BRB No. 98-1471 BLA

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| CHARLES HARRIS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| SHAMROCK COAL COMPANY, INCORPORATED | ) | DATE ISSUED: |
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| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, London, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Helen H. Cox (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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0611) of Administrative Law Judge Thomas F. Phalen, Jr., awarding 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). The administrative law judge considered whether the evidence submitted since the prior denial of the claim on the merits on April 15, 1996, *see* Director's Exhibit 88, established a basis for modification pursuant to 20 C.F.R. §725.310 and 20 C.F.R. Part 718.[1] The administrative law judge found that total disability, the basis of the prior denial, was established by the newly submitted pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(1) and (4), and therefore found a change in conditions established pursuant to Section 725.310. The administrative law judge then considered all the evidence of record and found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), but was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Finally, the administrative law judge found total disability due to pneumoconiosis was established by the medical opinion evidence of record pursuant to 20 C.F.R. § 718.204(b). Moreover, the administrative law judge found that no mistake of fact or law was established in Judge Jansen's prior decision. Accordingly, the administrative law judge awarded benefits, from the date of the filing of the claim in January, 1994. On appeal, employer contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(1) and (4) and, therefore, a change in conditions established pursuant to Section 725.310. In addition, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), total disability due to pneumoconiosis established pursuant to Section 718.204(b) and in awarding benefits commencing from the date that the claim was filed. Finally, employer contends that on modification, the instant case should have been assigned to the administrative law judge who originally considered the claim on the merits. Claimant responds, urging that the

[1] Claimant originally filed a claim on January 10, 1994, Director's Exhibit 1, which was ultimately referred to the Office of Administrative Law Judges. In a Decision and Order issued on April 15, 1996, Administrative Law Judge Rudolf L. Jansen found twenty-eight and one-quarter years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 88. Judge Jansen found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), but was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Judge Jansen further found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). However, Judge Jansen found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). As Judge Jansen found, the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1; *see also* 20 C.F.R. §718.202(a)(3); Director's Exhibit 88. Accordingly, benefits were denied. Claimant ultimately filed a motion for modification on May 31, 1996, Director's Exhibit 92.

administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, urging the Board to reject employer's contention that on modification this case should have been assigned to the same administrative law judge who had originally decided the case.

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held, however, that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, pursuant to Section 718.204(b), in this case arising within the jurisdiction of the Sixth Circuit Court, claimant must prove that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Initially, we reject employer's contention that on modification, this case should have been assigned to Judge Jansen, who originally considered the claim on the merits. There is no requirement that the administrative law judge who issued the original Decision and Order be assigned to decide the petition for modification, *see generally Nataloni v. Director,*

*OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *cf. Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), and no bias by the administrative law judge was established or asserted by employer, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Next, pursuant to Section 718.204(c)(1),[2] the administrative law judge considered the five new pulmonary function studies of record, which consisted of three qualifying pulmonary function studies from Dr. Baker, Director's Exhibit 97; Claimant's Exhibit 1,[3] one pulmonary function study from Dr. Dahhan which yielded a qualifying pre-bronchodilator result and a non-qualifying post-bronchodilator result and, according to Dr. Dahhan, an invalid diffusion study result, Director's Exhibit 99, and an invalid pulmonary function study from Dr. Broudy, Employer's Exhibit 5. Although one of Dr. Baker's pulmonary function studies was non-conforming, as it contained no tracings, *see* Claimant's Exhibit 1; 20 C.F.R. §718.103, the administrative law judge found the results of Dr. Baker's three pulmonary function studies were nevertheless consistent. The administrative law judge further found that Dr. Dahhan's invalidation of the diffusion study result of the pulmonary function study he administered was not sufficiently explained and that the pulmonary function study's results were consistent with Dr. Baker's and therefore found total disability established pursuant to Section 718.204(c)(1) based on their pulmonary function study results. Decision and Order at 14-15. Although employer contends that the administrative law judge failed to consider the newly submitted pulmonary function study evidence with the previously submitted pulmonary function study evidence to determine whether it demonstrated a change in condition, the administrative law judge noted that total disability was not established in the previous Decision and Order, Decision and Order at 13. However, as employer contends, the administrative law judge failed to note or consider that Dr. Dahhan's post-bronchodilator results were non-qualifying, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Where the record contains both a pre-bronchodilator and post-bronchodilator result and one qualifies while the other does not, the administrative law judge must weigh the values and explain

