BRB No. 98-1339 BLA

RICHARD D. KUNSELMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANTERRA COAL COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Debra Henry (United Mine Workers of America), Belle Vernon, Pennsylvania, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1271) of Administrative Law Judge Gerald M. Tierney 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 instant case involving a duplicate claim filed on March 1, 1994 is before the Board for the second time.[1]

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 10, 1980. Director's Exhibit 25. The district director denied the claim on October 10, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim.

Claimant filed a second claim on March 1, 1994. Director's Exhibit 1.

In the initial decision, the administrative law judge, after crediting claimant with twenty-three years of coal mine employment, found that the new evidence indicated that claimant suffered from pneumoconiosis and a pulmonary disability. The administrative law judge, therefore, found that claimant "was entitled to modification." In his consideration of the merits of the claim, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated October 23, 1997, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) as unchallenged on appeal. *Kunselman v. Canterra Coal Co.*, BRB No. 97-0227 BLA (Oct. 23, 1997) (unpublished). The Board, however, remanded the case to the administrative law judge to address whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard set out in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). *Id.* If the administrative law judge reached the merits of the case on remand, the Board instructed the administrative law judge to reconsider whether claimant had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) in accordance with the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[2] *Id.* The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) and 718.204(b). *Id.*

On remand, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1994 claim on the merits. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). After noting that the Board had affirmed his finding of total disability

[2]The Board previously recognized that the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Kunselman v. Canterra Coal Co.*, BRB No. 97-0227 BLA (Oct. 23, 1997) (unpublished).

pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and 718.204(b). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Employer initially contends that the administrative law judge erred in finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an 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. *Swarrow*, *supra*. Claimant's 1980 claim was denied because he failed to establish either the existence of pneumoconiosis or total disability. Director's Exhibit 25. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support either a finding of the existence of pneumoconiosis or a finding of total disability.[3]

[3]Employer argues that the district director did not deny claimant's 1980 claim because claimant failed to establish that he was totally disabled. The district director denied claimant's 1980 claim because he found that the evidence (1) did not establish that claimant had pneumoconiosis; (2) did not show that the disease was caused at least in part by coal mine work; and (3) did not show that claimant was totally disabled by the disease. In regard to the last basis for the denial, the district director noted that:

On remand, the administrative law judge noted that the Board had affirmed his finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 2. Because total disability was an element of entitlement previously adjudicated against claimant, the administrative law judge found claimant had established a material change in conditions. *Id.*

Employer argues that the administrative law judge erred in failing to follow the Board's remand instructions. We agree. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993). This principle has been held to be equally applicable to the duty of an administrative agency to comply with the mandate issued by a reviewing court. *Id.* On remand, the administrative law judge, in considering whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, should have examined all of the new evidence, favorable and unfavorable, and determined whether, on balance, it satisfied (or did not satisfy) the *Swarrow* standard defining a "material change in conditions." *See Swarrow*, *supra*.

> Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease).

Director's Exhibit 25.

Contrary to employer's argument, claimant's 1980 claim was denied in part because claimant failed to establish that he was totally disabled.

If no material change in conditions is found, claimant cannot pursue his second claim. On the other hand, if the administrative law judge finds that claimant has proved at least one of the elements of entitlement previously adjudicated against him, claimant will have established a material change in conditions. *Swarrow*, *supra.* At that point, the administrative law judge must consider all of the evidence of record, including that submitted with the prior claim, to determine whether such evidence supports a finding of entitlement to benefits. *Id.* These determinations, however, must be made in the first instance by an administrative law judge. *Id.* We, therefore, remand the case to the administrative law judge to reconsider whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[4]

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[4]We reject employer's contention that the administrative law judge erred by refusing to reopen the record on remand in order to permit it to supplement the record in light of *Swarrow*. Employer's assertion is based on the premise that due process requires that the record be reopened to allow it to respond to "the change in law with new proof." Employer's Reply Brief at 3. Employer, however, had notice of the type of newly submitted evidence that would be relevant for consideration of each of the elements of entitlement which previously defeated the claim, and thus, to the issue of a material change in conditions, and had the opportunity to submit such evidence at trial. Thus, as the standard enunciated by the Third Circuit in *Swarrow* did not change employer's evidentiary burden or the type of evidence relevant to meeting the burden of proof for establishing a material change in conditions pursuant to Section 725.309, *Swarrow* does not compel the reopening of the record. *See Troup v. Reading Anthracite Co.*, BLR , BRB No. 98-0143 BLA (Nov. 15, 1999)(*en banc*).

Employer also argues that the administrative law judge erred in his consideration of the x-ray evidence. In his consideration of whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge noted that the x-ray evidence was overwhelmingly positive for the presence of pneumoconiosis in the form of opacities in the lung. Decision and Order on Remand at 11. While claimant's June 27, 1980 x-ray was read as negative for pneumoconiosis, Director's Exhibit 25, claimant's subsequent x-rays taken on September 29, 1987, September 12, 1988, January 24, 1989, September 28, 1989, March 21, 1994, December 20, 1994 and January 31, 1995 were uniformly interpreted as positive for pneumoconiosis. Director's Exhibits 13, 14; Claimant's Exhibits 1, 4; Employer's Exhibits 1, 4, 6-8, 10, 12, 14, 16. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence supports a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[5]

Employer also contends that the administrative law judge erred in finding that

[5]Inasmuch as there is no biopsy or autopsy evidence in the record, claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that the opinions of Drs. Thames, Levine and Bizousky that claimant suffered from pneumoconiosis were entitled to greater weight than the contrary opinions of Drs. Pickerill, Laman, Fino and Branscomb. Decision and Order on Remand at 13.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Pickerill, Laman, Fino and Branscomb. The administrative law judge, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), attributed less weight to the opinions of Drs. Pickerill, Laman, Fino and Branscomb because he found that these physicians did not believe that coal mine dust exposure could cause obstructive defects. Decision and Order on Remand at 12-13. In *Warth*, the United States Court of Appeals for the Fourth Circuit held that an administrative law judge should not rely on a physician's opinion that a miner does not suffer from pneumoconiosis when it is based on an assumption that obstructive disorders cannot be caused by coal mine employment. *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269. However, the Fourth Circuit subsequently clarified its holding in *Warth*. Specifically, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that administrative law judges are not precluded from relying on physicians' opinions that are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease. Unlike the physicians in *Warth*, Drs. Pickerill, Laman, Fino and Branscomb did not assume that coal dust exposure can never cause an obstructive lung disease. *See* Employer's Exhibits 1, 3, 4, 9, 11, 14, 16.

The administrative law judge also discredited the opinions of Drs. Laman and Branscomb because they opined that pneumoconiosis is not a progressive disease.[6] Decision and Order on Remand at 13. Although the courts have recognized that pneumoconiosis is a progressive disease, *see 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) (recognizing that pneumoconiosis is a "serious and progressive pulmonary condition"), we note that the administrative law judge did not cite any authority in support of his view that a physician's opinion regarding the existence of pneumoconiosis can be discredited because that physician does not believe that pneumoconiosis is a progressive disease.

[6]Dr. Laman opined that coal workers' pneumoconiosis is not, in general, a progressive disease. Employer's Exhibit 4 at 29. Dr. Branscomb indicated that simple pneumoconiosis rarely, if ever, progresses after a miner leaves the mines. Employer's Exhibit 16.

Employer also contends that the administrative law judge erred in finding that the opinions of Drs. Pickerill, Laman, Fino and Branscomb were in conflict with the spirit of the Act. A medical report can be rejected as hostile to the Act only if it forecloses any possibility that simple pneumoconiosis can be disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). None of these physicians indicated that he believed simple pneumoconiosis was never disabling.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis. On remand, the administrative law judge must weigh the x-ray and medical opinion evidence together in determining whether the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Williams*, *supra*.

Employer next argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Having established at least ten years of coal mine employment, claimant is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). The administrative law judge considered whether the x-ray evidence was sufficient to rebut the presumption. In his consideration of the x-ray evidence, the administrative law judge acted within his discretion by according greater weight to the interpretations of claimant's most recent x-rays taken March 21, 1994, December 20, 1994 and January 31, 1995. *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order on Remand at 14. The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Drs. Palmer, Mital and Fisher are the only dually qualified physicians to interpret claimant's most recent x-rays taken March 21, 1994, December 20, 1994 and January 31, 1995. Dr. Palmer interpreted claimant's March 21, 1994 x-ray as positive for pneumoconiosis, Employer's Exhibit 6; Dr. Mital interpreted claimant's December 20, 1994 x-ray as positive for pneumoconiosis, Employer's Exhibit 1; and Dr. Fisher interpreted claimant's January 31, 1995 x-ray as positive for pneumoconiosis. Claimant's Exhibit 4.

The administrative law judge found that "the most recent and probative x-ray evidence indicates the presence of regular shaped opacities consistent with

pneumoconiosis or is silent as to its etiology."[7] Decision and Order on Remand at 14. The administrative law judge, therefore, found that employer failed to rebut the presumption set out at 20 C.F.R. §718.203(b). *Id.*

[7]The administrative law judge noted that Dr. Palmer interpreted claimant's March 21, 1994 x-ray as having irregular opacities, but was "silent as to etiology." Decision and Order on Remand at 14; Employer's Exhibit 6. The administrative law judge noted that Dr. Mital commented that his findings were consistent with pneumoconiosis and made no mention of asbestosis. Decision and Order on Remand at 14; Employer's Exhibit 1. The administrative law judge noted that Dr. Fisher diagnosed pneumoconiosis with q shaped (regular opacities). Decision and Order on Remand at 14; Claimant's Exhibit 4.

We agree with employer that the administrative law judge erred in his consideration of the evidence at 20 C.F.R. §718.203(b). Contrary to the administrative law judge's finding, the most recent and probative x-ray evidence does not indicate the presence of "regular shaped opacities."[8] The administrative law judge, therefore, mischaracterized the x-ray evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge also failed to explain the relevance of the x-ray evidence in determining whether claimant's pneumoconiosis arose out of his coal mine employment. Drs. Palmer, Mital and Fisher did not address the etiology of the opacities that they found on claimant's x-rays. *See* Claimant's Exhibit 4; Employer's Exhibits 1, 6.

The administrative law judge also failed to address all of the relevant medical opinion evidence pursuant to 20 C.F.R. §718.203(b). Drs. Pickerill, Laman, Fino and Branscomb provided detailed explanations for why the opacities on claimant's x-rays were not caused by coal workers' pneumoconiosis or his coal dust exposure. Employer's Exhibits 3, 4, 11, 14, 16. We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.203(b) and remand the case for further consideration.

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[9] The administrative law judge, citing the Fourth Circuit's decision in *Toler v. Eastern Associated Coal Co.*, 43 3d 109, 19 BLR 2-70 (4th Cir. 1995), discredited the opinions of Drs. Pickerill, Laman, Fino and Branscomb because they did not diagnose pneumoconiosis. Decision and Order on Remand at 16. However, the Fourth Circuit has subsequently recognized that even though an administrative law judge has found that a claimant suffers from pneumoconiosis, a physician's disability causation opinion premised on an understanding that the claimant does not have pneumonoconiosis may still have probative value.[10] *See Dehue Coal Co. v. Ballard*

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[8]Dr. Mital noted the presence of "small s and t sized **irregular** opacities in both mid and lower lung fields." Employer's Exhibit 1 (emphasis added). Dr. Palmer also found s/t opacities. Employer's Exhibit 6.

[9]The Third Circuit has held that a claimant need only prove that his pneumoconiosis was a substantial contributor to his total disability. *See Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[10]The Fourth Circuit further explained that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total

[Ballard], 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Moreover, in light of our decision to vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b).

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disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-2-316 (4th Cir. 1995).

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