BRB No. 97-1295 BLA

DUDLEY STEWART Claimant-Respondent v. WAMPLER BROTHERS COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Nora J. Clark (Douglass Law Office), Harlan, Kentucky, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-0599) of Administrative Law Judge Daniel L. Leland awarding 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). This case, a duplicate claim, is before the Board for the second time. Initially, the administrative law judge credited claimant with eighteen years and ten months of coal mine employment, and accorded greatest weight to the diagnosis of claimant's treating physician to find that

the newly-submitted medical opinion evidence established the existence of pneumoconiosis and therefore also established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Proceeding to the merits of the claim, the administrative law judge again gave special consideration to the opinion of claimant's treating physician and found the existence of totally disabling pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204 and, accordingly, awarded benefits as of the filing date of claimant's application.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 725.309(d) and upheld his weighing of the treating physician's opinion, but vacated his findings at Sections 718.202(a)(4) and 718.204(c) because he failed to weigh all of the relevant evidence, and at Section 718.204(b) because he improperly discredited a medical opinion because the physician did not diagnose pneumoconiosis. *Stewart v. Wampler Bros. Coal Co*., BRB No. 96-0757 BLA (Feb. 13, 1997)(unpub.). Accordingly, the Board remanded the case for further consideration.

On remand, the administrative law judge weighed all of the medical opinions and again credited the treating physician's opinion to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). The administrative law judge further found that the medical opinion evidence supported a finding of total respiratory disability pursuant to Section 718.204(c)(4), and, after weighing all of the contrary probative evidence, concluded that the evidence established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Pursuant to Section 718.204(b), the administrative law judge reweighed the medical opinions, discounted the opinion of one physician as premised on an assumption hostile to the Act, and again credited the treating physician's opinion to find that claimant's respiratory disability was due to pneumoconiosis. Finally, the administrative law judge determined that the record did not establish the onset date, and again awarded benefits as of the filing date of claimant's present application.

On appeal, employer contends that claimant's duplicate claim must either be dismissed as a matter of law or remanded for further consideration in light of recent case law from the United States Supreme Court. Employer also argues that the administrative law judge made several errors in his findings of fact and his application of the law in awarding benefits on remand. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's arguments regarding the continued viability of duplicate claims under the Act, arguing that the case law relied upon by employer has no bearing on duplicate claims. Employer replies, reiterating its arguments and contending that the Department of Labor's rationale for permitting duplicate claims is

itself invalid, and further, that under the applicable duplicate claim standard, claimant's new evidence is legally insufficient to establish a material change in conditions.

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 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).

Initially, employer argues that the recent decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997), bars the filing of duplicate claims. Employer's Brief at 24-26. Employer argues that neither the Longshore Act nor the Black Lung Benefits Act provides statutory authority for the adjudication of duplicate claims when the original claim has been denied for more than one year and the miner has not had subsequent exposure to coal dust. We disagree. Contrary to employer's contention, *Rambo II* does not bar the filing of the instant duplicate claim. *Rambo II*, in which modification was at issue, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether a longshoreman who was experiencing no present, post-work injury reduction in wage-earning capacity, could nonetheless be entitled to nominal benefits so as to toll the one year time limitation for filing for modification. The Supreme Court did not indicate in *Rambo II* that its holding had any bearing whatsoever on duplicate black lung claims. Therefore, we reject employer's contention.

Employer also contends that the Director's one-element standard for establishing a material change in conditions at Section 725.309, which was adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), is invalid in view of *Rambo II*. Employer argues that, under the *Ross* standard, once a claimant proves a change in his claim as to some element of entitlement, the claimant benefits from an irrebuttable presumption that the change is material. Employer argues that this presumption violates *Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994), *Rambo II* and Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated by 30 U.S.C. §932(a), all of which require that claimant prove a material change in conditions by a preponderance of the evidence. We disagree. The Court in *Rambo II* addressed the issue of a longshoreman's potential future decline in earning capacity, and did not address what proof was necessary to establish a material change in conditions in a black lung duplicate claim. The Court's decision in *Rambo II* does not alter *Ross* or the other cases adopting the one-element standard. *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); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc rehearing*).

Next, employer contends that even under *Ross*, the administrative law judge erred by finding a material change in conditions. Employer argues that *Ross* requires "more than proof satisfying at least 'one element' of entitlement," asserting that claimant must submit direct evidence of deterioration in his physical condition, and therefore, the administrative law judge must also analyze whether the new evidence differs qualitatively from the previously submitted evidence. Employer's Brief at 24 n.6, 26; Reply Brief at 9. Employer contends that the administrative law judge failed to perform this latter task. We reject this contention. The Sixth Circuit court held in *Ross* that, pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *See Ross, supra*. If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Id*. The administrative law judge properly determined that the newly-submitted medical opinion evidence established a material change in conditions by demonstrating that "claimant has developed pneumoconiosis since the denial of his earlier claim . . . ."[1] [1996] Decision and Order at 7. Therefore, we reject employer's contention.

Employer further asserts that the duplicate claim provision is invalid because it depends on the Department of Labor's belief that simple pneumoconiosis is progressive, which employer claims is refuted by current medical science. Reply Brief at 6. The Sixth Circuit court has accepted the Department of Labor's view that pneumoconiosis is progressive. *See Ross*, 42 F.3d at 997, 19 BLR at 2-17; *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993). Moreover, employer did not submit evidence into the record before the administrative law judge to support its contention that simple pneumoconiosis is not

[1] The record indicates that Dr. Sundaram's opinion, which was credited by the administrative law judge, was based on examinations, treatment, and testing that occurred subsequent to the previous denial, and thus is not cumulative of evidence considered previously. Director's Exhibit 28; Claimant's Exhibit 4.

progressive. *See Old Ben Coal Co. v. Scott*, 1998 WL 237432 (7th Cir., May 13, 1998); *Spese*, 117 F.3d at 1010, 21 BLR at 2-129 (whether simple pneumoconiosis can progress absent further coal dust exposure is a question of legislative fact). Therefore, we reject employer's contention.

On the merits, employer asserts that the administrative law judge erred by according greater weight to the opinion of claimant's treating physician, Dr. Sundaram, to find the existence of pneumoconiosis established. Employer's Brief at 17-18. As we held previously, we hold that the administrative law judge's reliance on the treating physician's diagnosis of pneumoconiosis was reasonable. The record indicates that Dr. Sundaram, who is board-certified in internal medicine, has been treating claimant for shortness of breath since June 1994 and sees claimant every two to three months. Claimant's Exhibit 4 at 7. Dr. Sundaram explained how his diagnosis was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, non-smoking history, and objective study results. Director's Exhibit 28; Claimant's Exhibit 4. Under these circumstances, the administrative law judge permissibly accorded greater weight to Dr. Sundaram's opinion as a treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and less weight to the opinions of Drs. Wicker and Mettu,[2] who he found examined claimant only once, and to the opinion of Dr. Dahhan, who he found based his opinion solely on a review of claimant's medical records. Therefore, we reject employer's argument.

In light of our holding that the administrative law judge permissibly accorded greater weight to the opinion of claimant's treating physician regarding the existence of pneumoconiosis, we reject employer's contention that the administrative law judge failed to explain why he accorded less weight to the opinions of Drs. Wicker and Dahhan. Employer's Brief at 23; *see Tussey*, *supra*. We also reject employer's assertion that the administrative law judge should have discredited the opinion of Dr. Sundaram because the physician relied on a positive x-ray when the administrative law judge found the x-ray evidence negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer's Brief at 22. Contrary to employer's contention, an administrative law judge may not discredit a medical opinion merely

[2] The administrative law judge also noted that Dr. Mettu's examination of claimant predated Dr. Sundaram's most recent examination by more than six years. Director's Exhibit 35 at 131; Claimant's Exhibit 4 at 40-41.

because it relies on a positive x-ray interpretation that conflicts with the weight of the x-ray evidence. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Employer argues that the administrative law judge improperly rejected the opinion of Dr. Smith. Employer's Brief at 19. In his first decision, the administrative law judge failed to determine whether or not Dr. Smith's diagnosis of chronic obstructive pulmonary disease (COPD) constituted a diagnosis of pneumoconiosis pursuant to Section 718.201. Director's Exhibit 28; Claimant's Exhibit 4. Therefore, the Board instructed the administrative law judge on remand to address this issue. On remand, the administrative law judge considered Dr. Smith's diagnosis as instructed and found that it was not a diagnosis of legal pneumoconiosis, since the physician did not link the COPD to coal dust exposure. Decision and Order on Remand at 2 n.1; *see* 20 C.F.R. §718.201. The administrative law judge declined to infer, however, that Dr. Smith opined that pneumoconiosis was absent, which employer attacks as a mischaracterization of Dr. Smith's opinion. It is the administrative law judge's duty to consider all of the evidence and draw his or her own inferences, *see Lafferty v. Cannelton Industries, Inc*. 12 BLR 1-190, 1-192 (1989), and the Board is not empowered to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988). Dr. Smith did not provide an etiology for the COPD he diagnosed in the six brief treatment notes in question. Director's Exhibit 28. Thus, the administrative law judge's inference that Dr. Smith simply did not address the issue of coal dust exposure one way or the other was reasonable. Therefore, we reject employer's contention that the administrative law judge was bound to construe Dr. Smith's diagnosis as an affirmative statement that pneumoconiosis was absent.

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge failed to compare Dr. Sundaram's opinion with the exertional requirements of claimant's usual coal mine employment in finding total respiratory disability established. Employer's Brief at 29. This contention lacks merit. The administrative law judge complied with the Board's instruction to consider Dr. Sundaram's opinion in light of the exertional requirements of claimant's usual coal mine employment listed at Director's Exhibit 7. *See Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge reasonably concluded that, as claimant's job running a loader required standing, crawling, and lifting for a substantial portion of his work day, the work described was hard manual labor.[3] Decision and Order on

[3] Employer incorrectly states that Director's Exhibit 7 does not list the exertional requirements of claimant's last coal mine job running a loader from 1986 to 1989.

Remand at 2; Director's Exhibit 7. Dr. Sundaram opined that claimant's respiratory impairment rendered him unable to "bend, crawl, [or] stoop," or to perform the "hard manual labor of a miner," on a six to eight hour basis. Claimant's Exhibit 4 at 10, 22. By comparing Dr. Sundaram's opinion with the exertional requirements of running a loader, the administrative law judge rationally inferred total respiratory disability. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir.1996); *Budash, supra*. Therefore, we reject employer's contention, and we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4) as supported by substantial evidence.

Employer's Brief at 29. It does. Director's Exhibit 7, blocks 6.b. and 8.

Pursuant to Section 718.204(c), employer contends that the administrative law judge failed to weigh all of the relevant evidence together to determine whether total respiratory disability was established. Employer's Brief at 28. Contrary to employer's contention, the administrative law judge complied with the Board's instruction to weigh all of the contrary probative evidence. *See Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). The administrative law judge acknowledged that the valid pulmonary function studies and blood gas studies were non-qualifying,[4] and considered the contrary medical opinions. Decision and Order on Remand at 2. However, the administrative law judge permissibly accorded greater weight to Dr. Sundaram's opinion because he has been regularly treating claimant's pulmonary problems, he performed the most recent examination, *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982), and he relied on pulmonary function study results.[5] The administrative law judge further found Dr. Sundaram's opinion corroborated by the evidence of claimant's complaints of shortness of breath and use of pulmonary medications. We hold that the administrative law judge complied with the requirement to weigh the contrary probative evidence and provided valid reasons for the relative weight that he assigned to the evidence. *See Beatty, supra*; *Fields, supra*; *Shedlock, supra*; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Therefore, we reject employer's argument and we affirm the administrative law judge's finding

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[5] Dr. Sundaram relied in part on claimant's FVC score as indicative of compromised lung function. Claimant's Exhibit 4 at 9. On cross-examination, Dr. Sundaram acknowledged the non-qualifying nature of most of the objective studies, but continued to diagnose total respiratory disability based on his observation of claimant's chronic shortness of breath, even at rest. Claimant's Exhibit 4 at 24.

pursuant to Section 718.204(c).

Pursuant to Section 718.204(b), employer contends that the administrative law judge erred by discrediting Dr. Dahhan's opinion. Employer's Brief at 32-33. After reviewing several pulmonary function and blood gas studies, treatment records, and x-ray readings, Dr. Dahhan noted the absence of any evidence of restrictive lung disease and opined that the pulmonary symptoms detected by the examining physicians were consistent with obstructive lung disease, which he would not expect to see in patients with pulmonary impairments caused by the inhalation of coal dust.[6] Employer's Exhibit 1. The administrative law judge accorded "little weight" to Dr. Dahhan's opinion because it "run[s] afoul of the holding in *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, [19 BLR 2-265] (4th Cir. 1995) that a physician's opinion that coal dust exposure can not cause chronic obstructive lung disease is lacking in probative value." Decision and Order on Remand at 3.

In *Warth*, the United States Court of Appeals for the Fourth Circuit held that a medical opinion based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment merits no weight in determining disability causation. Subsequently, however, the Fourth Circuit court explained that *Warth* does not preclude consideration of a disability causation opinion that is based in part on the absence of a restrictive impairment where the opinion is documented and reasoned and is not premised on the assumption that coal mine employment cannot cause obstructive disorders. *Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 341, 20 BLR 2-246, 2-254-55 (4th Cir. 1996). *Warth* and *Stiltner* were decided by the Fourth Circuit court, while this case arises within the jurisdiction of the Sixth Circuit court, which, to date, has not issued a published decision addressing this issue. Nevertheless, because the administrative law judge applied *Warth* in weighing the medical opinions at Section 718.204(b), we must evaluate his analysis in light of the most recent pronouncement of the Fourth Circuit court in *Stiltner*. The record indicates that Dr. Dahhan's opinion was based not only on the absence of a restrictive impairment, but also on his review of a fair portion of the medical evidence of record, and was not based on the assumption that coal mine employment cannot cause COPD. Employer's Exhibit 1. Therefore, his opinion should not have been discounted under *Warth.* Because the administrative law judge did not provide any reasons for crediting Dr. Sundaram's opinion at Section 718.204(b), other than his improper discrediting of Dr. Dahhan, we must vacate the administrative law judge's

[6] In contrast, Dr. Sundaram diagnosed the presence of both restriction and obstruction. Claimant's Exhibit 4 at 22. In attributing claimant's disability to pneumoconiosis, Dr. Sundaram found it significant that claimant never smoked and that his cardiogram was negative. Claimant's Exhibit 4 at 22, 29.

finding pursuant to Section 718.204(b) and remand this case for the administrative law judge to reweigh the medical opinions to determine whether claimant's total respiratory disability is due at least in part to pneumoconiosis.[7] *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989).

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

JAMES F. BROWN
Administrative Appeals Judge

[7] For the same reasons we provided in our previous decision, we again reject employer's contention that if the administrative law judge credits Dr. Sundaram's opinion, benefits cannot commence prior to June 14, 1994, the date of Dr. Sundaram's first examination of claimant. Employer's Brief at 34; *see Stewart*, slip op. at 8.