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[2] Inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3), that total disability was not demonstrated pursuant to Section 718.204(c)(2)-(3) and that no mistake of fact in Judge Jansen's prior Decision and Order was established have not been challenged on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] 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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

those results he finds more probative, *see Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). Thus, we vacate the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the six physicians who provided opinions based on newly submitted evidence. Dr. Baker diagnosed a "moderate to moderately severe" obstructive ventilatory defect based on new pulmonary function study results, Director's Exhibits 97, 101; Claimant's Exhibit 1. Dr. Sullivan diagnosed severe pneumoconiosis and moderate chronic obstructive pulmonary disease and listed claimant's functional limitations which would prevent him from performing his prior work, Director's Exhibit 97. Dr. Fino reviewed the new evidence and found that it did not change his prior opinion that, while claimant was totally disabled from a respiratory standpoint, it was due only to smoking, Employer's Exhibits 1-2. Dr. Dahhan found that his new examination and objective test results, including a qualifying pulmonary function study showing an obstructive abnormality with reversibility, revealed no materially significant change in claimant's respiratory condition from his original examination, when he found claimant was not totally disabled, Director's Exhibit 99. Finally, Dr. Broudy found that, although claimant's pulmonary function study was invalid, the rest of his examination and objective test results did not indicate that claimant was totally disabled, Employer's Exhibit 5.

The administrative law judge found that, although Dr. Baker did not make an unequivocal finding of total disability, the results of the pulmonary function study he administered were sufficient to establish total disability, and the administrative law judge found his opinion supported by Dr. Fino's opinion and the opinion of Dr. Sullivan, despite the administrative law judge's finding that Dr. Sullivan's opinion contained no documentary references or rationale for its conclusions, Decision and Order at 16-19. The administrative law judge discredited Dr. Dahhan's opinion because the administrative law judge found his invalidation of the diffusion result of the qualifying pulmonary function study he administered was not documented or reasoned and the administrative law judge discredited Dr. Broudy's opinion because the administrative law judge found that his invalidation of the pulmonary function study he administered and, therefore, his opinion as to total disability, was "equivocal."

Contrary to the administrative law judge's finding as to Dr. Baker's opinion, even though a pulmonary function study might yield qualifying results, a physician may still nevertheless diagnose no total disability, *see Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Similarly, although Dr. Dahhan noted that the diffusion result of the pulmonary function study he administered was invalid, he nevertheless based his opinion, in part, on the overall qualifying results of the pulmonary function study. The interpretation of such medical evidence is a medical determination for which an administrative law judge may not

substitute his own opinion, *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); *Casella v. Kaiser Steel Corp*, 9 BLR 1-131 (1986). Finally, the administrative law judge's analysis of Dr. Sullivan's opinion is irrational and inconsistent and his analysis of Dr. Broudy's opinion as to the validity of the pulmonary function study he administered is inconsistent under Section 718.204(c)(1) and (4). The administrative law judge found "no documentary references or other rationale for [Dr. Sullivan's] conclusions," Decision and Order at 16, yet nevertheless credited his opinion as supportive of Dr. Baker's opinion as to total disability. In addition, the administrative law judge noted that he agreed with Dr. Broudy's findings that the pulmonary function study he administered was invalid under Section 718.204(c)(1), whereas he discredited Dr. Broudy's invalidation of the pulmonary function study as "equivocal" under Section 718.204(c)(4). Thus, the administrative law judge's analysis of the medical opinion evidence and credibility determinations under Section 718.204(c)(1) are inconsistent with his analysis of the same evidence under Section 718.204(c)(4), *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984). Consequently, we vacate the administrative law judge's finding under Section 718.204(c)(4) and remand the case for the administrative law judge to reconsider all relevant evidence, like and unlike, under Section 718.204(c), *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.

Next, although the administrative law judge found no mistake of fact or law in Judge Jansen's original Decision and Order in which the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), Decision and Order at 23, the administrative law judge nevertheless considered all of the relevant medical opinion evidence pursuant to subsection (a)(4). The administrative law judge credited the opinions of Drs. Baker, Director's Exhibits 15, 61; Claimant's Exhibit 1, and Vaezy, Director's Exhibits 17-18, who both diagnosed pneumoconiosis, in light of their "superior qualifications" as both board-certified physicians in internal medicine and pulmonary disease as well as B-readers,[4] over the contrary opinions of Drs. Dahhan, Broudy, Lane and Fino. Decision and Order at 21-23. In addition, although the administrative law judge noted that Dr. Baker did not state a new diagnosis regarding coal workers' pneumoconiosis in his newly submitted opinions, he credited Dr. Baker's opinion as he found him to be claimant's "treating" physician. Finally, the administrative law judge found that Dr. Broudy's opinion that claimant "may" have some obstructive airways disease which he attributed to smoking, Employer's Exhibit 5, was

[4] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

equivocal and gave less weight to Dr. Fino's opinion as he neither treated or examined claimant.

However, as employer contends, Drs. Dahhan and Broudy are also board-certified physicians in internal medicine and pulmonary disease as well as B-readers, Director's Exhibit 99; Employer's Exhibit 5. In addition, as employer contends, Dr. Baker specifically noted in his originally submitted opinions, in which he made his diagnosis of pneumoconiosis, that he was not claimant's treating physician at that time, *see* Director's Exhibits 15, 61, and only began indicating that he was treating claimant in his newly submitted opinions which only reiterate his original diagnosis of pneumoconiosis. Finally, although Dr. Broudy opined that claimant "may" have some obstructive airways disease, he further stated that "whatever impairment" claimant has is the result of smoking and that none of claimant's respiratory impairment is due to pneumoconiosis, Employer's Exhibit 5. Thus, inasmuch as the administrative law judge's evidentiary analysis under Section 718.202(a)(4) does not coincide with the relevant evidence of record, we vacate the administrative law judge's finding and remand the case for reconsideration, *see Tackett*, *supra*.

The administrative law judge also found total disability due to pneumoconiosis established pursuant to Section 718.204(b), crediting the opinion of Dr. Baker, as claimant's treating physician and as supported by the opinion of Dr. Vaezy and the opinion of Dr. Myers which was in the original record, over the contrary opinions of Drs. Dahhan, Broudy and Fino, Decision and Order at 23.[5] Again, as employer contends, Dr. Baker specifically noted in his originally submitted opinions, in which he found claimant was totally disabled from a pulmonary standpoint and attributed his pulmonary impairment to his coal mine employment and smoking, that he was not claimant's treating physician at that time, *see* Director's

[5] Although employer contends that the administrative law judge did not specifically address claimant's smoking history and also found the opinions of those physicians, *i.e.*, Drs. Baker and Vaezy, who recommended that claimant work in a dust-free environment supported the determination that such dust is, at least in part, the cause of his total disability, any error by the administrative law judge in this regard is harmless as both Drs. Baker and Vaezy specifically attributed claimant's disability to coal mine employment and smoking in their previously submitted opinions, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Exhibits 15, 61, and only began indicating that he was treating claimant in his newly submitted opinions which do not address the cause of claimant's impairment or disability. Moreover, none of the newly submitted evidence attributes the cause of claimant's impairment or disability to coal workers' pneumoconiosis or claimant's coal mine employment. Thus, inasmuch as the administrative law judge's evidentiary analysis under Section 718.204(b) does not coincide with the relevant evidence of record, we also vacate the administrative law judge's finding and remand the case for reconsideration, *see Tackett, supra*.

Finally, in order to avoid any possible repetition of error on remand, we address employer's contention that, inasmuch as the administrative law judge found no mistake of fact in Judge Jansen's prior Decision and Order, the administrative law judge erred in awarding benefits, based on a change in conditions established since the previous denial, beginning with the date of filing of claimant's claim in January, 1994, Decision and Order at 24. The administrative law judge made no finding as to whether the evidence of record established a date of onset of total disability due to pneumoconiosis. If a date for the onset of a claimant's disability due to pneumoconiosis is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed, 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989), unless credible medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, *see Edmiston, supra*; *Gardner, supra*; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Although Section 725.503 does not indicate that any special guidelines are to be applied to cases involving modification, 20 C.F.R. §725.503, Section 725.503(a) refers to Section 6(a) of the Longshore and Harbor Workers' Compensation Act, which states that "the compensation shall be allowed from the date of the disability," 33 U.S.C. §906(a). 20 C.F.R. §725.503(a); *see also Eifler v. Director, OWCP*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991)(a change in condition, *i.e.*, a worsening of a claimant's pneumoconiosis to the point where it is totally disabling, entitles the claimant to benefits from the date of the change, whereas the correction of a mistake in fact, *i.e.*, "showing that he had totally disabling black lung disease at the time of the original hearing," entitles the claimant to benefits from the date of the total disability.) Consequently, inasmuch as the administrative law judge found that no mistake in fact was established pursuant to Section 725.310, but that a basis for modification was established based on a change in conditions, we vacate the administrative law judge's award of benefits from the month in which claimant filed his claim and remand the case for reconsideration pursuant to Section 725.503, *see* 20 C.F.R. §725.503; *Krecota, supra*; *Edmiston, supra*; *Gardner, supra*; *Lykins, supra*; *see also Eifler, supra*. If the administrative law judge again finds claimant entitled to benefits on remand based on a change in conditions pursuant to Section 725.310, then the administrative law judge should determine whether the evidence of record establishes a date of onset of claimant's total disability due to pneumoconiosis and award benefits dating from, at most, the

date following the prior denial of claimant's claim, *i.e.*, April, 1996, *see* Director's Exhibit 88.

Accordingly, the Decision and Order of the administrative law judge's awarding benefits is affirmed in part, vacated in part and the 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

JAMES F. BROWN
Administrative Appeals Judge