BRB Nos. 00-0815 BLA and
00-0815 BLA-A

VARIS CANFIELD	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MAJESTIC MINING, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jerome R. Novobilski, Clay, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (97-

BLA-1653) of Administrative Law Judge Clement J. Kennington on a duplicate claim[1] 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).[2] This case is before the Board for the second time. Pursuant to employer's prior appeal, the Board vacated the administrative law judge's decision awarding benefits because "the administrative law judge did not render a threshold determination of whether the newly submitted evidence was sufficient to establish total disability due to pneumoconiosis...and thus, a material change in conditions." Board's Decision and Order at 3. The Board further held that if the administrative law judge found a material change in conditions established on remand, he must make a determination on the merits. Because the case was being remanded, the Board also addressed allegations that the administrative law judge erred in his consideration of the evidence regarding the existence of pneumoconiosis, total disability due to pneumoconiosis and onset of disability. Board's Decision and Order at 3. The Board held that the prior finding, that claimant had established the existence of pneumoconiosis, could not stand in light of *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), since it was based on the true

[1] Claimant filed his first application for benefits on January 8, 1972, which was denied by the district director on June 26, 1981. Director's Exhibit 28. Claimant did not pursue this claim further. Subsequently, claimant filed a duplicate application for benefits on January 29, 1986, which was denied by Administrative Law Judge Thomas M. Burke in a Decision and Order dated November 7, 1991. Director's Exhibit 28. Claimant appealed and the Board affirmed Judge Burke's findings regarding length of coal mine employment and that claimant established pneumoconiosis arising out of coal mine employment and total disability inasmuch as these findings were unchallenged on appeal. Furthermore, the Board affirmed Judge Burke's determination that claimant failed to establish disability causation. Because the Board affirmed the denial of benefits, it did not address the contentions raised by employer in its cross-appeal regarding Judge Burke's evaluation of the x-ray evidence. *Canfield v. Majestic Mining Co.*, BRB No. 92-0642 BLA (May 28, 1993)(unpub.). The Board denied claimant's request for reconsideration. *Canfield v. Majestic Mining Co.*, BRB No. 92-0642 BLA (Aug. 10, 1993)(unpub. Order).

Thereafter, claimant filed a third claim for benefits on December 18, 1995, which is the subject of the case now before us. Director's Exhibit 1.

[2] 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.

doubt rule. Specifically, the Board held that the administrative law judge failed to identify and discuss the interpretations and the credentials of the physicians who provided negative x-ray readings in his weighing of the conflicting x-ray evidence and that the administrative law judge failed to render separate and distinct findings on the merits with respect to the x-ray and medical opinion evidence. The Board also held that the administrative law judge erred in attributing bias to employer's physicians. Furthermore, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998), the Board vacated the administrative law judge's finding crediting Dr. Craft's opinion because Dr. Craft's diagnosis of occupational pneumoconiosis was based solely on claimant's coal mine employment history and remanded the case for the administrative law judge to reconsider whether the opinion was reasoned. Likewise, the Board vacated the administrative law judge's finding regarding the onset date of total disability and remanded the case for further consideration of that date based on all the relevant evidence submitted since Judge Burke's November 7, 1991 denial of benefits. *Canfield v. Majestic Mining Co.*, BRB No. 98-1361 BLA (Dec. 3, 1999)(unpub.).

On remand, the administrative law judge found that inasmuch as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and that claimant was totally disabled thereby, claimant established a material change in conditions, *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Turning to the merits of the claim, the administrative law judge found that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis and awarded benefits commencing February 16, 1996, the date on which the evidence established totally disabling pneumoconiosis.

On appeal, employer asserts that the administrative law judge made numerous errors in his weighing of the medical evidence and therefore, irrationally found the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant cross-appeals, arguing that the administrative law judge erred in awarding benefits from February 16, 1996. Employer responds to claimant's cross-appeal, urging affirmance of the onset date. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating her 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 March 9, 2001, to which employer and the

Director have responded. The Director's brief, dated March 26, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations pursuant to 20 C.F.R. §§718.202, 718.204(c), 725.309, and 725.503. To the contrary, employer asserts in its brief dated March 23, 2001, that the revised regulations set forth at 20 C.F.R. §718.104(d)(requiring special consideration to the opinions of treating physicians), 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant in determining whether a miner is totally disabled due to pneumoconiosis) may impact the disposition of this case. Claimant has not responded to the Board's order.

Based upon the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The provision set forth at Section 718.104(d) applies only to medical opinions developed after January 19, 2001, therefore, this provision is inapplicable to the instant claim. A review of the record reveals no evidence implicating Section 718.201(c). Furthermore, employer has previously conceded that claimant suffers from a totally disabling respiratory impairment. Director's Exhibit 28. Consequently, contrary to employer's assertion, Section 718.204(a) is not implicated in this case. In addition, we conclude that none of the other challenged regulations affect the outcome of this case based on our review, 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 this case must be remanded to the administrative law judge for reconsideration in accordance with the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, BLR (4th Cir. 2000). Subsequent to the issuance of the administrative law judge's decision and the Board's decision remanding the case for the administrative law judge to "provide separate and distinct findings on the merits with respect to the x-ray evidence...and the medical opinion evidence...," Board's Decision and Order at 5-6, the Fourth Circuit[3] held that the administrative law judge must weigh all of the evidence under Section 718.202(a)(1)-(4) together to determine whether the evidence, as

[3] Since the miner's most recent coal mine employment occurred in the state of West Virginia, the United States Court of Appeals for the Fourth Circuit has jurisdiction over the case at bar. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2.

a whole, establishes the presence of pneumoconiosis by a preponderance of the evidence. *Compton*, *supra*; *accord Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In the instant case, however, as the administrative law judge considered medical opinion evidence along with x-ray evidence in reaching his determination regarding the existence of pneumoconiosis, Decision and Order on Remand at 4, we reject employer's argument. However, inasmuch as we must remand this case for reconsideration of the existence of pneumoconiosis because of errors made by the administrative law judge in his weighing of the x-ray and medical opinion evidence, we note that the administrative law judge's consideration of the evidence on remand must, of course, comply with the standard set forth in *Compton*, *supra*.

Regarding the weighing of x-ray evidence, employer argues that the administrative law judge failed to render specific findings of fact regarding several x-ray readings and engaged in a selective analysis of the x-ray evidence. Specifically, employer contends that although the administrative law judge identified which physicians found x-ray readings negative and their credentials, he failed to provide a basis for discounting these physicians' readings and failed, contrary to the Board's instructions, to consider and weigh the radiological qualifications of all the physicians. In its Decision and Order, the Board held that while the administrative law judge identified the interpretations and credentials of the physicians who read x-rays as positive, because he failed to specifically identify and discuss the interpretations and credentials of the physicians who provided negative readings, the case must be remanded for the administrative law judge to identify and discuss those factors in weighing the conflicting x-ray evidence, especially since the record showed that many of the physicians who provided negative x-ray readings were B-readers and/or Board-certified radiologists. Board's Decision and Order at 4.

In his discussion of the x-ray evidence, on remand, the administrative law judge correctly acknowledged that the physicians who provided negative x-ray interpretations included Drs. Francke, Leef, Shipley, Spitz, and Wiot, all of whom were B-readers and, with the exception of Dr. Ranavaya, Board-certified radiologists. Decision and Order on Remand at 3; Director's Exhibits 12, 13, 20, 21, 23, 26, 28. Further, contrary to employer's argument, the administrative law judge determined that there was "nothing superior about [the] credentials," of Drs. Wiot and Francke as "the record [was] devoid of any recent publications or research by Drs. Wiot and Francke." Decision and Order on Remand at 3. The administrative law judge determined that Dr. Gaziano, a Board-certified pulmonologist and B-reader, who provided a positive x-ray reading, possessed "equal qualifications to Employer's physicians, Francke, Leef, Ranavaya, Shipley, Spit and Wiot." Decision and Order on Remand at 4; Director's Exhibit 11.

Employer points out that, while the administrative law judge found that the negative readings of Drs. Wiot and Francke were not superior to positive readings in the record

because the record does not show that Drs. Wiot and Francke had any recent publications or research, the record also shows that the positive readings were not rendered by readers with any recent publications or research. Employer's Brief at 10. Hence, employer argues that the administrative law judge's use of the absence in the record of any recent publications or research by Drs. Wiot and Francke to reject their readings is irrational. Decision and Order on Remand at 3. We agree.

Further, employer contends that the administrative law judge erred in finding the qualifications of Drs. Francke, Leef, Ranavaya, Shipley, Spitz and Wiot, who were board-certified radiologists and B-readers, except for Dr. Ranavaya who was only a B-reader, to be equal to the qualifications of Dr. Gaziano, who was not a board-certified radiologist, but rather a board-certified pulmonologist,[4] and erred in finding that there was "no basis for affording one interpretation greater deference than another[.]" Decision and Order on Remand at 4. We agree.

Section 718.202(a)(1) provides that "where 2 or more X-ray reports are in conflict, ... consideration *shall* be given to the *radiological* qualifications of the physicians interpreting such X-rays."[emphasis added]; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Director's Exhibits 13, 20, 21, 23, 26, 28. Thus, because the administrative law judge did not accurately compare and weigh the <u>*radiological*</u> qualifications of the physicians, we must vacate the administrative law judge's finding on the x-ray evidence and remand the case to the administrative law judge for an accurate consideration of the physicians' qualifications pursuant to Section 718.202(a)(1). *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). The administrative law judge may accord greater weight to the readings of the physicians with superior qualifications; he is not barred from considering any additional special radiological expertise a physician possesses, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), but may not engage in a selective analysis of the evidence. *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *see* 20 C.F.R. §718.202(a)(1); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Adkins*, *supra*; *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666, 1-668 (1983). Accordingly, inasmuch as the administrative law judge must evaluate the x-ray evidence by considering the x-ray readings, the <u>*radiological*</u> qualifications of the respective experts, and the persuasiveness of their x-ray reports, we vacate the

[4] Dr. Gaziano is a board-certified <u>pulmonologist</u> and B-reader. Decision and Order on Remand at 4.

administrative law judge's weighing of the x-ray evidence and remand the case for the administrative law judge to reconsider the x-ray evidence along with other relevant evidence on the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1278, 18 BLR 2-42, 2-47 (7th Cir. 1993).

Next, employer argues that the administrative law judge erroneously relied on Dr. Craft's opinion as support for a finding of pneumoconiosis because it is unreasoned and lacks supporting documentation. In its Decision and Order, the Board held that the administrative law judge erred in relying on Dr. Craft's opinion because he "based his diagnosis of occupational pneumoconiosis solely on claimant's employment history," Board's Decision and Order at 4, and remanded the case for the administrative law judge to determine whether Dr. Craft's opinion was a reasoned opinion on the existence of pneumoconiosis. Board's Decision and Order at 5. Employer contends, however, that the administrative law judge made inconsistent rulings on remand when he relied on the opinion of Dr. Craft as one of the physicians who "confirm[ed] based upon their treatment of [c]laimant the presence of pneumoconiosis and its disabling character[,]" Decision and Order on Remand at 3, but then found that because "Dr. Craft does not set forth the reasons for his opinion" that claimant has occupational pneumoconiosis "other than to rely upon [c]laimant's general work history[,]" and because his [t]reating records...do not confirm the presence of pneumoconiosis..." his opinion "is not well reasoned". Decision and Order on Remand at 4; Director's Exhibits 14, 27. This inconsistency requires remand for the administrative law judge to clarify his finding regarding Dr. Craft's opinion. *See Tackett*, *supra*.

Employer additionally argues that the administrative law judge erred in mechanically relying on the opinions of claimant's treating physicians, Drs. Boggs and Stewart, because their reports lack any explanation or documentation supporting their opinions. This argument, however, was previously addressed by the Board in its prior Decision and Order where the Board held that the administrative law judge "provided a reasoned basis which indicates that he reflected on why the treating physicians' medical opinions should be accorded greater weight than some of the other medical opinions of record." Board's Decision and Order at 5. We will not, therefore, revisit this argument. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer contends further, however, that the administrative law judge erred in failing to reconsider the assessments of those physicians to whom he improperly attributed bias. The Board held that the administrative law judge erred in finding bias on the part of Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress, and Loudon because they were hired by employer. *See Urgolites v. Bethenergy Mines, Inc.*, 20 BLR 1-20 (1992). Accordingly, inasmuch as the administrative law judge's erroneous finding may bear on his assessment of the medical opinion evidence, the administrative law judge should reconsider the medical

opinion evidence in this regard.[5]

[5] The Board did hold, however, that the administrative law judge properly discredited the opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel, Kress and Loudon concerning the cause of claimant's disability because the underlying premise of the doctors, that claimant does not suffer from pneumoconiosis, [was] inaccurate. Board's Decision and Order at 6. The Board also rejected employer's assertion that the opinions of Drs. Bellotte, Crisalli, Fino, Hippensteel and Loudon were entitled to dispositive weight because of their superior credentials and that the administrative law judge violated the Administrative Procedure Act, 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), by failing to explain his reason for discrediting these opinions. Board's Decision and Order at 7.

Relevant to total disability due to pneumoconiosis, employer asserts that to find disability causation the administrative law judge irrationally relied upon Dr. Rasmussen's opinion, which was based on an incorrect cigarette smoking history. Employer's assertion is without merit, however, inasmuch as the Board previously rejected the argument that the opinion of Dr. Rasmussen must be discredited because Dr. Rasmussen relied on an inaccurate smoking history. Likewise, we reject employer's argument that the administrative law judge erred by relying on Dr. Gaziano's opinion because Dr. Gaziano did not explain his conclusion and his credentials are not in the record inasmuch as the Board previously rejected this assertion.[6] Board's Decision and Order at 6; *Williams, supra*; *Brinkley, supra*; *Bridges, supra*.

Because the administrative law judge's weighing of the evidence of record on remand regarding the existence of pneumoconiosis may impact his determination on disability causation, however, we vacate the administrative law judge's determination on that issue as well. On remand, therefore, the administrative law judge must determine whether claimant has established either the existence of pneumoconiosis or that pneumoconiosis was at least a contributing cause of totally disabling respiratory impairment, and therefore a material change in conditions. 20 C.F.R. §§718.202(a), 718.204(c), 725.309 (2000); *see Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990); *accord Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990). If the administrative law judge finds a material change in conditions established, he must then render a finding on the merits.

We next turn to the argument contained in claimant's cross-appeal concerning the administrative law judge's finding on onset date. Claimant challenges the administrative law judge's determination regarding the date of onset of total disability, arguing that the date of onset for the commencement of benefits should be July 1, 1992, the date on which Dr. Boggs started treating claimant for the symptoms of pneumoconiosis. Director's Exhibits 14, 27.

It is well established that Section 725.503(b) provides for the payment of benefits beginning the first day of the month in which claimant becomes totally disabled due to pneumoconiosis unless the evidence fails to establish the month of onset. If the evidence

[6] Contrary to employer's argument, Dr. Gaziano's medical qualifications are contained in the record inasmuch as he submitted documentation showing that he is Board-certified in internal medicine and pulmonary diseases. Director's Exhibit 28.

fails to establish the month of onset of total disability, payment of benefits begins on the first day of the month in which the claim is filed. 20 C.F.R. §725.503(b); *see Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-30 (1992); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-757 (1985).

In considering the evidence submitted since the November 7, 1991 denial by Judge Burke, the administrative law judge relied upon the February 16, 1996 opinion of Dr. Gaziano because there was no earlier, credible medical report demonstrating total disability due to pneumoconiosis. The doctor detected the presence of pneumoconiosis by x-ray, found qualifying blood gas levels, and attributed claimant's respiratory insufficiency to pneumoconiosis and chronic obstructive pulmonary disease. Decision and Order on Remand at 5. However, inasmuch as we are remanding this case for reconsideration of the evidence on pneumoconiosis and total disability causation, we must again remand for consideration of the onset date. *See Rochester v. Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see also Rutter, supra*.

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