BRB No. 01-0483 BLA

LUTHER MCINTOSH Claimant-Respondent v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

Tammie Jones Sivalls, Mt. Sterling, Kentucky, for claimant.

Timothy S. Williams (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, McGRANERY and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (99-BLA-1104) of Administrative Law Judge Rudolph L. Jansen awarding benefits 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*. (the Act).[1] In this duplicate claim, the administrative law judge found the newly submitted

[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 are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

medical opinion evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment and therefore sufficient to establish a material change in conditions.[2] The administrative law judge credited claimant with three and one-half years of coal mine employment and found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were awarded.

On appeal, the Director challenges the administrative law judge's weighing of the evidence relevant to the issues of whether pneumoconiosis arose out of coal mine employment and whether claimant was totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits,

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[2] Claimant filed his initial application for benefits on August 31, 1973, which was finally denied on August 21, 1979 because claimant failed to establish any of the elements of entitlement. Claimant took no further action on that claim. *See* Director's Exhibit 20. Claimant filed his second application for benefits on August 15, 1988, which the district director denied on January 24, 1989 because claimant failed to establish any of the elements of entitlement. Claimant took no further action on the second claim. *See* Director's Exhibit 21. Claimant filed his third application for benefits on September 18, 1991, which the district director denied on February 28, 1992 because claimant failed to establish the cause of his pneumoconiosis and the presence of a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 22. Claimant took no further action on his third claim; he filed the present claim on January 9, 1998. *See* Director's Exhibit 1.

contending that the administrative law judge properly found disability causation established, but that the administrative law judge erred in not crediting claimant with ten years of coal mine employment.[3]

[3] We affirm the administrative law judge's findings that claimant established a material change in conditions and the existence of pneumoconiosis as the Director, Office of Workers' Compensation Programs (the Director), has conceded these issues. *See* Hearing Transcript at 7; Director's Brief at 3, 9-10. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[4] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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 establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] Since the miner's last coal mine employment took place in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The Director first contends that the administrative law judge improperly relied upon the medical opinions of Drs. Sundaram[5] and Sewell to find that claimant met his burden of establishing that his pneumoconiosis arose out of coal mine employment, merely because their opinions on the issue were uncontested. Specifically, the Director argues that these physicians relied upon an exaggerated history of coal mine employment and failed to address other possible causes of claimant's pneumoconiosis.[6] Claimant contends that the administrative law judge erred in crediting claimant with only three and one-half years of coal mine employment, and contends that ten years of coal mine employment have been established.

We will first address claimant's contention that the administrative law judge erred in crediting claimant with only three and one-half years of coal mine employment instead of at least ten as an accurate finding on length of coal mine employment is essential to the administrative law judge's consideration of the credibility of the physicians' opinions on cause of pneumoconiosis and cause of disability. As the administrative law judge correctly stated, the Board has consistently held that any reasonable method of computing the length of coal mine employment is permissible; that such a determination may be based on many different factors; and that one particular type of evidence need not be credited over another type of evidence. *See Croucher v. Director, OWCP*, 20 BLR 1-68 (1996)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Calfee v. Director,*

[5] We agree with the Director's argument that the administrative law judge treated the medical opinion of Dr. Sundaram inconsistently when he found the report insufficient to establish the etiology of the miner's pneumoconiosis for purposes of establishing a material change in conditions at 20 C.F.R. §725.309 (2000), but sufficient to meet claimant's burden of proof on the etiology of his pneumoconiosis when considering the claim on the merits at 20 C.F.R. §718.203(c). Since the Director does not disagree with the administrative law judge's determination that claimant nonetheless established a material change in conditions by showing the presence of a totally disabling respiratory impairment, however, error, if any, in the administrative law judge's consideration of Dr. Sundaram's opinion on the issue of causality at Section 725.309 (2000) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] The administrative law judge's decision to accord little weight to the medical opinion of Dr. Wicker because Dr. Wicker failed to explain the inconsistency between his diagnoses in 1991 and 1998, and the administrative law judge's conclusion that the medical opinions of Drs. Broudy and Williams are not relevant to whether pneumoconiosis arose out of coal mine employment as neither physician diagnosed pneumoconiosis are affirmed as unchallenged on appeal. *See Skrack*, *supra*.

OWCP, 8 BLR 1-7 (1985); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343 (1984); *Harkey v. Alabama By-Products Corp.*, 7 BLR 1-26 (1984); *Mullins v. Director, OWCP*, 6 BLR 1-508 (1983).

In the instant case, the record contains the affidavits of coworkers concerning the time they worked with claimant in coal mine employment, an affidavit from Yancy Amos indicating the length of claimant's employment with Amos & Amos Coal Company, claimant's Social Security earnings record, and claimant's testimony at the hearing. *See* Director's Exhibit 20; Hearing Transcript at 11, 17-18, 22-24. Claimant contends that the record establishes that he was employed for Amos & Amos Coal Company from 1951 through 1959, even though employment with that company was not reflected on claimant's Social Security Statement of Earnings.

The administrative law judge concluded that because the evidence of coal mine employment presented in the affidavits and claimant's testimony was inconsistent, and not corroborated by claimant's Social Security Earnings Statement, he would not rely on it to determine the length of claimant's coal mine employment, but would rely, instead, on the evidence of coal mine employment shown on the Social Security Earnings Statement. *See* Decision and Order at 4.

While Social Security records provide important information regarding the work history of a miner, evidence of additional employment, such as the affidavit of Yancy Amos and claimant's testimony, is also relevant and probative. *See Hutnick v. Director, OWCP*, 7 BLR1-326 (1984); *Harkey*, *supra*; *Bizarri*, *supra*. In the instant case, claimant contends that his Social Security Earnings Statement reflects only 14 quarters of coal mine employment from 1951 through 1959 because his principal employer over that period was Amos & Amos, which paid in cash, and that his Earnings Statement reflects employment by other companies during periods when he was laid off from Amos & Amos. Hearing Transcript 21-23. Further, claimant contends that the affidavit of Yancy Amos, timekeeper and co-owner of Amos & Amos, that claimant worked for Amos & Amos from 1951 through 1959 corroborates claimant's testimony that his employment for this company was not reflected on the earnings statement because he was paid in cash. Hearing Transcript 22-23. Accordingly, because the administrative law judge did not consider and discuss whether the fact that claimant was paid in cash was a possible explanation for the absence on claimant's Earnings Statement of employment during 1951 through 1959 with Amos & Amos, we vacate his finding on the length of coal mine employment and remand the case for him to consider whether claimant may have been paid in cash while employed at Amos & Amos, and, therefore, has additional years of coal mine employment.[7] *See* Decision and Order at 4;

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[7] The administrative law judge's decision to credit claimant with three quarters of coal mine employment between 1945 and 1950 and with one quarter of coal mine employment in

Vickery, *supra*; *Hutnick*, *supra*; *Harkey*, *supra*; Director's Exhibit 20.

1960 is unchallenged on appeal and is, therefore, affirmed. *See Skrack*, *supra*.

The administrative law judge must then, as the Director contends, consider to what extent a discrepancy, if any, between the physicians' findings on length of coal mine employment, *i.e.*, Dr. Sewell found fifteen years and Dr. Sundaram found twelve, and his own finding on length of coal mine employment has on the credibility of the opinions.[8] Likewise, as the Director contends, the administrative law judge must consider whether evidence of other potentially hazardous exposures, which the physicians failed to consider, has on the credibility of their opinions. Thus, we agree with the Director that, before the administrative law judge accords any weight to the medical opinions, he must determine if they are reasoned by considering, *inter alia*, whether the physicians had an accurate knowledge of the history of claimant's coal mine employment and other possibly hazardous exposures. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86 (6th Cir. 1988); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc recon.*); *Horton v. Director, OWCP*, 7 BLR 1-446, 1-448 (1984); *Blackledge v. Director, OWCP*, 6 BLR 1-1060, 1-1063 (1984). Moreover, the administrative law judge must determine if the physicians rationally explained their conclusions in light of their findings and documentation. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *modified on recon*., 20 BLR 1-64 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, vacate the administrative law judge's determination that claimant established that his pneumoconiosis arose out of coal mine employment and remand this case for further consideration of the length of claimant's coal mine employment, his smoking history and other hazardous

[8] In determining that pneumoconiosis arose out of coal mine employment, although the administrative law judge found the reports of Drs. Sewell and Sundaram entitled to less weight because of inadequate documentation, he nonetheless credited them because they were uncontested and, therefore, found that claimant demonstrated that his pneumoconiosis arose out of coal mine employment. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994), *modif. on recon*. 20 BLR 1-64 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

exposure, and the medical opinions of Drs. Sundaram and Sewell.[9] Likewise, for the same reasons discussed above, we must vacate the administrative law judge's decision to rely on Dr. Sundaram's medical opinion to establish disability causation. On remand, therefore, the administrative law judge must also review Dr. Sundaram's opinion and determine if the physician's causation opinion is reasoned, taking into consideration the physician's knowledge of claimant's length of coal mine employment, other employment and smoking history. *See Carson*, *supra*; *Fields*, *supra*.

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[9] At Section 718.203(c), claimant need prove only that the etiology of his pneumoconiosis is his coal mine employment. *See* 20 C.F.R. §718.203(c). Claimant is not required to disprove any other possible causes of his pneumoconiosis as part of his burden of proof. *Id*.

The Director next argues that the administrative law judge misapplied the decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993) to accord little weight to the medical opinion of Dr. Broudy on causation because, in the Director's view, Dr. Broudy did not base his opinion regarding the cause of claimant's disability solely on his finding of no pneumoconiosis, but also on his consideration of claimant's history, symptoms, examination, and testing.[10] In *Tussey*, the court held that medical reports stating that claimant was not disabled due to pneumoconiosis which are premised on a diagnosis of no pneumoconiosis lose their probative value where clinical pneumoconiosis has been established. In the instant case, the administrative law judge stated that Dr. Broudy's opinion, that claimant's disability was caused by his long history of cigarette smoking, not pneumoconiosis, would be accorded little weight because Dr. Broudy had not diagnosed pneumoconiosis, which was found to have been established and which the Director conceded was established.[11] The administrative law judge's determination was rational and in accordance with law. *Tussey*, *supra*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

[10] We affirm the administrative law judge's findings regarding the medical opinions of Drs. Wicker and Sewell as neither party challenges the administrative law judge's decision to accord little weight to the medical opinion of Dr. Wicker because of his inconsistent diagnoses nor to refrain from relying on the medical opinion of Dr. Sewell, because it does not discuss the cause of claimant's respiratory impairment. *See Skrack*, *supra*.

[11] The Director acknowledges that Dr. Broudy's failure to recognize that the x-ray evidence established the existence of clinical pneumoconiosis makes his opinion problematic, and that it may not therefore be entitled to full weight. *See* Director's Brief at p. 15, fn 8.

I concur: BETTY JEAN HALL
Administrative Appeals Judge

McGranery, Administrative Appeals Judge concurring:

I concur in the majority's decision to remand the case for reconsideration of the evidence on total disability and causation at 20 C.F.R. §718.204(b), (c). I would, however, expand the remand order to include consideration of the x-ray evidence at 20 C.F.R. §718.304, implementing 30 U.S.C. §921(c)(3), which has thus far been overlooked and which, if certain readings are credited, would provide claimant with invocation of the irrebuttable presumption of total disability and causation.

Because the Director conceded that pneumoconiosis was established in the duplicate claim, the x-ray readings were not as closely scrutinized as they would have been otherwise. In any event, there are four x-ray readings in the record which would support invocation of the irrebuttable presumption at Section 718.304(a). Reading the January 23, 1998 x-ray, Drs. Goldstein and Barrett identified large opacities which they classified as Category A and Category B pneumoconiosis, respectively. *See* Director's Exhibit 9. Similarly, Drs. Sargent and Wicker read the October 11, 1991 x-ray and identified large opacities which they classified as Category A and Category B pneumoconiosis, respectively. *See* Director's Exhibits 22-07 and 22-08. Although the administrative law judge identified the x-ray evidence in the record and whether the reader found simple pneumoconiosis, he did not consider the findings of large opacities which are relevant to Section 718.304(a). Understandably, claimant did not appeal this oversight since he was the prevailing party below; hence, that issue is not before the Board. Nonetheless, in the interest of judicial economy, I think it prudent to call this error to the administrative law judge's attention. *Girden v. Sandals International*, 262 F.3d 195 (2d Cir. 2001)(prudent for reviewing court to advise trial court of an error understandably not raised by prevailing party, which trial court should avoid repeating on remand).

Moreover, in raising this issue *sua sponte*, I am following the example of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. In *Campbell v. Director, OWCP*, 2001 WL 1480749 (6th Cir.) the claimant appealed the denial of benefits solely on the ground that the administrative law judge erred in failing to find total disability established. The court observed that because the Department of Labor had conceded the existence of pneumoconiosis - as in the case at bar - the administrative law judge had not carefully reviewed the x-ray evidence and as a result, he had overlooked four x-ray readings of complicated pneumoconiosis pursuant to Section 718.304. Because the administrative law judge had not addressed the evidence on this issue the court remanded the

case for further consideration.[1] The Sixth Circuit decision to raise the issue of complicated pneumoconiosis *sua sponte* is consistent with well-established principles of judicial review discussed by the Supreme Court in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

I note that in the past the Board has recognized the merit in raising an issue *sua sponte* where that was in the interest of justice. *See Helmick v. Director, OWCP*, 9 BLR 1-161, 162 (1986). Hence, I would remand the case for reconsideration of the evidence at Section 718.304.

REGINA C. McGRANERY
Administrative Appeals Judge

[1] Although the Sixth Circuit disfavors citation of its unpublished opinions, reference to *Campbell* is appropriate here under 6th Cir. R. 28(g) because *Campbell* demonstrates the propriety of raising *sua sponte* the issue of consideration of 20 C.F.R. §718.304, where there is x-ray evidence which has not been considered in light of the regulation and which would support invocation of the irrebuttable presumption.