BRB No. 98-1421 BLA

KERMON K. MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-BLA-1258) of Administrative Law Judge Edward J. Murty, Jr., 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). Claimant filed his initial application for benefits on November 18, 1981, and filed a second claim on July 30, 1982. These claims were merged and ultimately denied by the Board on July 26, 1988, on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 67; *Mullins v. Clinchfield Coal Co.,* BRB No. 86-2139 BLA (July 26, 1988)(unpub.). Claimant filed the present duplicate claim on April 23, 1991. Director's Exhibit 1. In a Decision and Order issued on March 24, 1993, the administrative law judge credited claimant with over thirty-six years of coal mine employment, and found that the x-ray and medical opinion evidence of record were

insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's Section 725.309 finding and directed the administrative law judge to apply the holding in *Spese v. Peabody Coal Co.,* 11 BLR 1-174 (1988), on remand. The Board also vacated the Section 718.202(a)(1) and (4) findings, and instructed the administrative law judge to apply the holding in *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In addition, the Board directed the administrative law judge to consider the evidence relevant to 20 C.F.R. §718.204(b) and (c), if these issues were reached on remand. *Mullins v. Clinchfield Coal Co.,* BRB No. 93-1360 BLA (May 27, 1994)(unpub.).

In response to employer's Motion for Reconsideration, the Board vacated its prior holding that the instant case arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, and held that the present claim lies within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The Board, therefore, directed the administrative law judge to apply the newly issued holding of the Fourth Circuit in *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). The Board also again directed the administrative law judge to reconsider the evidence at Section 718.202(a)(1) and (a)(4), and to consider the evidence relevant to Section 718.204(b) and (c), if reached on remand.

In a Decision and Order issued on April 28, 1997, the administrative law judge considered the newly submitted evidence and found that claimant had failed to establish the presence of pneumoconiosis at Section 718.202(a)(1)-(4), or total respiratory disability pursuant to Section 718.204(c). Accordingly, the administrative law judge found that claimant had not established a material change in conditions, and benefits were again denied. On appeal, the Board affirmed the finding that claimant had not established a material change in conditions with respect to the existence of pneumoconiosis at Section 718.202(a)(1)-(4), but vacated the administrative law judge's findings pursuant to Section 718.204(c) and Section 725.309 due to the administrative law judge's failure to consider all relevant evidence and his mischaracterization of several medical reports. *Mullins v. Clinchfield Coal Co.,* BRB No. 97-1154 BLA (May 12, 1998)(unpub.).

On July, 23, 1998, the administrative law judge issued his Decision and Order on remand denying benefits after reiterating his previous finding that claimant failed to establish the existence of pneumoconiosis, thereby precluding an award of benefits. On appeal, claimant contends that the administrative law judge erred in his consideration of the evidence relevant to the existence of pneumoconiosis, total disability and causation. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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 by 30

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

To establish entitlement to benefits under Part 718, claimant must prove total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Trent, supra; Perry, supra.*

When a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must weigh the evidence developed since the prior denial and determine whether it establishes at least one of the elements previously adjudicated against claimant. *Rutter, supra.* If the administrative law judge finds that claimant has established a material change in conditions based on the newly submitted evidence, he must then consider the newly submitted evidence in conjunction with the previously submitted evidence in considering entitlement on the merits. *Id*.

As we previously held, the administrative law judge in the present case properly weighed the newly submitted evidence of record, and rationally determined that it did not support a finding of pneumoconiosis at Section 718.202(a)(1)-(4), or a material change in conditions regarding this element of entitlement. The administrative law judge did not, however, consider and weigh the newly submitted evidence relevant to the issues of total disability or causation of total disability, to determine whether claimant had established a material change in conditions under these required elements as instructed in our prior remand order. Instead, on remand, the administrative law judge erroneously found that claimant failed to establish a required element of entitlement on the merits, based only on his consideration of the newly submitted evidence relevant to this issue. Thus, the administrative law judge has not considered whether the newly submitted evidence establishes any one of the elements of entitlement previously adjudicated against claimant in accordance with the holding in *Rutter, supra.* Only if the administrative law judge determines that claimant has demonstrated a material change in conditions by establishing any element previously found against him, can the administrative law judge reach the merits of the claim, which requires that the newly submitted evidence be considered in conjunction with the previously submitted evidence to determine whether claimant can establish any of the elements of entitlement. *Rutter*, *supra*. As this analysis has not been performed in the present case, we hold that remand is required.[1] *Id.*

[1]We note that Administrative Law Judge Murty is no longer associated with the Office of

the Administrative Law Judges. Accordingly, on remand the instant case will be assigned to another administrative law judge.

We also note that claimant has raised numerous arguments regarding the administrative law judge's consideration of the evidence of record. Specifically, claimant contends that the administrative law judge erred by failing to apply the holding in *Woodward, supra,* and *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), in his consideration of the x-ray evidence pursuant to Section 718.202(a)(1). Claimant further asserts that the administrative law judge erred by weighing Dr. Sargent's x-ray reading as negative for the presence of pneumoconiosis, and that this physician's diagnosis of chronic bronchitis is a diagnosis of pneumoconiosis. Claimant also suggests that the differing diagnoses of Drs. Fino and Branscomb regarding total disability undermine their findings regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as Dr. Fino found a disabling pulmonary disease unrelated to coal dust exposure, and Dr. Branscomb found no lung disease. Pursuant to Section 718.204(b) and (c), claimant contends that the administrative law judge erred by failing to credit the opinions of the treating physicians of record, Drs. Smiddy and Tholpady, and erroneously found that the opinion of Dr. Smiddy was based solely on one x-ray reading. Claimant further asserts that the administrative law judge erred by failing to find total disability established based on claimant's diffusion capacity test, which claimant asserts is qualifying under the holding of *Walker v. Director, OWCP,* 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), and by means of the April 15, 1991, pulmonary function study, which claimant contends produced qualifying values.[2] Claimant also argues that Dr. Sargent's diagnosis of chronic bronchitis which has resulted in a respiratory impairment is a diagnosis of totally disabling pneumoconiosis, and that Dr. Sargent erroneously believes that coal worker's pneumoconiosis cannot progress once a miner leaves the coal mines. Lastly, claimant contends that the administrative law judge erred by stating that the miner must show that his coal workers' pneumoconiosis is the primary disabling factor in his lung disease, rather than establishing that pneumoconiosis is an element of his totally disabling lung disease in accordance with the holding in *Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[2]A "qualifying" pulmonary function study or blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" test yields values which exceed the requisite table values.

Initially, we decline to address claimant's arguments regarding whether the newly submitted x-ray or medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), or a material change in conditions pursuant to Section 725.309, inasmuch as claimant has not raised any arguments not previously considered by the Board. Thus, we decline to disturb our prior affirmance of the administrative law judge's determination that the newly submitted evidence does not support a finding of pneumoconiosis under Section 718.202(a)(1)-(4). *Withrow v. Rushton Mining Co.,* 8 BLR 1-232 (1985). We do note, however, that if on remand claimant is found to have a established a material change in conditions based on another element of entitlement, the administrative law judge must consider the x-ray evidence in accordance with the holding in *Adkins, supra,* when considering whether the record as a whole establishes the presence of pneumoconiosis.[3] We further hold that as the present case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge is not required to apply the holding of the United States Court of Appeals for the Sixth Circuit in *Woodward, supra.*

Pursuant to Section 718.204(c), the newly submitted evidence in the record includes six non-qualifying arterial blood gas studies, two non-qualifying pulmonary function studies, one qualifying pulmonary function study which was found to be invalid due to poor effort, and one pulmonary function study which appears to be qualifying but lacks a notation regarding claimant's age and height. Employer's Exhibits 15-17, 22; Claimant's Exhibit 3; Director's Exhibits 20, 38, 47-49, 67. The record also contains several medical reports. Dr. Paranthaman diagnosed chronic pulmonary fibrosis of uncertain etiology, stated that claimant may not be able to perform his former mine work from a respiratory standpoint, and that coal dust exposure may have contributed to claimant's illness. Director's Exhibit 26. Dr. Branscomb failed to diagnose pneumoconiosis and stated that claimant probably has the pulmonary ability to perform his former coal mine work. Employer's Exhibit 21. Dr. Sargent also found no evidence of pneumoconiosis, but diagnosed chronic bronchitis, and found that claimant's ventilatory impairment was severe enough to cause difficulty in performing his last coal mine employment. Employer's Exhibit 22; Director's Exhibit 61. Dr. Fino also found no evidence of pneumoconiosis, but noted a totally disabling respiratory impairment unrelated to coal dust exposure. Employer's Exhibit 20

We find no merit in claimant's assertion that his score on his diffusing capacity test conclusively establishes that he suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c)(2). Although the Fourth Circuit has recognized that such a test is relevant evidence which must be considered at Section 718.204(c), the weight to be accorded such evidence is to be determined by the administrative law judge as the finder of

[3]In *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), the United States Court of Appeals for the Fourth Circuit held that in weighing the x-ray evidence of record, an administrative law judge cannot rely solely upon a numerical analysis of the x-ray readings, but must consider the relative qualifications of the physicians rendering the interpretations.

fact. *See Walker, supra; see also Mullins Coal Co. of Virginia v. Director, OWCP,* 484 U.S. 135 11 BLR 2-1 (1987), *reh'g denied,* 484 U.S. 1047 (1988); *Cook v. Director, OWCP,* 901 F.2d 33, 13 BLR 2-427 (4th Cir. 1990). Thus, on remand, the administrative law judge must weigh this evidence with the other relevant evidence of record including claimant's pulmonary function study dated April 15, 1991, and determine the weight each should be given. *Mullins, supra; Milburn Colliery Company v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Perry, supra; Tackett v. Director, OWCP,* 7 BLR 1-703 (1985).

We also reject claimant's argument that the administrative law judge was required to credit the opinions of claimant's treating physicians as such a finding is within the administrative law judge's discretion, and cannot be based on a mechanical crediting of a physician's status without considering other relevant factors. *Sterling Smokeless Coal Co. v. Akers,* 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.,* 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Moreover, contrary to claimant's suggestion, Dr. Smiddy did not directly address the issue of total disability and therefore his opinion cannot satisfy claimant's burden of proof on this issue.[4] *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986). The administrative law judge must consider, however, Dr. Sargent's medical report pursuant to Section 718.204(c)(4), and determine whether it is sufficient to establish a totally disabling respiratory impairment, and pursuant to Section 718.204(b), to determine whether Dr. Sargent's belief that pneumoconiosis does not progress after the miner leaves the mines undermines his diagnosis regarding causation. *See Mullins, supra; Adkins*, *supra*.

Finally, we note that the administrative law judge has not yet considered the issue of causation of total disability under Section 718.204(b) and, therefore, did not err by applying an incorrect standard of proof regarding this issue. On remand the administrative law judge must determine whether claimant's pneumoconiosis was a contributing cause of his total disability. *See* 20 C.F.R. §718.204(b); *Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[4]On remand, however, the administrative law judge must consider, pursuant to Section 718.204(c)(1), the pulmonary function study that Dr. Smiddy obtained.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part, and this 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

REGINA C. McGRANERY
Administrative Appeals Judge