BRB No. 00-0217 BLA

JOHN M. ADAIR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	DATE ISSUED:
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-10) of Administrative Law Judge Daniel L. Leland (the administrative law judge) 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). In this duplicate claim, the administrative law judge found that claimant's prior claim had been finally denied by the Decision and Order of Administrative Law Judge Ralph A. Romano on June 28, 1998 as claimant failed to establish

a totally disabling respiratory impairment at Section 718.204(c). The administrative law judge found the newly submitted evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 because it established a totally disabling respiratory impairment. On the merits, the administrative law judge credited claimant with thirty-two years and two months of coal mine employment and, based on the filing date of September 9, 1997, adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) based on employer's concession. The administrative law judge also found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded. On appeal, employer challenges the findings of the administrative law judge at Sections 725.309 and 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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 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

[1] Claimant filed his initial application for benefits on July 14, 1980. *See* Director's Exhibit 38. The district director found claimant entitled to benefits. *Id.* Employer contested. *Id*. Following a hearing on the merits, Administrative Law Judge Ralph A. Romano found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c), and denied benefits. *Id*. Claimant filed his present application for benefits on March 28, 1997. *See* Director's Exhibit 1.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

Employer first contends that the administrative law judge erred in failing to consider all the evidence, both old and new, in determining whether a material change in conditions was established. We disagree. As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge properly applied the standard enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Swarrow*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. Thus, contrary to employer's argument, the administrative law judge properly reviewed only the evidence submitted following the denial of claimant's prior claim in determining whether claimant established a material change in conditions. *Swarrow*, *supra*.

Next, employer contends that the administrative law judge erred in failing to reconcile his finding of total disability with the normal objective studies. Specifically, employer contends that the administrative law judge failed to explain why he relied on the June 4, 1997 pulmonary function study as a basis for his holding that the miner was totally disabled when the record contained three more recent pulmonary function studies which were non qualifying. Employer also contends that the administrative law judge erred in relying on the

---

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

[4] In reviewing the newly submitted evidence regarding the presence of a totally disabling respiratory impairment, the administrative law judge discredited the qualifying pulmonary function studies performed on April 14, 1997 and May 27, 1997 as he found that these tests were invalid. *See* Director's Exhibits 14, 15, 17, 18, 37; Decision and Order at 7. The administrative law judge correctly concluded that the June 4, 1997 pulmonary function performed by Dr. Strother was qualifying; that the three most recent pulmonary function studies of record were valid and nonqualifying; that the new blood gas study evidence was nonqualifying; *i.e.*, tests performed on April 14, 1997 and May 13, 1998. *See* Director's Exhibit 21; Employer's Exhibit 7, and that the record contained no evidence of cor pulmonale. *See* Decision and Order at 7. Likewise, the administrative law judge concluded that Dr. Garrettson opined that claimant could perform his usual coal mine employment, that

opinions of Drs. Strother and Schaaf to find total disability when their opinions on total disability were not supported by objective testing, and that the administrative law judge erred in relying on the opinions of Drs. Ignacio, Tuteur and Bush to support a finding of total disability as there was no evidence that any of these physicians actually offered a medical opinion that claimant was disabled.

In weighing the evidence on the presence or absence of a disabling pulmonary impairment at Section 718.204(c), the administrative law judge acted within his discretion when he found it sufficient to support claimant's burden of proof. The administrative law judge's finding indicates that he relied primarily upon the medical opinions of Drs. Schaaf and Strother. In finding the reports of Drs. Schaaf and Strother reasoned and documented, the administrative law judge permissibly found that their opinions were supported by objective studies and the physical examinations they performed, as well as claimant's credible complaints of shortness of breath, his recent hospitalizations for exacerbations of shortness of breath, and his use of pulmonary medications. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996): *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, the administrative law judge did not err when he accorded determinative weight to the opinions of Drs. Schaaf and Strother as the administrative law judge may credit medical opinions of total disability when, as in the instant case, the physician explains how he diagnosed total disability despite nonqualifying objective tests, and his report is supported by other underlying documentation. *See Smith v. Director, OWCP*, 8 BLR 1-258; *Fuller v. Gilbraltar Coal Corp.*, 6 BLR 1-1291 (1984). We, therefore, affirm the finding of the administrative law judge that claimant established the presence of a totally disabling respiratory impairment at Section 718.204(c)(1)-(4), and thus, a material change in conditions at Section 725.309 as it is supported by substantial evidence and is in accordance with law.

