BRB No. 02-0591

TEDDY J. WHITED	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
RHONDA COAL COMPANY	)	
	)	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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0846) of Administrative Law Judge Stuart A. Levin with respect to 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 is the second time that this case has been before the Board. In *Whited v. Rhonda Coal Co.*, BRB No. 00-0692 BLA (Apr. 10, 2001)(unpub.), the Board vacated the administrative law judge's determination that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and remanded the case to the administrative law judge for reconsideration of the evidence relevant to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304.[1] The Board also instructed 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 20 C.F.R.

administrative law judge to consider whether reopening the case on modification would render justice under the Act.

On remand, the administrative law judge determined that Dr. Navani's reading of the CT scan obtained on March 11, 1998, was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge also found that because neither party had requested that the record be reopened on remand, to do so would not be in the interests of justice. Employer asserts on appeal that the administrative law judge did not properly address the issue of whether modifying the denial of benefits would render justice under the Act. Employer also alleges that the administrative law judge erred in determining that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed briefs in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

With respect to the administrative law judge's consideration of the evidence relevant to Section 718.304, employer argues that the administrative law judge erred in treating Dr. Navani's reading of the March 11, 1998 CT scan as a reasoned and documented diagnosis of complicated pneumoconiosis. Employer asserts that because Dr. Navani said that the "CT appearances are *consistent with* coal workers' pneumoconiosis that *approximates* to u/r, 2/1, A, em, ax, tb," his diagnosis of complicated pneumoconiosis is, at best, equivocal. Director's Exhibit 61 (emphasis supplied). Employer also indicates that Dr. Navani's opinion is undocumented and unreasoned as, unlike Drs. Scott, Wheeler, and Castle, Dr. Navani did not read any other CT scans or x-rays and did not review claimant's medical records, nor did he diagnose the calcifications or the granulomatous disease observed by other physicians on x-ray and CT scan.

We reject employer's allegations of error in this regard. With respect to the

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Parts 718, 722, 725 and 726 (2002). The amendments to 20 C.F.R. §725.310 do not apply to cases, such as the present one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[2] Claimant filed an application for benefits on October 25, 1994. This claim was denied in a Decision and Order issued on December 5, 1996 by Administrative Law Judge Edith Barnett. The Board affirmed the denial of benefits. *Whited v. Rhoda Coal Co.*, BRB Nos. 97-0538 BLA and 97-0538 BLA-A (Dec. 4, 1997)(unpub.). Claimant filed a request for modification on October 15, 1998 and submitted newly developed evidence.

alleged equivocation in Dr. Navani's opinion, the administrative law judge acted within his discretion in interpreting Dr. Navani's statements as a diagnosis of complicated pneumoconiosis, as the terms used by Dr. Navani do not explicitly indicate that he was uncertain as to the identity of the disease processes that he observed on the CT scan. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, although an administrative law judge may refer to the amount of documentation underlying an opinion in determining its relative weight, the fact that a medical opinion is based upon a smaller pool of data than other opinions of record does not require the administrative law judge to treat it as undocumented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Employer also argues that the administrative law judge did not adequately address "the factual and theoretical bases" underlying the opinions of Drs. Scott, Wheeler, and Castle, which, employer asserts, are much more extensive than those underlying Dr. Navani's opinion. Employer's Brief at 21. The administrative essentially dismissed the significance of this distinction by finding that the probative value of the opinions of Drs. Wheeler, Scott, and Castle was undermined by their mistaken belief that the large opacity seen on the CT scans of record was caused by tuberculosis, rather than complicated pneumoconiosis. Decision and Order at 7-8. The administrative law judge concluded that this assumption was mistaken because the record contains a negative sputum test procured in October of 1994. Decision and Order at 8.

Employer alleges error in the administrative law judge's reliance upon "antiquated medical records concerning the alleged absence of tuberculosis at [a] fixed point in time in October 1994." *Id.* This contention has merit. The negative tuberculosis test predates the denial of claimant's application for benefits. Thus, as employer asserts, the evidence submitted in conjunction with claimant's request for modification could support a finding that claimant developed tuberculosis subsequent to 1994 or that the 1994 test merely ruled out the presence of active tuberculosis at that point in time. Accordingly, we must vacate the administrative law judge's findings discrediting the opinions of Drs. Scott, Wheeler, and Castle, and remand this case for further findings. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985). On remand, the administrative law judge must reconsider his determination that Dr. Navani's opinion outweighs the contrary medical evidence relevant to Section 718.304. In addressing the medical opinions of record, the administrative law judge should address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*,

138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Finally, in the prior Decision and Order, the Board directed the administrative law judge to consider whether reopening the present case would render justice under the Act. The administrative law judge interpreted this as an instruction to determine whether reopening *the record* would further the interests of justice. Decision and Order at 8. Employer states correctly that this is not the proper analysis required. Accordingly, we must vacate the administrative law judge's finding and remand this case to the administrative law judge for reconsideration of this issue. On remand, if the administrative law judge again finds a change in conditions established pursuant to Section 725.310 (2000), he must consider whether modifying the prior denial of benefits would render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 459 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *Branham v. Bethenergy Mines, Inc. [Branham II]*, 21 BLR 1-79 (1998). If the administrative law judge finds that there is no justification for altering the denial of benefits, claimant's request for modification should be denied. *See O'Keeffe, supra*; *Branham II, supra*.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge