BRB No. 00-0779 BLA

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

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Judith E. Kramer, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-423) of Administrative Law Judge Rudolf L. Jansen denying 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).[1] This case is before the Board for a second time.[2] In the prior appeal, the Board

[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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not

affected by the amendments.

[2] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on May 2, 1973 which SSA denied on March 27, 1974. Director's Exhibit 11. On November 11, 1978, claimant elected SSA review of his claim under the 1977 Amendments to the Act. *Id*. SSA denied the claim and forwarded the claim to the Department of Labor (DOL) for review. *Id*. DOL denied the claim on April 20, 1982 on the grounds that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Claimant took no further action on this claim.

Claimant filed the present claim on November 4, 1987 which the district director denied on April 18, 1988. Director's Exhibits 1, 7. In July 1988, claimant mailed two letters regarding his claim. Director's Exhibits 7, 8. The district director treated these letters as a request for modification which was denied on August 15, 1988. Director's Exhibit 10. Claimant appealed the district director's denial of his claim to the Board. By Order dated June 14, 1990, the Board remanded this case to the Office of Administrative Law Judges for hearing pursuant to *Lukman v. Director, OWCP*, 896 F.2D 1248, 13 BLR 2-332 (10th Cir. 1990), *rev'g Lukman v. Director, OWCP*, 10 BLR 1-56 (1987); *Dotson v. Director, OWCP*,

affirmed Administrative Law Judge Huddleston's denial of benefits in this duplicate claim. Judge Huddleston, applying the standard enunciated in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), found the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, credited claimant with seventeen years of coal mine employment, but found on the merits, that the evidence was insufficient to establish the existence of pneumoconiosis and insufficient to demonstrate the presence of a totally disabling respiratory impairment. On reconsideration, however, the Board vacated the Decision and Order of Judge Huddleston in light of the Director's concession that he had not fulfilled his statutory obligation to provide claimant with a complete and credible pulmonary evaluation in order to substantiate his claim, vacated the administrative law judge's Decision and Order and remanded the case to the district director for further development of the medical evidence. *See Broughton v. Director, OWCP*, BRB No. 92-1651 BLA (Order Granting Reconsideration Mar. 6, 1996)(unpub.).

On remand, the district director again denied benefits after providing claimant with a pulmonary evaluation. Director's Exhibit 14. Following a hearing, Administrative Law Judge Rudolf L. Jansen (the administrative law judge) credited claimant with eight years and seven months of coal mine employment and applied the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1993), to find the newly submitted evidence insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, and therefore a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant contends "that the Decision and Order denying benefits must be vacated and this matter remanded to the Office of the District Director with instructions that [claimant] be provided with a complete pulmonary evaluation to develop evidence relevant to a determination of his entitlement to benefits." Claimant's Brief at 1. Alternatively, claimant contends that the findings of the administrative law judge on the issues of length of coal mine employment, existence of pneumoconiosis, presence of a totally disabling respiratory impairment and material change in conditions are not supported and must be reversed. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand arguing that because he had conceded the existence of legal pneumoconiosis on the last appeal of this case, claimant has established both the existence of pneumoconiosis and a material change in conditions and that the administrative law judge's findings on these issues must, therefore, be reversed as these elements were not properly at issue before either the

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14 BLR 1-10 (1990). *See Broughton v. Director, OWCP*, BRB No. 88-3042 BLA (Jun. 14, 1990) (unpub.).

district director or the administrative law judge. The Director further asserts, contrary to claimant's argument, that Dr. Simpao's opinion is credible and therefore satisfies the Director's obligation to provide a complete, credible pulmonary evaluation. Nonetheless, he agrees with claimant insofar as claimant contends that the administrative law judge's finding of total disability must be vacated and the case remanded for further consideration of the evidence relevant to that issue. Moreover, contrary to claimant's argument, the Director contends that, it is not necessary for the Board to address whether the opinion of a reviewing physician, in this instance Dr. Burki, is sufficient to satisfy his obligation to provide a complete, credible pulmonary evaluation because Dr. Simpao's opinion is credible. The Director concedes, however, that should the administrative law judge find total disability established, on remand, then the disability is due at least in part to pneumoconiosis.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, 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 March 2, 2001, to which claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by claimant and the Director and our review, 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 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 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(2000). Failure to establish any one of these elements precludes entitlement.[3] *Trent v. Director, OWCP*, 11 BLR 1-26

[3] 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*).

(1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, claimant asserts that the administrative law judge is collaterally estopped from readjudicating the issue of length of coal mine employment. We disagree. For the doctrine of collateral estoppel to apply, there must be a previous final and valid judgment. *See Sedlock v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). As there has not been a final judgment in the present case, the administrative law judge permissibly reconsidered the issue of the length of claimant's coal mine employment on remand as the Board had vacated Judge Huddleston's prior Decision and Order. *Id*. In considering the issue, therefore, the administrative law judge acted within his discretion when he credited claimant with eight years and seven months of coal mine employment based on claimant's Social Security records, which reflected at most, one year of coal mine employment, and his hearing testimony which provided additional facts regarding claimant's coal mine employment. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984). We, therefore, affirm the findings of the administrative law judge on the length of coal mine employment.

Claimant and the Director contend that the administrative law judge should not have considered the issues of the existence of pneumoconiosis and a material change in conditions on remand, as the Director had previously conceded these issues.[4] We agree. As the Director's concession is binding, the administrative law judge improperly reconsidered the issue of the existence of pneumoconiosis on remand. *See* 20 C.F.R. §725.463(a); *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). We, therefore, vacate the findings of the administrative law judge at Section 718.202(a). Moreover, inasmuch as the existence of pneumoconiosis was conceded, claimant has established a material change in conditions pursuant to Section 725.309 as a matter of law. *See* 20 C.F.R. §725.309; *Ross*, *supra*.

Claimant next contends that if the Board affirms the administrative law judge's findings that neither Dr. Baker nor Dr. Simpao provided reasoned opinions on the issue of total disability, as they were the only physicians who examined claimant in the course of the proceedings on his claims and Dr. Burki's opinion could not satisfy the Director's statutory obligation inasmuch as he was only a reviewing physician, the case must again be remanded to the district director with instructions to provide claimant a full, complete, credible pulmonary evaluation. Alternatively, claimant argues that the administrative law judge erred

[4] The Director has conceded that claimant established the existence of pneumoconiosis based on the medical examinations and reports of Drs. Simpao and Baker. *See* Director's Exhibit 12 at p. 57-58. *Id*. at p. 39, fn.7.

in his evaluation of the medical opinions evidence on the issue of total disability.[5]

The administrative law judge found that Dr. Baker's opinion, that claimant had only a mild impairment, was insufficient to support a finding of total disability inasmuch as "it [was] vague and suggest[ed] only a minor [sic] impairment." Decision and Order at 12. In light of the Sixth Circuit's holding in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, BLR 2-
(6th Cir. 2000), however, that even a mild respiratory impairment may preclude the performance of the miner's usual duties, depending on the exertional requirements of those duties, the administrative law judge erred in rejecting Dr. Baker's opinion because his diagnosis of a mild impairment was *per se* insufficient to establish total disability. We, therefore, vacate the administrative law judge's finding on total disability and remand for reconsideration of the evidence thereunder. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-108 (6th Cir. 1983). Moreover, inasmuch as Dr. Baker's opinion could, if credited, establish total disability, it satisfies the Director's obligation to provide claimant a complete, credible pulmonary evaluation. *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

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[5] Subsequent to Dr. Baker's examination of claimant in February of 1991, counsel for the Director conceded that it had failed to fulfill its statutory obligation of providing claimant with a complete, credible pulmonary evaluation because Dr. Baker's opinion failed to address disability inasmuch as it did not indicate whether claimant's mild pulmonary impairment would prevent him from performing his usual coal mine employment. Director's Brief at 5 n.4. Accordingly, claimant was examined by Dr. Simpao on May 28, 1996. Dr. Baker's opinion, however, lists claimant's job title and description of job's physical requirements as: underground: continuous miner 2 years 1970's; underground: run motor off and on 3 years 1969; underground: continuous miner (8-10 months); and hand loaded 10-11 years. Director's Exhibit 12.

As to Dr. Simpao's opinion, claimant argues that the administrative law judge improperly found it to be equivocal based on Dr. Simpao's use of the word "think" when discussing claimant's ability to perform his usual coal mine employment. The Director, contends that Dr. Simpao's medical opinion is sufficiently definitive and that the case must be remanded for the administrative law judge to properly evaluate Dr. Simpao's opinion.

On deposition, Dr. Simpao was asked to assume that claimant's coal mine employment required bending and lifting and involved general manual labor. Dr. Simpao was then asked if claimant would have the pulmonary capacity to do general labor of an underground miner based on his physical examination and pulmonary function studies. Dr. Simpao responded "I don't think so. No sir." Claimant's Exhibit 2 at 11-12.

In addition to the above asked question and response, however, the record also reflects the following exchange:

> "Has claimant contracted an occupationally related pulmonary disease that is the result of his coal mine employment?"
> "Yes sir."
> "Does claimant have an impairment as a result of that, that would prevent him from performing the regular labor of coal mine employment?"
> "Yes sir."

Id. at 18.

Accordingly, inasmuch as it is not clear that the administrative law judge considered all of Dr. Simpao's testimony, we remand this case for the administrative law judge to reconsider both the medical opinion and deposition testimony of Dr. Simpao in its entirety. *See Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990)(*en banc*); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). If the administrative law judge determines that Dr. Simpao's opinion is not equivocal, he must also assess its credibility by determining whether it is reasoned and documented. Inasmuch as we hold that Dr. Baker's opinion satisfies the Director's obligation to have provided claimant with a complete credible pulmonary evaluation, we need not reach that issue with regard to Dr. Simpao's opinion, or Dr. Burki's opinion.

Claimant next argues that the administrative law judge's reasons for crediting the report of Dr. Burki cannot be affirmed. Specifically, claimant contends: that Dr. Burki did not provide a rationale for his finding of no impairment when he said "see previous note"; that the record does not support Dr. Burki's determination that claimant gave suboptimal effort on the May 28, 1996 pulmonary function study; that Dr. Burki provided no explanation and reasoning for his finding of suboptimal effort in claimant's pulmonary function studies;

and that the administrative law judge erred in treating the reports of Drs. Burki and Simpao unequally when he rejected the report of Dr. Simpao for the same reasons he accepted Dr. Burki's report. We agree with claimant that the administrative law judge failed to consider the explanations provided by Dr. Burki for reaching his finding of no impairment and provided irreconcilable reasons for crediting and discrediting the medical reports of Drs. Burki and Simpao. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we vacate the administrative law judge's crediting of the medical opinion of Dr. Burki for the reason given and remand this case for the administrative law judge to reconsider the opinion along with all other relevant evidence on total disability. *See Fields*, *supra*.

If, on remand, the administrative law judge finds that claimant has demonstrated the presence of a totally disabling respiratory impairment, claimant will be entitled to benefits as the Director has conceded that claimant's totally disabling respiratory impairment is due to pneumoconiosis, and we need not consider claimant's arguments concerning the credibility of Dr. Burki's opinion on causation.

Accordingly, the Decision and Order of the administrative law judge denying 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge