BRB No. 00-0987 BLA

JAMES R. STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WELLMORE COAL CORPORATION	)	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 on Remand of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III, Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-0640) of Administrative Law Judge Michael P. Lesniak 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).[1] This case, which was adjudicated pursuant to 20 C.F.R. Part 718 (2000), is on appeal before the Board for the third time.[2] The procedural history of this case is not dispositive herein and is set forth in the Board's prior decision, *Stiltner v. Wellmore Coal Corp.*, BRB No. 98-0337 BLA, *slip op*. at 2 n.1 (Jun. 22, 1999)(unpub.). In that decision, the Board rejected employer's assertions that the administrative law judge impermissibly rejected its request to have claimant reexamined and that the administrative law judge failed to properly conduct a *de novo* review of the evidence on modification. *Stiltner*, *slip op.* at 4-5. The Board, however, vacated the Decision and Order on Modification of the administrative law judge awarding benefits and, remanded the case for further consideration inasmuch as the administrative law judge failed to address the newly submitted medical opinion of Dr. Tuteur, which if fully credited, could support a finding of modification pursuant to 20 C.F.R. §725.310 (2000). *Id.* at 5.

Subsequently, employer filed a timely Motion for Reconsideration and Suggestion for Rehearing *En Banc* of the Board's Decision and Order. Granting employer's request, the Board reconsidered its decision *en banc*. However, the Board rejected employer's argument that it had an absolute right to compel claimant to respond to discovery requests, other requests for medical evidence, or further interrogatories based on its petition for modification in accordance with the holding in *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999). *Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(*en banc*). Accordingly, the Board reaffirmed its previous holding that the administrative law judge properly rejected employer's request to have claimant reexamined pursuant to its petition for modification, but nevertheless, remanded the case to the administrative law judge for consideration of the

[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, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is James R. Stiltner, the miner, who filed his application for benefits on February 7, 1986. Director's Exhibit 1.

opinion of Dr. Tuteur in conjunction with the other medical opinions of record. *Ibid*.

On remand, the administrative law judge considered Dr. Tuteur's opinion *de novo* in conjunction with the other medical opinions of record and found that because Dr. Tuteur's opinion was insufficient to support a mistake in a determination of fact, employer failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established and awarded benefits. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded. The Director's brief, dated May 14, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations pursuant to 20 C.F.R. §§718.201, 718.202, and 718.204(c). Although employer argues that the revised regulations set forth at 20 C.F.R. §718.104(d) (requiring special consideration to the opinions of treating physicians), and 20 C.F.R. §718.204(a)(specifying that a non-respiratory disability is irrelevant in determining whether a miner is totally disabled due to pneumoconiosis) will not affect the outcome of this case inasmuch as the evidence in the instant case was developed prior to the effective date of the revised regulations and there is no non-pulmonary condition at issue herein, employer asserts that the revised regulations set forth at 20 C.F.R. §718.204(c)(1), (stating that a "miner should be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment") and 20 C.F.R. §718.201(a)(2) and (c), defining pneumoconiosis as any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment and as a latent and progressive disease, will impact the outcome of the case inasmuch as the regulations create a new disability causation standard and will affect remand instructions given by the Board to the administrative law judge.

Claimant has not responded to the Board's order.[3] Having considered the briefs submitted by the parties, and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of 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 the 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).

Employer first contends that the administrative law judge erroneously failed to weigh the medical opinions of record when finding that claimant established the existence of pneumoconiosis. Consequently, employer argues that the administrative law judge's failure to explain which medical opinions he credited and discredited violates the requirement in the Administrative Procedure Act (APA), 5 U. S. C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), that a decision contain the administrative law judge's findings of fact and conclusions of law. We disagree.

In accordance with the Board's remand instruction, the administrative law judge thoroughly discussed the opinion of Dr. Tuteur, conducted a *de novo* review of this opinion in conjunction with the other medical opinion evidence and provided an ample discussion of his reasons for discrediting Dr. Tuteur's opinion. Accordingly, we reject employer's argument that the administrative law judge's consideration of the medical opinion evidence does not comply with the APA. Furthermore, the administrative law judge's credibility determinations regarding Dr. Tuteur's opinion in addition to his explicit statement that he conducted "a *de novo* review of all the evidence of record," complies with the standard for consideration of the evidence on modification articulated in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[3] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Employer contends further that the administrative law judge failed to weigh the physicians' opinions diagnosing the existence of pneumoconiosis in light of the reliance of these physicians' on positive x-ray interpretations that were found to be outweighed by negative interpretations pursuant to Section 718.202(a)(1)(2000). Addressing this issue in both the 1997 Decision and Order on Modification and the 2000 Decision and Order on Remand on appeal herein, the administrative law judge properly concluded that a physician's opinion may not be discredited under Section 718.202(a)(4)(2000) simply because it is based in part on a discredited positive x-ray interpretation. *See Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13-14 (1996); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-1-47 n.2 (1986); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984). The administrative law judge is not required to find a physician's opinion unreasoned merely because he relies in part on objective evidence which is contrary to the other objective evidence of record. *Church*, *supra*. Rather, the administrative law judge must consider each report to determine if that report's underlying documentation supports the conclusions of that physician. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993). However, in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 20, BLR (4th Cir. 2000), a recent decision by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, holding that all relevant evidence must be weighed together in determining the existence of pneumoconiosis, this case must be remanded for reconsideration of all evidence relevant to the existence of pneumoconiosis pursuant to the standard set forth in *Compton*, *supra*.[4]

We turn next to employer's challenge of the administrative law judge's determination that claimant established total disability due to pneumoconiosis. Employer argues that the administrative law judge failed to conduct a *de novo* review of the evidence in accordance with the APA and merely relied on the weighing of the previously submitted evidence by Administrative Law Judge Clement J. Kichuk contained in the initial Decision and Order dated August 13, 1993. *See* Director's Exhibit 95.

As the Board stated previously in this case, the standard pronounced by the Fourth Circuit court mandates that the administrative law judge perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, in determining whether modification is established. *See Stiltner*, BRB No.98-0337 BLA, *slip op.* at 4-5; *citing Jessee*, *supra*; *see also Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In the instant case, the administrative law judge explicitly stated that he conducted "a *de novo* review of all the evidence of record," that he considered Dr. Tuteur's opinion in conjunction with the other physician opinion evidence, and the administrative law

[4] Inasmuch as the miner's most recent coal mine employment occurred in the state of Virginia, the case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2.

judge stated that Judge Kichuk's determination was based on "substantial, well-reasoned medical evidence of record." Decision and Order on Remand at 4. Moreover, the administrative law judge provided the rationale for his finding that the opinion of Dr. Tuteur, a newly submitted opinion that was not previously considered by Administrative Law Judge Kichuk, was worthy of little weight. *Ibid*. Thus, the administrative law judge's consideration of the evidence in this manner is sufficient under the standard enunciated in *Jessee*, *supra*, and the APA and we reject employer's argument that he failed to properly engage in a *de novo* review.

Employer additionally asserts that even though Dr. Tuteur's qualifications were not in the record, other than the notation on his report that he is an Associate Professor of Medicine in the Pulmonary Disease Division, the administrative law judge erroneously failed to accept Dr. Tuteur as a "highly respected pulmonary expert" because there was no evidence of record to refute his qualifications which have been established by case law and frequently cited in various decisions by the courts of appeals. Contrary to employer's assertion, however, it is the burden of the party proffering a physician's report and relying on the expertise of that physician to provide evidence of the physician's expertise or experience, and the administrative law judge is not required to go outside the record to determine a physician's qualifications. *See Rankin v. Keystone Coal Mining Co.*, 8 BLR 1-54 (1985); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Casey v. Director, OWCP*, 7 BLR 1-873 (1985); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730, 1-733-734 (1983). We, therefore, reject employer's allegation of error.

Nevertheless, we are compelled to vacate the administrative law judge's Decision and Order on Remand on the issue of causation, and again remand the case for further consideration of this issue. Employer contends that the administrative law judge improperly discounted the disability causation opinion of Dr. Tuteur on the ground that Dr. Tuteur did not diagnose the existence of pneumoconiosis, contrary to the administrative law judge's finding, that the existence of pneumoconiosis was established. Employer points out that when, as here, a physician makes an alternative finding, that even if claimant had pneumoconiosis, he would still be disabled due to his cigarette smoking, such opinion is not premised on the belief that claimant does not have pneumoconiosis, and is probative on the causation issue. We agree.

In a report dated October 22, 1996, Dr. Tuteur opined that the miner's totally disabling respiratory impairment was due solely to cigarette smoke-induced chronic obstructive pulmonary disease. Director's Exhibit 122. Dr. Tuteur went on, however, to conclude that, even assuming that the miner had evidence of simple coal workers' pneumoconiosis, any pulmonary impairment claimant had was the result of cigarette smoking and was neither caused nor aggravated by coal workers' pneumoconiosis or coal dust exposure. *Ibid*.

Although a physician's opinion regarding the etiology of a miner's total respiratory disability is deprived of probative value where the underlying premise of that medical opinion is wrong, *e.g.*, that claimant's disability is not due to pneumoconiosis, when the evidence has already been found to have established the existence of pneumoconiosis, *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *accord Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), an opinion which acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant and probative 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, 2-315-316 (4th Cir. 1995), *citing Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

In the instant case, the administrative law judge found that Dr. Tuteur's opinion was entitled to less weight because he "did not find [that] the miner suffers from pneumoconiosis." Decision and Order on Remand at 4. In so doing, however, the administrative law judge did not consider Dr. Tuteur's opinion in its entirety. Specifically, Dr. Tuteur stated that even assuming claimant had evidence of simple coal workers' pneumoconiosis, he considered any pulmonary impairment claimant had was the result of chronic inhalation of tobacco smoke from cigarettes and was neither caused nor aggravated by coal workers' pneumoconiosis or coal dust exposure. Director's Exhibit 122. Because Dr. Tuteur's opinion in its entirety regarding the cause of the miner's total respiratory disability constitutes probative evidence which warrants due consideration by the administrative law judge, we must vacate the administrative law judge's determination that claimant established total disability due to pneumoconiosis and remand the case for further consideration of the medical opinion evidence. *See Compton*, *supra*; *Ballard*, *supra*; *Hobbs*, *supra*. In particular, the administrative law judge must discuss the opinion of Dr. Tuteur in its entirety and assess the weight, if any, to assign it in relation to the other physicians' opinions of record.

Therefore, on remand, the administrative law judge must explain his weighing of Dr. Tuteur's opinion and render a decision that adequately sets forth his weighing of all of the medical opinion evidence in determining whether there is a mistake in fact in the previous determination on causation. 20 C.F.R. §718.204(c). Likewise, as employer contends, the administrative law judge must consider and discuss the evidence attributing claimant's total respiratory disability to claimant's heavy cigarette smoking history in determining whether claimant was totally disabled due to pneumoconiosis. *See Arnold v. Secretary of HEW*, 567 F.2d 258, 259 (4th Cir. 1977).

Further, on remand as employer contends, the administrative law judge must consider Dr. Tuteur's opinion pursuant to *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). The administrative law judge accorded less weight to Dr. Tuteur's opinion because his statement that coal dust inhalation and the resulting pneumoconiosis do not produce an obstructive defect is contrary to the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).[5] Employer contends, however, that the administrative law judge erred in according little weight to Dr. Tuteur's opinion because Dr. Tuteur's statement that "the inhalation of coal mine dust does not regularly produce obstructive physiology," Director's Exhibit 122, does not exclude the possibility that pneumoconiosis can cause airway obstruction and because Dr. Tuteur based his opinion on several factors in reaching his causation diagnosis.

[5] Based on his review of the evidence dated October 22, 1996, Dr. Tuteur opined that claimant does not have coal workers' pneumoconiosis, but instead has cigarette-smoke induced chronic obstructive pulmonary disease sufficient to preclude him from continuing coal mine work. Director's Exhibit 122.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge