BRB No. 99-0286 BLA

GROVER MUNCY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
WOLF CREEK COLLIERIES	)	
	)	
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 - Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Susie Davis (Kentucky Black Lung Association), Pikeville, Kentucky, for claimant.

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

Jennifer U. Toth (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (95-BLA-1447) of Administrative Law Judge Paul H. Teitler 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). This case is before the Board for the second time. In an initial Decision and Order dated January 10, 1997, the administrative law judge credited claimant with twenty-nine years of coal mine employment based upon the stipulation of the parties, and considered the instant claim, which was filed on March 4, 1994, pursuant to the applicable regulations at 20 C.F.R. Part 718. The administrative law judge found that, although the existence of pneumoconiosis was not established

under 20 C.F.R. §718.202(a)(1)-(3), the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the rebuttable presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment, which the administrative law judge found was not rebutted. The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b). Consequently, the administrative law judge awarded benefits. Employer appealed, challenging the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c)(4), (b). Employer contended, *inter alia*, that the administrative law judge erred in not considering Dr. Dahhan's opinion, which was included among Employer's Exhibits 3-28 that were admitted into evidence at the hearing, which was held on January 23, 1996. The Board vacated the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c)(4), (b), and remanded the case "for reconsideration and/or to allow the administrative law judge to provide reasons for excluding and/or not considering Employer's Exhibits 3-28...." *Muncy v. Wolf Creek Collieries*, BRB No. 97-0690 BLA (Dec. 22, 1997)(unpublished). The Board also instructed the administrative law judge to reconsider all of the relevant medical opinion evidence of record under Section 718.202(a)(4); specifically, "to resolve the conflicts in the opinion of Dr. Guberman with the opinions of Drs. Younes and Broudy...and [to] resolve the inconsistency in his weighing of the opinions of Drs. Clarke and Wells under subsection (a)(4) as opposed to Section 718.204(c) when reconsidering the medical opinion evidence under subsection (a)(4)." *Id*. at 5. The Board further instructed the administrative law judge to weigh, if reached on remand, all of the relevant evidence, like and unlike, pursuant to Section 718.204(c), *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), and to reconsider the relevant evidence under Section 718.204(c)(4), (b), resolving the conflict in the opinion of Dr. Guberman with the opinions of Drs. Younes and Broudy. *Muncy, supra*.

On remand, the administrative law judge stated that he would exclude Employer's Exhibits 3-28 from consideration on remand because employer had ample opportunity to remedy the loss of these exhibits, which were lost or misplaced in transit from the hearing, by forwarding copies to the Office of Administrative Law Judges (OALJ), but failed to do so. The administrative law judge then determined again on remand that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), and total disability due to pneumoconiosis under Section 718.204(c), (b).[1] The administrative law judge thus awarded benefits. On appeal, employer argues that the case must be remanded for the administrative law judge to consider Employer's Exhibits 3-28. Employer further challenges the administrative law judge's weighing of the evidence under Sections 718.202(a)(4) and 718.204(c)(4), (b), as well as the administrative law judge's finding as to the date from which benefits commence. Claimant responds in support of the award of benefits.[2] The Director, Office of

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

[2]Claimant's response was filed on claimant's behalf by Susie Davis of the Kentucky Black Lung Association of Pikeville, Kentucky, but Ms. Davis is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995).

Workers' Compensation Programs (the Director), has filed a letter brief, agreeing with employer that the case must be remanded to the administrative law judge for consideration of Employer's Exhibits 3-28. The Director indicates he does not intend to address the remaining issues raised on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Initially, we agree with employer and the Director that fundamental fairness mandates remanding this case to the administrative law judge for consideration of Employer's Exhibits 3-28, which include Dr. Dahhan's medical opinion. Employer's Exhibit 3. The administrative law judge stated that while there was "possible blame on [his] part in losing the exhibits in transit, the fact remains that without the actual exhibits at hand, [he] could not consider them." Decision and Order on Remand at 2. The administrative law judge noted that his legal technician sent Mr. Reynolds – who had been employer's counsel at the hearing and until February 1997, at which time employer's present counsel entered her appearance – two letters, dated August 1, 1996 and September 12, 1996, providing notice that the exhibits had been lost and requesting that Mr. Reynolds resubmit them within thirty days. *Id*. The administrative law judge noted that Mr. Reynolds did not respond on either occasion. Thus finding that employer had ample opportunity to resubmit the exhibits, but chose not to respond, the administrative law judge essentially found that employer waived consideration of the exhibits. *Id*.

Employer's present counsel asserts that neither she nor employer received notice from the administrative law judge that the exhibits had been lost, and never received the administrative law judge's request that the exhibits be resubmitted. Employer contends that only Mr. Reynolds was served with the notice and request. Employer has attached to its brief an affidavit from Richard H. Risse, an attorney associated with employer's present counsel, stating that in January 1997, he went to Mr. Reynolds' office and "discovered dozens of files in disarray covering the floor and shelves," and that between January 27, 1997 and February 3, 1997, he "recovered 152 Zeigler files from Reynolds' office." Petition for Review and Brief, Exhibit B. Mr. Risse further stated that in March 1997, Mr. Reynolds' former secretary dropped off at his (Mr. Risse's) office "dozens of items of mail received by Reynolds' office from April 1996 through March 1997, which had not been associated with the files." *Id*. Employer has attached also an affidavit from Dan Beatty, an associate attorney in Mr. Reynolds' office in 1996, who stated that he last saw Mr. Reynolds come to work at the office "on or around May 18, 1996." Petition for Review and Brief, Exhibit A. Employer thus contends that Mr. Reynolds had been neglecting employer's files and essentially abandoned his law practice, and that any indication of the administrative law judge's request for employer to resubmit Employer's Exhibits 3-28 was consequently absent from the file obtained by employer's present counsel in February 1997, upon counsel's entry of appearance. Employer further asserts that the administrative law judge compounded the problem on remand by serving a briefing schedule order dated March 6, 1998 on Mr. Reynolds, rather than on employer's current counsel. Employer contends that the failure to serve the order on employer's present counsel effectively deprived employer of any ability to resubmit the exhibits at issue, or to explain to the administrative law judge

why he had received no response to his letters from Mr. Reynolds. Employer's Brief at 12. We hold that, under the circumstances of this case, employer was, albeit inadvertently, denied procedural due process, and that fundamental fairness requires that the case be remanded to the administrative law judge for employer to be afforded an opportunity to resubmit Employer's Exhibits 3-28. *See Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577, 1-579 (1984). On remand, the administrative law must consider Dr. Dahhan's report, which is included among those exhibits, in weighing the relevant evidence under Sections 718.202(a)(4) and 718.204(c), (b).

We next address employer's contentions regarding the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c), (b), as well as employer's challenge to the administrative law judge's finding regarding the date from which benefits commence, in order to avoid any repetition of error on remand. Employer contends that the administrative law judge failed to follow the Board's remand instruction to resolve the conflict between Dr. Guberman's opinion and the opinions of Drs. Broudy and Younes, and to resolve the inconsistency in his weighing of the opinions of Drs. Clarke and Wells under Section 718.202(a)(4) and Section 718.204(c)(4). Noting that the administrative law judge found all of the opinions of record to be well reasoned and documented, employer argues that the administrative law judge improperly found the opinions of Drs. Guberman, Clarke and Wells most persuasive solely because those opinions were consistent with the administrative law judge's personal view of the evidence. Employer thus argues that the administrative law judge merely substituted his own opinion for that of the medical experts. Employer's contentions lack merit.

On remand, the administrative law judge properly stated that the opinions of Drs. Broudy and Younes did not support a finding of pneumoconiosis, notwithstanding each physician's finding that claimant's blood gas studies exhibited hypoxemia, since Dr. Broudy specifically found that claimant did not suffer from pneumoconiosis, and Dr. Younes found no evidence of pulmonary disease. Decision and Order on Remand at 3; Director's Exhibit 10; Employer's Exhibit 1. The administrative law judge on remand thus properly characterized the opinions, as instructed by the Board.[3] *See Muncy v. Wolf Creek Collieries*, BRB No. 97-0690 BLA (Dec. 22, 1997)(unpublished), slip op. at 4-5. Contrary to employer's contention, the administrative law judge properly resolved the conflict posed by the medical opinion evidence at Section 718.202(a)(4) by finding the opinions of Drs. Guberman, Wells and Clarke, which indicate that claimant has pneumoconiosis, to be more

[3]The Board held previously that the administrative law judge erred in finding that the opinions of Drs. Younes and Broudy established the existence of pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, without considering the fact that while Drs. Younes and Broudy, like Dr. Guberman, found that claimant's blood gas study results indicated hypoxemia, Dr. Younes found no evidence of pulmonary disease, and Dr. Broudy found that claimant's dyspnea was non-pulmonary in origin. *Muncy v. Wolf Creek Collieries*, BRB No. 97-0690 BLA (Dec. 22, 1997)(unpublished), slip op. at 4-5. The Board held that the administrative law judge thus did not resolve the conflicts in the opinions of Drs. Guberman, Younes and Broudy as to the cause of the hypoxemia revealed on claimant's blood gas study results. *Id.*

persuasive than the contrary opinions of Drs. Broudy and Younes because the opinions of Drs. Guberman, Wells and Clarke were better reasoned and documented. Decision and Order on Remand at 4; Director's Exhibits 10, 15; Employer's Exhibit 1; ALJ Exhibit 1. We are unpersuaded by employer that the administrative law judge substituted his opinion for those of Drs. Broudy and Younes. The administrative law judge properly found that the opinions of Drs. Guberman, Wells and Clarke were well reasoned, not because they were consistent with his opinion, but because the underlying bases upon which these physicians relied, including an accurate coal mine employment history of twenty-eight years and the absence of a smoking history, reasonably led them to *their* shared conclusion that claimant has pneumoconiosis. *Id.* Whether a medical opinion is documented and well reasoned is for the administrative law judge as fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We, therefore, reject employer's contention that the administrative law judge failed to resolve the conflicting evidence under Section 718.202(a)(4), and we further reject employer's argument that the administrative law judge provided improper reasons for relying upon the opinions of Drs. Guberman, Wells and Clarke in finding the existence of pneumoconiosis established thereunder. Nonetheless, the administrative law judge's finding pursuant to Section 718.202(a)(4) is vacated for the administrative law judge to weigh the opinion of Dr. Dahhan against the other medical opinions once Employer's Exhibits 3-28 are resubmitted into the record on remand, as discussed *supra*.[4]

Employer also contends that the administrative law judge erred in failing to weigh all of the evidence, like and unlike, together under Section 718.204(c)(1)-(4) before concluding whether claimant established total disability, contrary to the requirements of *Shedlock, supra*. We agree. The administrative law judge appears not to have weighed the single qualifying arterial blood gas study of record against the two non-qualifying studies or the other contrary evidence under Section 718.204(c)(1) and (c)(4). It appears that the administrative law judge's conclusion that the qualifying blood gas study, which was administered on March 10, 1994, established total disability under Section 718.204(c)(2) was made summarily. Decision and Order on Remand at 5-6. For that

[4]Employer is correct that the administrative law judge should consider the relative qualifications of all of the physicians of record when he reconsiders this evidence on remand in light of Dr. Dahhan's opinion. This factor, however, is not dispositive as the administrative law judge is not required to credit or discount the opinion of a physician solely based upon the physician's credentials. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998).

reason, and in light of our remand instruction that the administrative law judge consider Dr. Dahhan's opinion, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability under Section 718.204(c)(2) and (c)(4). On remand, the administrative law judge should consider the evidence consistent with *Shedlock*. In vacating the administrative law judge's finding under Section 718.204(c)(4), however, we are unpersuaded by employer's argument that the administrative law judge erred in failing to compare the exertional demands of claimant's coal mine employment against the opinions of Drs. Wells, Clarke and Guberman in finding that these opinions support a finding that claimant is totally disabled. Employer's contention is misplaced. Rather than listing physical limitations, which would have to be compared to the exertional requirements of claimant's job before total disability could be inferred, *see DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988), each of these physicians clearly opined that claimant has a totally disabling respiratory impairment, and thus the doctors' opinions need not have included a comparison of physical limitations to exertional requirements. Director's Exhibit 15; ALJ Exhibit 1.

Employer also contends that the administrative law judge improperly weighed the medical opinions under Section 718.204(b). Contrary to employer's contention, however, the administrative law judge properly credited Dr. Guberman's opinion that claimant has a totally disabling pulmonary impairment due to coal dust exposure, ALJ Exhibit 1, as bolstered by Dr. Clarke's shared opinion on the basis that these opinions were well reasoned and documented. *See Clark, supra*; *Tackett, supra*; Decision and Order on Remand at 7. Dr. Guberman's opinion is not, as employer suggests, merely an opinion advising against further coal dust exposure. ALJ Exhibit 1. Furthermore, the administrative properly discounted Dr. Broudy's opinion under Section 718.204(b) because Dr. Broudy's finding that claimant is not totally disabled was contrary to the administrative law judge's determination, and the administrative law judge properly rejected Dr. Younes' opinion under Section 718.204(b) because Dr. Younes' opinion that claimant does not suffer from pneumoconiosis was belied by the administrative law judge's contrary finding. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); Decision and Order at 7; Director's Exhibit 10; Employer's Exhibit 1. Nonetheless, inasmuch as we have vacated the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c) for the reasons discussed *supra*, we vacate the administrative law judge's finding under Section 718.204(b) and remand for the administrative law judge to reconsider all of the relevant evidence thereunder, if reached.

Finally, we agree with employer that the administrative law judge improperly determined the date from which benefits commence. If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. See 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

In the instant case, the administrative law judge determined, without weighing or discussing the relevant evidence, that the record "does not contain any medical evidence establishing that the miner was not totally disabled at some point subsequent to his filing date." Decision and Order on Remand at 8. Employer contends correctly that this summary determination does not satisfy 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 McCune v. Central Appalachian Coal* Co., 6 BLR 1-996, 1-998 (1984); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). On remand, the administrative law judge must discuss the relevant evidence to determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis.[5] *Krecota, supra.*

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding

[5]We note that the onset date is not established, in and of itself, by the first medical opinion establishing total disability due to pneumoconiosis, since the first such medical opinion only indicates that the miner became totally disabled due to pneumoconiosis at some point prior to it. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge