did not consider this issue in his Decision and Order, the administrative law judge must render the necessary finding on remand.[6]

We also hold that the administrative law judge did not consider the newly submitted medical opinion evidence under Section 727.203(a)(4) in accordance with the appropriate standard when assessing whether claimant had established a change in conditions pursuant to Section 725.310. As the Director has indicated, the administrative law judge weighed the newly submitted medical reports to determine whether they established the existence of pneumoconiosis. *See* Decision and Order at 7-8. In so doing, the administrative law judge focused closely on the issue of the source of claimant's respiratory symptoms. *Id.*. Pursuant to Section 727.203(a)(4), however, neither the existence of pneumoconiosis nor the etiology of claimant's respiratory condition is at issue. Rather, a finding of invocation of the interim presumption under this subsection is based upon a reasoned medical opinion which demonstrates the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(4); *see Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984). We must, therefore, vacate the administrative law judge's findings under Section 727.203(a)(4). On remand, the administrative law judge must reconsider the evidence relevant to Section 727.203(a)(4) under the appropriate standard.

With respect to the administrative law judge's findings concerning the newly submitted medical reports, we reject claimant's argument regarding Dr. Paranthaman's opinion. Claimant's unsupported allegation of bias does not constitute a proper ground for discrediting this evidence. An administrative law judge cannot reject evidence prepared by a physician on the ground that he or she provided the evidence on behalf of a particular party without specific proof that the opinion offered has been affected by bias. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Stanford v. Valley*

[6]As noted *supra*, the Board vacated Judge McCarthy's finding that claimant failed to establish modification under 20 C.F.R. §725.310, as Judge McCarthy neglected to consider adequately whether the report of Dr. Kanwal, dated July 29, 1980, could support a finding of a mistake of fact in the prior denial. *Dishman v. Director, OWCP*, BRB No. 92-0757 BLA (Nov. 30, 1993)(unpublished).

Camp Coal Co., 7 BLR 1-906 (1985); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Claimant has offered no such proof in this case.

In accordance with the Director's contentions, however, the administrative law judge based his findings with respect to the relative weight accorded to the medical reports of Drs. Paranthaman and Robinette, in part, upon inappropriate grounds. In determining that the opinion, in which Dr. Paranthaman diagnosed chronic bronchitis due to cigarette smoking and concluded that claimant is not disabled, was better documented and reasoned than Dr. Robinette's opinion, the administrative law judge did not consider factors affecting the credibility of Dr. Paranthaman's findings. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Dr. Paranthaman stated that his attribution of claimant's condition to cigarette smoking was premised upon the fact that the symptoms of chronic bronchitis did not start until ten years after claimant retired from mining in 1977. Director's Exhibit 127. A review of the record indicates, however, that claimant reported breathing difficulties consistent with chronic bronchitis to various physicians, including Dr. Paranthaman, beginning as early as 1971. Director's Exhibits 10, 12, 30, 35, 43, 45, 50, 61, 90. Accordingly, we vacate the administrative law judge's findings with respect to Dr. Paranthaman's opinion. *See Hutchens*, *supra*. The administrative law judge must reconsider this opinion on remand.

The Director's allegations of error concerning the administrative law judge's treatment of Dr. Robinette's opinion also have merit, in part. In discrediting Dr. Robinette's opinion, the administrative law judge inappropriately relied, in part, upon the fact that Dr. Robinette based his finding of total disability upon nonqualifying objective studies. Decision and Order at 8; Director's Exhibits 99, 122; *see Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Moreover, in contrast to the administrative law judge's finding, Dr. Robinette premised his diagnoses "in large part" upon claimant's recitation of symptoms. Decision and Order at 8. In the portion of each of his reports in which he set forth his conclusions, Dr. Robinette identified specifically the physical findings and objective test results that supported his diagnoses. Director's Exhibits 99, 122. Thus, the administrative law judge relied, in part, upon an inaccurate characterization of Dr. Robinette's medical reports in giving his opinion little weight. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

The administrative law judge acted within his discretion as fact-finder, however, in determining that Dr. Robinette's opinion is entitled to diminished weight on the ground that Dr. Robinette did not sufficiently explain how his findings regarding claimant's condition are consistent with the medical journal articles that he cited in which a link is described between coal dust exposure and obstructive lung disease. Decision and Order at 8; Director's Exhibit 122; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge also rationally found that Dr. Paranthaman's qualifications are superior to those of Dr. Robinette, inasmuch as the record contains Dr. Paranthaman's curriculum vitae, which indicates that he is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 127. With respect to Dr. Robinette,

the x-ray reading forms that he proffered include a notation describing him as a "Certified 'B' Reader" and the letterhead of the stationary used by the medical clinic in which he practices identifies him as "Dr. Robinette, Pulmonary." Director's Exhibits 99, 122, 123. The administrative law judge was not required to accept the latter designation as an indication that Dr. Robinette is Board-certified in Internal Medicine and Pulmonary Disease, nor was the administrative law judge required to refer to any publication that is not of record in order to ascertain Dr. Robinette's qualifications. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, the administrative law judge identified two valid grounds for according less weight to Dr. Robinette's opinion than to the contrary opinion of Dr. Paranthaman. Nevertheless, because the administrative law judge must reconsider Dr. Paranthaman's opinion, the bases upon which the administrative law judge accorded Dr. Robinette's opinion diminished relative weight may not prove relevant on remand. The administrative law judge may be required, therefore, to reconsider his treatment of Dr. Robinette's opinion on remand in light of his findings with respect to the opinion of Dr. Paranthaman.

In light of the foregoing, the administrative law judge's finding that the newly submitted medical opinions are insufficient to establish a mistake of fact or a change in conditions under Section 725.310 is vacated and the case is remanded to the administrative law judge for reconsideration of this issue.[7] *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In weighing the evidence relevant to Section 727.203(a)(4), the administrative law judge must consider whether the opinions of Drs. Kanwal, Robinette, and Paranthaman establish the presence of a totally disabling respiratory or pulmonary impairment. If the administrative law judge finds that the newly submitted medical reports support a finding of invocation under Section 727.203(a)(4), he must assess whether this same evidence is sufficient to support a finding of rebuttal under Section 727.203(b)(1)-(4). If entitlement is not established under Part 727, the administrative law judge must then consider claimant's application for benefits under 20 C.F.R. Part 410, Subpart D. *See Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

[7]In *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit held that a claimant's general allegation of error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in fact under 20 C.F.R. §725.310.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge