

BRB No. 02-0152 BLA

JOE HURT)
)
 Claimant-Respondent)
)
 v.)
)
 LOCUST GROVE COAL COMPANY) DATE ISSUED:
)
 and)
)
 KENTUCKY COAL-PRODUCERS)
 SELF-INSURANCE FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS') DECISION and ORDER
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

Appeal of the Decision and Order on Remand Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand Awarding Benefits (98-BLA-

0336) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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 This case is before the Board for a second time. Claimant initially filed a claim for benefits on October 4, 1983, which was denied by Administrative Law Judge Lawrence E. Gray on September 1, 1987, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 56. On July 16, 1993, claimant filed the instant duplicate claim, Director's Exhibit 1. On March 30, 1999, the administrative law judge issued a Decision and Order awarding benefits. Subsequent to employer's appeal, the Board issued a Decision and Order affirming the administrative law judge's decision in part, vacating it in part, and remanding the case for further consideration. *Hurt v. Locust Grove Coal Co.*, BRB No. 99-0761 BLA (Sep. 29, 2000)(unpub.). Specifically, the Board affirmed that the administrative law judge's finding of a material change in conditions as it was unchallenged on appeal. *Hurt*, slip op. at 2 n.1. The Board, however, agreed with employer that the administrative law judge erred in finding the existence of pneumoconiosis based on the medical opinion evidence of record. Accordingly, the administrative law judge was instructed to reconsider all the relevant medical opinion evidence relevant to the existence of pneumoconiosis. The Board further held that the administrative law judge failed to provide sufficient findings for the Board to review on disability causation. *Hurt*, slip op. at 6. The administrative law judge's findings on causation were, therefore, vacated and the case remanded for further consideration of that issue, if reached. Pursuant to the Board's remand order, the administrative law judge again considered all of the relevant medical opinion evidence and concluded that it established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 2-12. The administrative law judge further found that the weight of the evidence established that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order on Remand at 12-13. Accordingly, benefits were again awarded. In a Supplemental Decision and Order issued November 20, 2001, the administrative law judge awarded attorney's fees in the amount of \$500.00.

On appeal, employer contends that the administrative law judge erred in previously concluding that the evidence established a material change in conditions and that the Board

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. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

erred in affirming that finding as unchallenged on appeal. Employer also contends that the administrative law judge erred in finding that the weight of the medical opinion evidence supported a finding of the existence of pneumoconiosis and that the medical opinion evidence established that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Employer further asserts that application of the newly revised regulations is impermissibly retroactive and violates employer's due process rights. Claimant responds, urging that the award of benefits be affirmed. The Director, Officer of Workers' Compensation Programs (the Director), has filed a brief for the limited purpose of challenging employer's assertion that application of the newly revised regulations is impermissibly retroactive and violates employer's due process rights.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge previously erred in concluding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) and that the Board erred in affirming that determination. Specifically, employer argues that because the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the applicable standard is set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), declaring that in order to establish a material change in conditions, a claimant must establish, by newly submitted evidence, an element of entitlement previously adjudicated against him. Employer asserts that because claimant's initial claim was denied solely on the basis of claimant having failed to establish the existence of pneumoconiosis, the administrative law judge, in considering the duplicate claim, was to consider initially only the newly submitted evidence on the issue of pneumoconiosis and to determine whether that evidence established the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. Employer asserts, therefore, that the administrative law judge erred in determining that a material change in conditions was established because he concluded that the newly submitted evidence established a totally disabling respiratory impairment, an element not previously adjudicated against claimant.

As noted, *supra*, claimant's initial claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 56. When the instant duplicate claim was filed, the administrative law judge determined that a material change in conditions was established "as the newly submitted evidence unanimously shows that [claimant] is now totally disabled from a pulmonary standpoint." *See* Decision and Order of March 30, 1999 at 18. Further review of the administrative law judge's decision, however, shows that the

administrative law judge also concluded that “claimant has established a material change in conditions as the newly submitted evidence establishes that he has pneumoconiosis.” Decision and Order of March 30, 1999 at 18. Thus, because the administrative law judge properly determined that a material change in conditions was established because the existence of pneumoconiosis, the element previously adjudicated against claimant, was established, we conclude that any error made by the administrative law judge in also finding that a material change in conditions was established because a totally disabling pulmonary impairment was established is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also asserts that the Board erred in concluding that employer had not challenged the administrative law judge’s finding of a material change in conditions in its previous appeal to the Board. We conclude that a review of the brief submitted by employer in its previously appeal to the Board, reflects that employer did sufficiently challenge the administrative law judge’s material change finding.² *See Employer’s Brief* filed April 2, 1999.

Employer further argues that under *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) and *Ross*, *supra* the administrative law judge must compare the evidence in the original claim with the evidence submitted in support of the duplicate claim, on the element of pneumoconiosis, and explain how the evidence differs qualitatively in determining whether a material change in conditions has been established. Employer contends that pursuant to *Kirk*, the new evidence must not only establish the element previously decided against claimant, but must be “substantially more supportive of claimant.” In this case, employer contends that the administrative law judge failed to properly apply the requirements of *Ross* and *Kirk*, because he made no effort to compare the evidence in the original claim with the evidence in the duplicate claim. According to employer, such a comparison would reveal merely that the debate as to whether claimant has pneumoconiosis is ongoing, and not that the miner’s condition has actually changed.

In finding that the new evidence established the existence of pneumoconiosis the administrative law judge noted that despite the split in the x-ray readings on the existence of pneumoconiosis, the new medical opinions now established the existence of pneumoconiosis as more broadly defined by the Act. Decision and Order dated March 30, 1999 and Decision and Order on Remand dated September 28, 2001. Thus, we reject employer’s argument and hold that the administrative law judge’s finding of a material change complies with the teaching of *Kirk* and *Ross*. Accordingly, contrary to employer’s assertion, *Kirk* does not

² Employer was represented by different counsel at that time.

constitute an alteration of the material change in conditions standard enunciated by that court in *Ross, supra*, but merely a clarification of that standard. We, therefore, reject employer's assertion that remand is necessary based on intervening case law, *see Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), and reaffirm the Board's previous holding that the administrative law judge properly found that a material change in conditions was established pursuant to Section 725.309(d)(2000).

Employer next asserts that the administrative law judge erred in concluding that the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a). Employer also argues that application of the newly revised regulation defining pneumoconiosis at Section 718.202, exceeds the scope of the statutory definition and is therefore invalid. Thus, employer contends that retroactive application of this definition is impermissible as it denies employer due process by denying employer the right to develop evidence under the newly revised definition of pneumoconiosis. We agree with the Director, however, that the revised regulation is not impermissibly retroactive and does not deny employer due process as it merely codifies and clarifies existing case law. *See Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987).³ Moreover, contrary to employer's argument, the revised regulation does not exceed the scope of the statutory definition because pneumoconiosis is defined by the statute as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. *See* 30 U.S.C. §902(b); *see also Nat'l Mining Ass'n v. Department of Labor*, F.3d , 2002 WL 1300007 *8 (D.C. Cir., June 14, 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

Employer further contends that even if the medical opinion evidence of record were deemed sufficient to support a finding of the existence of pneumoconiosis, the administrative law judge erred in failing to weigh all of the evidence relevant to the existence of pneumoconiosis, *i.e.*, the negative x-ray evidence together with the medical opinion evidence, in a manner consistent with the holdings of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Turning to the medical opinion evidence, employer asserts that the administrative law judge erred in his analysis of the opinions of those physicians who conclude that claimant did not suffer from

³ For the same reasons, we reject employer's argument concerning the validity of the revised regulation at 20 C.F.R. §718.204(c).

pneumoconiosis, *i.e.*, Dr. Fino, Employer's Exhibit 2, Dr. Broudy, Director's Exhibit 60; Employer's Exhibit 1; Dr. Harrison, Director's Exhibit 14, Dr. Myers, Director's Exhibit 13, and Dr. Branscomb, Employer's Exhibit 4. Employer further argues that the administrative law judge erred in crediting the opinions of Drs. Baker and Wicker, Director's Exhibits 15, 29, 64, as supporting a finding of pneumoconiosis, because both opinions were based on nothing more than positive x-ray interpretations.

When this case was previously before the Board, the Board vacated the administrative law judge's finding that the medical opinions of record supported a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The Board held that the administrative law judge failed to explain what factors, other than positive x-rays and a history of coal dust exposure, Drs. Baker and Wicker relied upon in finding that claimant suffered from pneumoconiosis. *Hurt*, slip op. at 4. The Board also held that the administrative law judge impermissibly accorded greatest weight to the opinion of Dr. Wicker, merely based on his status as claimant's treating physician. *Hurt*, slip op. at 4. The Board further stated that while the administrative law judge rationally concluded that Dr. Broudy's opinion was hostile to the Act, it was unclear why the administrative law judge reached the same conclusion regarding the opinion of Dr. Fino. *Hurt*, slip op. at 5. Finally, the Board held that the administrative law judge failed to provide a sufficient basis for his conclusion that the opinions of Drs. Myers, Broudy, Fino and Bransomb, diagnosing the presence of asthma, provided a "misdiagnosis." *Hurt*, slip op. at 5.

On remand, the administrative law judge concluded that the reports of Drs. Wicker and Baker constituted well-reasoned and documented opinions. The administrative law judge explained that both physicians provided medical support for their conclusions that claimant suffered from an obstructive disease arising in part from coal mine employment, a medical diagnosis sufficient to support a finding of pneumoconiosis at Section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The determination of whether a medical opinion is sufficiently reasoned and documented to support an element of an entitlement is within the discretion of the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge further concluded that the opinion of Dr. Wicker as treating physician was entitled to the greatest weight not only because of that status but because Dr. Wicker's opinion was well-reasoned and well-documented and because he had the best knowledge of claimant's day-to-day condition. Decision and Order on Remand at 11, 12. This determination constitutes a permissible basis for according greater weight to the opinion of a treating physician. *See Jericol Mining, Inc. v. Napier*, 311 F.3d 703, BLR (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Griffith v.*

Director, OWCP, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). We thus conclude that the administrative law judge has complied with the Board's remand instructions and has provided affirmable bases for according greater weight to the medical opinions of Drs. Wicker and Baker.

Further, we reject employer's myriad assertions that the administrative law judge erred in failing to accord greater weight to the medical opinions of those physicians who provided contrary opinions, *i.e.* those opinions diagnosing an absence of legal pneumoconiosis. In a permissible exercise of his discretion, the administrative law judge found that the opinion of Dr. Fino, a consulting physician, was not well-reasoned as he failed to take into account all the relevant evidence of record, particularly evidence that was favorable to claimant. *See Clark, supra; Peskie, supra; Lucostic, supra.* Moreover, the administrative law judge found that the opinions of those physicians diagnosing asthma, unrelated to coal mine employment, were not as well-reasoned or as well-documented as those opinions diagnosing the existence of pneumoconiosis. Employer's argument to the contrary, such assertions are mere requests for the Board to reweigh the evidence of record, a function outside the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Lastly, regarding the existence of pneumoconiosis, we reject employer's contentions that the administrative law judge must weigh all evidence of pneumoconiosis, like and unlike, together in accordance with *Compton*. The Sixth Circuit has shown no inclination to adopt the rationale of *Compton* and it has repeatedly approved independent application of the subsections of Section 718.202(a) to determine the existence of pneumoconiosis. *E.g., Jericol Mining, Inc., supra; Cornett, supra; Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997). Thus, we conclude that the administrative law judge has complied with our remand instructions and we affirm the administrative law judge's determination that the medical opinion evidence establishes the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *see Furgerson v. Jericol Mining Inc.*, BRB No. 01-0728 BLA (Sep. 24, 2002).

Employer next contends that the administrative law judge erred in concluding that claimant established disability causation, *i.e.*, that claimant's totally disabling respiratory impairment was due to pneumoconiosis.⁴ Employer argues that the administrative law judge's causation finding is cursory and that he credits the opinions of Drs. Baker and Wicker without adequate explanation. Employer further contends that this cursory analysis repeats the errors found in the administrative law judge's analysis of the medical opinion evidence relevant to the existence of pneumoconiosis and violates the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C.

⁴The administrative law judge's finding that claimant is totally disabled, Decision and Order of March 30, 1999 at 18, has not been challenged on the merits.

§554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record.

When this case was previously before the Board, the Board held that the administrative law judge's finding that claimant established disability causation violated the APA because the administrative law judge failed to provide any basis for crediting the opinions of Drs. Wicker and Baker. *Hurt*, slip op. at 6. The Board instructed the administrative law judge to address the relevant evidence on disability causation if the issue were reached on remand. In considering whether total disability due to pneumoconiosis was established, the administrative law judge concluded that the opinions of Drs. Baker and Wicker, that claimant's totally disabling respiratory was due to coal dust exposure and/or pneumoconiosis, constituted well-reasoned and documented opinions. The administrative law judge further found that the opinions of Drs. Myers and Harrison attributing total disability to asthma alone were not credible as the physicians failed to address the existence of legal pneumoconiosis. The administrative law judge also gave no weight to the opinion of Dr. Fino because he failed to consider relevant evidence in making his determination. Lastly, the administrative law judge found that Dr. Branscomb's opinion, that claimant's totally disabling respiratory impairment was due to asthma, was outweighed by the opinion of Dr. Wicker, the treating physician.

We conclude that while the administrative law judge's findings regarding disability causation are terse, they nevertheless comply with the Board's remand instructions and are, therefore, affirmable. As discussed in the context of the medical opinion evidence of pneumoconiosis, the administrative law judge thoroughly reviewed all of the relevant evidence of record and permissibly accorded greatest weight to the opinions of Drs. Baker and Wicker because they were well-reasoned. *See Clark, supra; Peskie, supra; Lucostic, supra*. Further, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino, Myers and Harrison because of the physicians' failure to address all the relevant evidence, which, he reasonably concluded, indicates that they had a less than complete picture of the miner's health. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Lastly, the administrative law judge permissibly credited the opinion of Dr. Wicker as claimant's treating physician. *See Napier, supra; Stephens, supra; Groves, supra; Griffith, supra; Tussey, supra*.

Accordingly, the administrative law judge's Decision and Order On Remand Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge