BRB No. 01-0674 BLA

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

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert A. Mazzoni, Scranton, Pennsylvania, for claimant.

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

Claimant appeals the Decision and Order (00-BLA-0841) of Administrative Law Judge Paul H. Teitler 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] The administrative law judge credited claimant with eight and one-half years of

[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.

coal mine employment and adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1)-(4).[4] The administrative law judge also found the evidence insufficient to establish total disability on the merits pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2) (2000).[5] Based upon his finding that the evidence is insufficient to establish the existence of pneumoconiosis on the merits, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[6]

[2]Claimant's initial claim was filed with the Social Security Administration on January 22, 1973. Director's Exhibit 16. After several denials by the Social Security Administration, this claim was finally denied by the Department of Labor on August 9, 1991 in a Decision and Order issued by Administrative Law Judge G. Marvin Bober. *Id.* Judge Bober's denial was based upon claimant's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. *Id.* The Board affirmed Judge Bober's Decision and Order. *Cappellini v. Director, OWCP*, BRB No. 91-2077 BLA (May 24, 1993)(unpub.). Because claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed with the Department of Labor on December 1, 1999. Director's Exhibit 1.

[3]Although Administrative Law Judge Paul H. Teitler (the administrative law judge) indicated that he would consider the case under the revised regulations, he did not cite to the revised regulations in addressing total disability. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[4]Although the administrative law judge ultimately found the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he did not consider this issue until he rendered findings pursuant to 20 C.F.R. §718.204(c)(1) and (c)(2) (2000). The administrative law judge stated, "I will defer the discussion of the medical opinion evidence to the question of total disability due to pneumoconiosis." Decision and Order at 7.

[5]The administrative law judge did not render findings at 20 C.F.R. §718.204(c)(3) and (c)(4) (2000). As previously noted, the administrative law judge did not consider the medical opinion evidence with respect to the existence of pneumoconiosis until he rendered findings at 20 C.F.R. §718.204(c)(1) and (c)(2) (2000). Hence, it appears that once the administrative law judge found that the existence of pneumoconiosis was not established on the merits, he decided not to render a finding at 20 C.F.R. §718.204(c)(4) (2000).

[6]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after

Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(4) is not established. The Director, Office of Workers' Compensation Programs (the Director) responds, contending that the administrative law judge erred in weighing the conflicting medical opinion evidence with respect to the existence of pneumoconiosis.[7]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends, and the Director agrees, that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(4). Specifically, claimant and the Director assert that the administrative law judge erred in discrediting the opinions of Drs. Levinson and Sahillioglu. The administrative law judge considered the medical opinions of Drs. Biancarelli, Cali, Michos, Levinson and Sahillioglu.[8] Whereas Drs. Biancarelli, Levinson and Sahillioglu

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January 19, 2001.

[7]Inasmuch as the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8]Dr. Biancarelli's reports and Dr. Levinson's March 31, 1986 report were previously submitted into evidence in the prior claim. Director's Exhibit 16. The newly submitted medical opinion evidence consists of Dr. Levinson's October 22, 2000 report, Claimant's Exhibit 1, and the reports of Drs. Cali, Michos and Sahillioglu, Director's Exhibits 6, 15, 24.

opined that claimant suffers from pneumoconiosis, Director's Exhibits 6, 16; Claimant's Exhibit 1, Dr. Michos opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 24. Dr. Cali diagnosed probable asthma vs. emphysema. Director's Exhibit 15. The administrative law judge stated, "I credit Dr. Michos['s] opinion that the etiology of the [c]laimant's chronic bronchitis and variation in PFTs is secondary to poorly treated asthma, which is a condition found in [the] general public." Decision and Order at 15.

Claimant asserts that the administrative law judge erred in discrediting Dr. Sahillioglu's opinion. The administrative law judge found that "[i]t does not appear that Dr. Sahillioglu had the opportunity to review Dr. Navani's negative x-ray reading." Decision and Order at 14. An administrative law judge may not speculate regarding whether a physician's conclusions would have been affected by knowledge of additional medical data. *See Shelosky v. Consolidation Coal Co.*, 8 BLR 1-303 (1985); *Coleman v. Kentland Elkhorn Coal Co.*, 5 BLR 1-260 (1982). The administrative law judge also found that "Dr. Sahillioglu's failure to consider the asthma diagnosis affects the weight of the report and his conclusion that [c]laimant's mild breathing problem was due to pneumoconiosis." Decision and Order at 14. The administrative law judge stated, "[f]rom a careful reading of Dr. Sahillioglu's report, it appears that [c]laimant advised him that his brother had asthma, but the report does not mention this fact." *Id*. Contrary to the administrative law judge's finding, Dr. Sahillioglu specifically noted, in the "Family History" section of the February 22, 2000 report, that claimant's brother has asthma. Director's Exhibit 6. Moreover, Dr. Sahillioglu noted, in the "Individual Health/Medical History" section of the same report, that claimant does not have a history of bronchial asthma. *Id*. Thus, we vacate the administrative law judge's finding that the existence of pneumoconiosis is not established on the merits at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. *See generally Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Claimant also asserts that the administrative law judge erred in discrediting Dr. Levinson's opinion. The administrative law judge stated that "although [Dr. Levinson] took a history of asthma attacks and a prescription for it, he did not indicate that he considered the asthma condition and the previous asthma attacks relative to his diagnosis of [c]laimant's mild pulmonary impairment." Decision and Order at 14. In the "History of the Present Illness" section of the October 22, 2000 report, Dr. Levinson stated that "[claimant] denies recent hospitalizations but has had attacks of asthma and has been prescribed on Flovent 110 micrograms bid, by Dr. Cali." Claimant's Exhibit 1. Dr. Levinson concluded, "[o]n the basis of the present examination and my review of the studies performed as well as my review of available previous medical records it is my professional opinion that [claimant] does suffer from simple coal workers' pneumoconiosis." *Id*. Thus, contrary to the administrative law judge's finding, Dr. Levinson considered claimant's history with regard to asthma in rendering an opinion that claimant suffers from pneumoconiosis. *See generally Stark, supra*. On remand, the administrative law judge must provide a valid reason for his weighing of the

conflicting medical evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In addition, the administrative law judge found that "Dr. Levinson's report is in direct conflict with his testimony at the hearing." Decision and Order at 14. The administrative law judge stated, "[w]hen asked in direct testimony whether there was a material change in the progression of the disease from 1986 to the present, Dr. Levinson said he felt that there was a slow progression." *Id*. In a report dated October 22, 2000, Dr. Levinson stated that the "[p]ulmonary function studies reveal a mild obstructive impairment but when these are compared to his prior pulmonary function it can be seen that there has been a significant deterioration both in the FEV1 and forced vital capacity." Claimant's Exhibit 1. Dr. Levinson concluded, "[o]n the basis of the present examination and my review of the studies performed as well as my review of available previous medical records it is my professional opinion that [claimant] does suffer from simple coal workers' pneumoconiosis." *Id*.

During the December 11, 2000 hearing, Dr. Levinson indicated that there was a significant progression in the deterioration of claimant's pulmonary function from his prior examinations of claimant to his most recent examination of claimant.[9] Hearing Transcript at 16. Dr. Levinson additionally indicated that the progression of claimant's disease from 1986 to the present has been slow. *Id*. Nonetheless, Dr. Levinson opined that claimant suffers from simple coal workers' pneumoconiosis. *Id*. at 17. As previously noted, Dr. Levinson diagnosed simple coal workers' pneumoconiosis in the October 22, 2000 report and stated that the change in pulmonary function over the past fifteen years had been significant, but he did not address whether the disease progressed slowly. Claimant's Exhibit 1. Thus, contrary to the administrative law judge's finding, Dr. Levinson's report is not inconsistent with his hearing testimony with regard to the progression of claimant's pneumoconiosis. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984).

[9]Dr. Levinson stated, "[s]o there was almost a fifteen year period between the first time I examined him and the most recent time I examined him." Hearing Transcript at 16. Dr. Levinson also stated that although "[y]ou would expect...some deterioration...I found that his deterioration was about five to eight times the expected amount." *Id*. Hence, Dr. Levinson concluded, "[s]o to me, that was significant." *Id*.