---

although Drs. Ignacio, Tuteur and Bush did not find claimant totally disabled, they did not find that claimant was not totally disabled and capable of performing his usual coal mine employment; and that Drs. Schaaf and Strother, who are Board-certified pulmonologists in internal medicine and pulmonary diseases, *see* Director's Exhibits 29, 31; Claimant's Exhibits 3, 10; Employer's Exhibit 6, found claimant totally disabled from performing his usual coal mine employment because of a respiratory impairment. *Id.*

[5] In their depositions, both Dr. Schaaf and Dr. Strother explained, in detail, the bases for their diagnoses of a totally disabling respiratory impairment. *See* Claimant's Exhibit 10; Employer's Exhibit 6. Dr. Schaaf testified that he based his disability finding on what claimant could do functionally and the objective data. Dr. Schaaf stated that he based his total disability diagnosis on the FEV1/FVC ratio in his pulmonary function study and further explained that this ratio shows an impairment of air flow and indicates that claimant has an obstructive airways disease. *See* Claimant's Exhibit 10 at 10-11.

Turning to the administrative law judge's finding at Section 718.204(b), employer contends that the administrative law judge erred in finding the opinions of Drs. Strother, Tuteur, Bush and Garrettson hostile to the Act and therefore rejecting their opinions on the issue of causation. Specifically, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Strother, Tuteur, Bush and Garrettson as hostile to the Act since they did not foreclose the possibility that simple pneumoconiosis can be disabling.

Concerning the medical opinions at issue, employer correctly argues that the administrative law judge improperly rejected these opinions on the ground that they were hostile to the Act. A medical report can be rejected as hostile to the Act if it forecloses any possibility that simple pneumoconiosis can be disabling. *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985); *see Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989);. Accordingly, inasmuch as Drs. Strother, Tuteur, Bush and Garrettson have not stated that simple pneumoconiosis is never disabling, we vacate the administrative law judge's finding on this issue and remand for further consideration of these opinions at Section 718.204(b). *See* Employer's Exhibit 6 at 38-40; Employer's Exhibit 7, 8; Employer's Exhibit 10 at 38-39; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Next, employer contends that the administrative law judge erred in failing to reconcile the various inconsistencies in the evidence regarding claimant's smoking history. Employer contends that this error is prejudicial as the administrative law judge credited Dr. Schaaf's opinion, attributing claimant's pulmonary impairment to coal mine employment, over the opinions of Drs. Tuteur, Bush and Garrettson, attributing claimant's impairment to smoking, when Dr. Schaaf acknowledged that if he had been given the history of heavy tobacco usage, upon which the other doctors relied, he would have given greater consideration to smoking as the cause of claimant's impairment. Specifically, on deposition Dr. Schaaf acknowledged that the other physicians had elicited a heavier tobacco usage by claimant than he had, and stated that if he thought claimant had smoked two and a-half packs of cigarettes a day he would be more willing to think about smoking as a cause of claimant's respiratory problem. Claimant's Exhibit 10 at 47-48.

The administrative law judge found that claimant testified that he quit smoking in 1960 after having smoked one and one-half packs of cigarettes a day since the age of fifteen, Hearing Transcript 21-22, although claimant admitted that it was possible that he had testified to smoking two and one-half packs a day at the hearing on his previous claim. Hearing Transcript at 32-36; Decision and Order at 3. Dr. Strother found that claimant had smoked one to one and one-half packs of cigarettes a day from age fourteen to age thirty-seven. Employer's Exhibit 6 at 18; Director's Exhibits 29, 31. Dr. Bush determined that claimant had smoked cigarettes for twenty-four years until 1960 at the rate of one-half pack a

day during the week and two to two and one-half packs a day on the weekends. Employer's Exhibit 7. Dr. Tuteur found a smoking history of twenty to twenty-five years, with a few cigarettes a day during the week followed by one and one-half packages or more per day on weekends. Employer's Exhibit 9. Dr. Schaaf reported that claimant told him he had started smoking at age fifteen and smoked six to eight cigarettes a day during the week at the maximum and up to a pack and a half on weekends, but that he quit smoking in 1960. Claimant's Exhibit 3. Dr. Garrettson found that claimant stopped smoking in 1960 after smoking for thirty to thirty-four years at the rate of eight to ten cigarettes a day and more on the weekends. Employer's Exhibit 10 at 32-33.

While the physicians agree that claimant quit smoking in 1960, there are inconsistent findings regarding how heavy claimant's tobacco usage was during the time he smoked. Employer's Exhibits 6, 7, 8, 9, 10; Claimant's Exhibit 3, 10. As a finding of heavy tobacco usage could undermine the weight to be accorded Dr. Schaaf's opinion, the sole support for the administrative law judge's finding that causation was established at Section 718.204(b), we must remand the case for the administrative law judge to reconsider this evidence. *See* Claimant's Exhibit 10 at 47-48; *Tackett, supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Moreover, in evaluating the medical evidence, the administrative law judge may not substitute his opinion for that of a qualified expert. *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Employer also contends that the administrative law judge erred in discrediting Dr. Strother's causation opinion because he was the only physician who diagnosed asthma and attributed claimant's pulmonary disability to asthma. Employer contends that the administrative law judge erred in discrediting Dr. Strother's opinion on this basis in light of the fact that his opinion was thoroughly explained and in light of his high degree of expertise as a pulmonologist. Further, employer contends that the evidence of record, which documents a history of wheezing, supports Drs. Strother's diagnosis of asthma and the intermittent reversibility of the miner's pulmonary function studies is consistent with the bronchospastic nature of asthma. Employer's Brief at 12.

The administrative law judge found Dr. Strother's opinion that claimant's pulmonary disability was due to asthma suspect because: he was the only physician to make this diagnosis; Dr. Schaaf found that claimant did not have a history of wheezing or asthma; and the other physicians of record disagreed as to whether claimant's ventilatory studies were reversible. As employer contends, however, the record does contain evidence of wheezing, including Dr. Schaaf's opinion, Claimant's Exhibits 1, 3; Claimant's Exhibit 10 at 16-17; Employer's Exhibit 8; Employer's Exhibit 9; Employer's Exhibit 10 at 30-31, which the administrative law judge did not discuss in his evaluation of Dr. Strother's opinion. *See* Employer's Exhibit 6 at 21-22, 28-29. Nevertheless, as the administrative law judge reasonably rejected the opinion on the other two grounds, we affirm the administrative law

judge's finding regarding Dr. Strother's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Finally, employer argues that the administrative law judge's credibility findings regarding the medical opinion of Dr. Schaaf are insufficient as the administrative law judge has not provided the necessary findings of fact and law to support his decision to accord determinative weight to this opinion as required by the Administrative Procedure Act (APA), 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We agree. The administrative law judge's conclusory statement, "I find Dr. Schaaf's opinion on causation the most credible opinion of the record[,]" Decision and Order at 9, does not contain a sufficient discussion of the reasons and basis for the administrative law judge's finding. We, therefore, vacate the findings of the administrative law judge regarding the medical opinions at Section 718.204(b) and remand this case for further consideration of the medical opinion evidence thereunder.

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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge