BRB No. 98-1526 BLA

PAUL E. INGRAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1818) of Administrative Law Judge J. Michael O'Neill 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). Claimant initially filed a claim in January 1980. Director's Exhibit 30. Administrative Law Judge John C. Bradley issued a Decision and Order - Denying Benefits in March 1985. Judge Bradley credited claimant with twenty-nine years and eleven months of coal mine employment. Moreover, Judge Bradley found that the x-ray

evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). However, Judge Bradley found that rebuttal of the interim presumption was established under 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Director's Exhibit 30 at 41 *et seq.* Claimant appealed, and the Board issued a Decision and Order affirming the administrative law judge's denial of benefits. *Ingram v. Ziegler Coal Co.*, BRB No. 85-0904 BLA (May 26, 1987)(unpublished); Director's Exhibit 30 at 1-2.

In July 1996 claimant filed a duplicate claim. Administrative Law Judge O'Neill (the administrative law judge) found that the evidence was sufficient to establish a material change in conditions. Specifically, the administrative law judge found that the newly submitted medical opinion, blood gas study and pulmonary function study evidence were sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). 1998 Decision and Order at 9. Next, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Further, the administrative law judge found that the evidence was sufficient to establish that claimant's pneumoconiosis arose from coal mine employment under 20 C.F.R. §718.203(b).[1] However, the administrative law judge found that claimant did not show that he is totally disabled due to pneumoconiosis.[2] 20 C.F.R. §718.204(b). Accordingly, the claim was denied.

In the present appeal, claimant argues that the administrative law judge erred in not finding that claimant's disability was due to pneumoconiosis. Employer has submitted a response brief advocating affirmance of the administrative law judge's denial of benefits. Alternatively, employer contends that the administrative law judge erred in finding that claimant suffers from pneumoconiosis, that he is totally disabled, and that he has established a material change in conditions. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the instant appeal unless specifically requested to do so by the Board.

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[1] We affirm the administrative law judge's 20 C.F.R. §718.203(b) finding as uncontested on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, claimant must establish that his totally disabling respiratory impairment was due at least in part to pneumoconiosis. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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 the 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 under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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. Inasmuch as this claim arises under the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the standard for establishing a material change in conditions is that enunciated by the court in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Under the *Ross* standard, the administrative law judge must weigh the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements of entitlement previously adjudicated against claimant in the prior claim.

In finding that claimant failed to meet his burden under Section 718.204(b), the administrative law judge stated that:

> Because I relied on the more recent evidence to establish the existence of the disability, I rely on that same evidence to establish the cause of the disability. Drs. Simpao and Sahetya both attributed Mr. Ingram's disability to a combination of coal mine employment and smoking. While neither could attribute an exact figure to how much the coal dust contributed, they both felt that it was a significant contribution. As Dr. Sahetya is both a board certified pulmonologist and Mr. Ingram's treating physician, I give her reasoned opinion enhanced weight in this area.
>
> Dr. Branscomb found no disability, and thus I give his opinion lesser weight. Dr. Fino felt that Mr. Ingram's disability was caused entirely as the result of his cigarette smoking-induced ailments, while Dr. Selby felt it was a combination of this and Mr. Ingram's asthma. Both physicians are board certified in pulmonary medicine, and therefore I give their reasoned opinions enhanced weight as well. When I weigh all the evidence together, I find that the weight of the evidence indicates that Mr. Ingram's disability results from his cigarette smoking, and not significantly from his coal mine employment.

> Thus, I find that he has not shown that he is totally disabled due to pneumoconiosis, and therefore his claim must be denied.

1998 Decision and Order at 14.

Claimant, citing *Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983), argues that Dr. Selby's report does not meet the *Blevins* test for determining whether claimant's disability is related to cigarette smoking and unrelated to coal dust. Contrary to claimant's contention, *Blevins* addressed the competency of evidence used to rebut the presumption that a miner's total disability arose out of his coal mine employment pursuant to 30 U.S.C. §921(c)(4). As rebuttal of a presumption is not involved in this case, *Blevins* does not apply.

Claimant next argues that the administrative law judge erred in not crediting the opinion of Dr. Sahetya to establish pneumoconiosis as a cause of disability inasmuch as she is claimant's treating physician, and a pulmonary specialist whose opinion is documented and reasoned. Claimant's Brief at 5, 6. The administrative law judge in the instant case correctly found that Dr. Sahetya was claimant's treating physician. 1998 Decision and Order at 14; Hearing Transcript at 16, 31; Employer's Exhibit 1. Dr. Sahetya, in a 1997 opinion, diagnosed black lung disease and concluded that claimant is disabled. Director's Exhibit 24. In *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, stated, "It is clearly established that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Id.*, 982 F.2d at 1042, 17 BLR at 2-24. However, in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), the Sixth Circuit clarified that *Tussey* does not require an administrative law judge to credit the opinion of a treating physician which is equivocal. In the instant case, the administrative law judge initially gave enhanced weight to Dr. Sahetya's seemingly unequivocal opinion, but presumably found it outweighed by the contrary opinions.

Next, claimant argues that the administrative law judge erred in not crediting the opinion of Dr. Simpao. Dr. Simpao, in a 1996 opinion, diagnosed total impairment and stated that multiple years of coal dust exposure is "medically significant in his pulmonary impairment." Director's Exhibit 9. Claimant avers that Dr. Simpao was a "neutral" evaluator because he evaluated claimant at the request of the Department of Labor. Claimant's Brief at 6. This argument lacks merit. The opinions of Department of Labor physicians should generally not be accorded greater weight due to their impartiality. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991); *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992). However, the administrative law judge erred in failing to render any credibility determination with regard to Dr. Simpao. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

Claimant also argues that the administrative law judge provided no explanation for his finding that claimant's impairment was unrelated to his occupational exposure of almost thirty years. Claimant's Brief at 7. The administrative law judge apparently found

that disability causation was not established, based on the negative opinions of Drs. Fino and Selby.[3] The reason given by the administrative law judge for crediting their opinions was that they were both Board-certified in pulmonary medicine. However, as the administrative law judge acknowledged, Dr. Sahetya is also a Board-certified pulmonologist, as well as claimant's treating physician. Employer's Exhibit 1. The administrative law judge *apparently* credited the opinions of Drs. Fino and Selby over Dr. Sahetya on the basis of numerical superiority.

We note that the administrative law judge did not render any specific credibility findings with regard to the medical opinions under Section 718.204(b). Although the administrative law judge appears to have credited the opinions of the pulmonary experts, he appears to have merely resolved the conflict between the experts' opinions by a head count. Thus, we hold that the administrative law judge's conclusion fails to meet the Administrative Procedure Act's requirement that an administrative law judge resolve the conflict between physicians' opinions by considering factors that tend to either bolster, or render suspect, the credibility of the reports. 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) and 30 U.S.C. §932(a); *Hutchens*, *supra*. Thus, we vacate the administrative law judge's finding at Section 718.204(b) and remand the case to the administrative law judge to consider the credibility of the experts' conflicting opinions.

Claimant also argues that the administrative law judge erred in crediting the opinions of Drs. Fino and Selby inasmuch as they were not of the opinion that claimant had contracted pneumoconiosis. Claimant's Brief at 8-9. Dr. Fino stated, "There is insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis." Employer's Exhibit 5. Dr. Selby stated that claimant does not suffer from coal workers' pneumoconiosis. Employer's Exhibit 7. On remand, the administrative law judge should consider whether this is a factor that affects the credibility of the opinions of Drs. Fino and Selby at 20 C.F.R. §718.204(b). *See Tussey*, 982 F.2d at 1042, 17 BLR at 2-24; *Trujillo v.*

[3] Dr. Fino, in a 1998 opinion, diagnosed disabling respiratory impairment arising out of cigarette smoking, and opined that claimant's disability was unrelated to coal mine dust. Employer's Exhibit 5. Dr. Fino is Board-certified in internal medicine, including a subspecialty in pulmonary disease. *Id*. Dr. Selby, in a 1998 opinion, found that claimant had a moderate to severe degree of emphysema from cigarette smoking, and that any respiratory impairment which claimant had is not a result of coal mining employment. Employer's Exhibit 7. Dr. Selby is Board-certified in internal medicine, including a subspecialty in pulmonology. *Id*.

Kaiser Steel Corp., 8 BLR 1-472 (1986).

In its response brief, employer argues that the "treating physician" preference is not permissible under the Administrative Procedure Act and the Supreme Court's decision in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). Employer's Brief at 16-17. Employer argues that legal rules may not be promulgated through adjudication, rather than rulemaking. Employer's argument lacks merit, as employer has not presented a convincing argument as to why *Allentown Mack* applies in the instant case.[4] The "treating physician" preference is a valid means for deciding whether the administrative law judge's decision was rational. *See Tussey*, *supra.* We decline to interpret *Allentown Mack* as overruling *Tussey*.

Next, employer argues that the administrative law judge erred in finding pneumoconiosis established pursuant to Section 718.202, total disability established under Section 718.204, and, therefore, a material change in conditions under Section 725.309. Employer's Brief at 20. With regard to Section 718.202(a)(1), employer avers that the administrative law judge's treatment of the x-ray evidence was internally inconsistent.[5] We decline to address employer's Section 718.202(a)(1) argument, because the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(4) is uncontested on appeal.[6] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer also argues that the administrative law judge erred by reviewing only "like kind" evidence at Section 718.202, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Employer's Brief at 21. This argument lacks merit, inasmuch as the instant case does not arise within the jurisdiction of the United States

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[4] In *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), the employer petitioned for review of an Order of the National Labor Relations Board (NLRB) requiring the employer to recognize and bargain with its union, after the NLRB found that the employer had committed an unfair labor practice by polling its employees concerning union support without a good faith reasonable doubt as to the union's majority support. *See Allentown Mack*, *supra*. The Supreme Court held that the NLRB's standard for employee polling of union support was rational and consistent with the National Labor Relations Act. 29 U.S.C. §151 *et seq.*; *Allentown Mack*, *supra*.

[5] The administrative law judge found that the newly submitted x-ray evidence was not as favorable to claimant as the previously submitted x-ray evidence. On balance, the administrative law judge found that the x-ray evidence was positive for pneumoconiosis. 1998 Decision and Order at 11-12.

[6] Employer states, "The existence of pneumoconiosis has been a contested issue in this case all along ..." Employer's Brief at 20. However, employer makes no argument specifically concerning 20 C.F.R. §718.202(a)(4).

Court of Appeals for the Third Circuit. *See Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-105 n.2 (1998). No other circuit has adopted *Williams* and the Board has long held that subsections (a)(1)-(a)(4) of Section 718.202 provide alternative means to establish the existence of pneumoconiosis. *See*, *e.g.*, *Church v. Eastern Associated Coal Corp.* 20 BLR 1-8 (1996); *Dixon*, *supra*.

Employer further avers that the administrative law judge erred in relying on the pulmonary function studies to find a material change in conditions as he erred in finding pulmonary function studies as qualifying because claimant was too old to have qualifying values provided in the table values at 20 C.F.R. Part 718 Appendix B. Employer's Brief at 21-22. Employer's argument has no merit. The administrative law judge could rationally apply the table values for a claimant beyond the age of the table values.[7] *See generally O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Employer maintains that the administrative law judge erred in relying on the numerical superiority of medical opinions to find the existence of total disability. Employer's Brief at 22. Employer correctly quotes the administrative law judge as stating, "In this matter, three of the four physicians found the presence of such an impairment, ..." 1998 Decision and Order at 9. On remand, the administrative law judge should consider all relevant factors in determining whether total disability has been established, and not base his decision solely on numerical superiority. *See* 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) and 30 U.S.C. §932(a); *Hutchens*, *supra*.

Employer next contends that the administrative law judge mischaracterized Dr.

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[7] The administrative law judge stated:

> Three of the four [new] pulmonary function studies returned qualifying values, of which one was unchallenged, one was stipulated to be invalid, and the third was challenged by several of the doctors, but was not marked as invalid in the parties' joint stipulation. (DX 22, 23; [DX] 7; JX 1). In any event, I find the pulmonary function studies support a finding of total disability.

1998 Decision and Order at 5. Claimant was 74 or 75 years old when these pulmonary function studies were performed. The table for qualifying values at 20 C.F.R. Part 718, Appendix B stops at age 71. It appears, therefore, that the administrative law judge applied table values for claimant beyond the table ages. It appears that the record contains three new pulmonary function studies. The April 1997 study is qualifying for age 71. Director's Exhibit 23. The August 1996 study is not qualifying for age 71. Director's Exhibit 7. For age 71, the October 1996 may qualify before bronchodilation depending on what height is selected, *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983), and does not qualify after bronchodilation. Director's Exhibit 22.

Branscomb's finding as relying on old data.[8] Employer contends that Dr. Branscomb relied on old data, coupled with the absence of any valid pulmonary function studies. Employer's Brief at 22. Dr. Branscomb, in a 1998 opinion, stated:

> The data prior to 1985 objectively established ample pulmonary function for continued mining. There have been no valid pulmonary function studies subsequent to that time that establish any impairment is present. ... Even if one accepted as valid his best current test results (and they are not maximal) his function is sufficient to permit him to continue his previous coal mine employment.

[8] Dr. Branscomb found that claimant had no coal workers' pneumoconiosis and was not totally disabled from a respiratory standpoint. Employer's Exhibit 6.

Employer's Exhibit 6, Report at 8. It appears that Dr. Branscomb was focusing additionally on at least one new pulmonary function study which disproved disability. The administrative law judge, thus, erred in discrediting Dr. Branscomb's opinion because he "was relying on information that is over a decade old and not subject to the consideration at that [sic] stage of the proceeding."[9] 1998 Decision and Order at 9. Consequently, we remand the case for the administrative law judge to reconsider his treatment of Dr. Branscomb's opinion. We, therefore, vacate the administrative law judge's findings at Sections 718.204(c) and 725.309.

Finally, we note that this case contains a diagnosis of Category A complicated pneumoconiosis by Dr. Bassali. Director's Exhibit 30 at 132-133. On remand, the administrative law judge should consider whether Dr. Bassali's opinion establishes entitlement pursuant to the irrebuttable presumption at 20 C.F.R. 718.304.

[9] The administrative law judge stated:

> [Dr. Branscomb] also found no total disability because no impairment existed in 1985, and no valid pulmonary function study had been performed since that time. ... [Dr. Branscomb] felt Mr. Ingram's best current pulmonary function study test results, although invalid, showed the miner's function was sufficient to permit continued coal mine employment.

1998 Decision and Order at 8.

Accordingly, the administrative law judge's Decision and Order - Denying 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