Further, the administrative law judge stated that "[Dr. Levinson] also admitted that the FVC and the FEV1 did not qualify to establish disability." Decision and Order at 14. The administrative law judge further noted that "[Dr. Levinson] also stated that his arterial blood gas study revealed a borderline low level of oxygenation and that the blood gas values would not meet the standards for disability."[10] *Id*. at 14-15. However, an administrative law judge may not discredit a medical opinion because it was based upon a non-qualifying objective test. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Moreover, in his consideration of the objective evidence, the administrative law judge stated that "[Dr. Levinson] concluded that the results of the ABGs [Dr. Sahillioglu] performed on February 22, 2000 were normal."[11] *Id*. However, the record does not indicate that Dr. Levinson found that this study produced normal values.

During the December 11, 2000 hearing, counsel for the Director asked Dr. Levinson if he agreed that the values of the February 22, 2000 arterial blood gas study performed by Dr. Sahillioglu are normal. Hearing Transcript at 27. Dr. Levinson responded, "I would agree that those values do not meet the standards for disability." *Id*. Further, counsel for the Director asked Dr. Levinson if he agreed that the values of all the arterial blood studies reported by all doctors of record in this case are normal. Hearing Transcript at 27. Dr. Levinson responded, "No, I would not agree with that. I said, I agree that they didn't meet the standards." *Id*. Dr. Levinson stated that "[t]he oxygen level [in the October 17, 2000 arterial blood gas study] that I obtained, 71.2, [is] certainly somewhat low. It's mildly reduced, but it's certainly somewhat low, on the low side, for someone of his age, but it doesn't meet the standards for disability." *Id*. Thus, in view of the aforementioned, we hold that the administrative law judge mischacterized Dr. Levinson's opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Finally, the administrative law judge stated that "Dr. Levinson admitted that he did not know that there were negative readings by Board Certified Radiologists and "B" readers and that he defers to "B" readers when evaluating x-rays." Decision and Order at 14. However,

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[10]The administrative law judge noted that "[Dr. Levinson] stated that the oxygen level of 71.2 was somewhat lower, although the vent studies and the blood gas studies are just mildly reduced." Decision and Order at 15. The administrative law judge found that "[t]here was a slight increase in the PO2 after exercise." *Id*. The administrative law judge stated that "Dr. Sahillioglu concluded that the results of the ABGs Dr. Levinson performed on February 22, 2000 were normal." *Id*. In addition, the administrative law judge stated that "Dr. Levinson's vent study produced higher values than Dr. Sahillioglu's in February 2000." *Id*.

[11]The administrative law judge's reference to Dr. Levinson as the physician who performed the February 22, 2000 arterial blood gas study appears to be a clerical error. The record indicates that this study was performed by Dr. Sahillioglu. Director's Exhibit 5.

as previously noted, an administrative law judge may not speculate whether a physician's conclusions would have been affected by knowledge of additional medical data. *See Shelosky, supra*; *Coleman, supra*.

Before considering all the evidence on the merits, the administrative law judge must consider whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge's finding that claimant failed to establish a material change in conditions was based upon his consideration of all the evidence of record. However, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has adopted the standard that an administrative law judge must consider all of the *new evidence*, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Swarrow, supra*. Here, the previous claim was denied because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Director's Exhibit 16. Thus, in order to establish a material change in conditions at 20 C.F.R. §725.309 (2000), the administrative law judge must consider whether the newly submitted evidence is sufficient to establish an element of entitlement previously adjudicated against claimant. *See Swarrow, supra*.

If the administrative law judge finds the newly submitted evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000), the administrative law judge must consider whether the evidence is sufficient to establish the existence of pneumoconiosis on the merits. *See* 20 C.F.R. §718.202(a); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[12] Further, the administrative law judge must consider whether the evidence is sufficient to establish that pneumoconiosis arose out of coal mine employment on the merits, if reached. *See* 20 C.F.R. §718.203. In addition, the administrative law judge must consider whether the evidence is sufficient to establish total disability on the merits, if reached. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Lastly, the administrative law judge must consider whether the evidence

[12]The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a) (2000) to determine whether claimant has established the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

is sufficient to establish total disability due to pneumoconiosis on the merits, if reached. *See* 20 C.F.R. §718.204(c).[13]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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[13]Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge