BRB No. 99-0977 BLA

JOHN N. JOYCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	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 on Remand Awarding Benefits of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (95-BLA-2603) of Administrative Law Judge Samuel J. Smith 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, which is before the Board for the third time,

involves a duplicate claim filed on February 17, 1988.[1] In an initial Decision and Order dated March 25, 1991, Administrative Law Judge Peter McC. Giesey credited claimant with thirty-five years of coal mine employment and considered the claim under the applicable regulations set forth at 20 C.F.R. Part 718. Judge Giesey found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), a presumption which Judge Giesey found was not rebutted. Judge Giesey further determined that the evidence of record was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, Judge Giesey awarded benefits. Employer filed an appeal with the Board.

In a Decision and Order dated August 30, 1993, the Board held that the newly submitted evidence was sufficient to establish a material change in conditions under 20 C.F.R. §725.309 as a matter of law. *Joyce v. Eastern Associated Coal Corp.*, BRB No. 91-1227 BLA (Aug. 30, 1993)(unpublished), slip op. at 3, *citing Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). In addition, the Board held that Judge Giesey acted within his discretion in applying the true doubt rule to find the x-ray evidence sufficient to establish the presence of pneumoconiosis under Section 718.202(a)(1). *Id*. at 3. The Board also affirmed Judge Giesey's finding under Section 718.203(b), as well as his finding that the medical opinions of Drs. Taylor and Kester supported a finding of total disability pursuant to Section 718.204(c)(4). *Id*. at 4. The Board further held, however, that there was merit in employer's contention that Judge Giesey erred in neglecting to address the comments of Drs. Morgan and Zaldivar regarding the validity of the objective studies upon which Dr. Rasmussen relied in opining that claimant is totally disabled due to pneumoconiosis. *Id*. The Board also noted that Judge Giesey did not weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record pursuant to Section 718.204(c). *Id*. at 5, n.7. Finally, the Board held that Judge Giesey did not identify

[1]Claimant previously filed a claim for benefits on April 15, 1983, which the district director denied on April 25, 1984 for claimant's failure to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 37. Claimant filed a second claim on January 14, 1986. Director's Exhibit 38. The district director denied this claim on March 19, 1986, again having found that claimant did not establish any of the elements of entitlement. *Id*. Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on February 17, 1988. Director's Exhibit 1.

evidence sufficient to satisfy claimant's burden of proof under Section 718.204(b). *Id*. at 5. Accordingly, the Board vacated Judge Giesey's findings under Sections 718.204(b) and 718.204(c)(4), and remanded the case for reconsideration. *Id*. at 6.

In a Decision and Order dated July 20, 1994, Administrative Law Judge George A. Fath noted that the United States Supreme Court had recently invalidated the true doubt rule in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).[2] Director's Exhibit 70. Judge Fath consequently weighed the relevant evidence of record under Section 718.202(a)(1) and (a)(4), and determined that claimant did not prove the existence of pneumoconiosis by a preponderance of the evidence thereunder. *Id*. Judge Fath further determined that the evidence of record supported a finding of total disability pursuant to Section 718.204(c)(4), but was insufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(b). *Id*. Accordingly, Judge Fath denied benefits.

On March 28, 1995, claimant filed a request for modification of the denial of benefits, submitting additional evidence. Director's Exhibit 75. The district director denied this request, and claimant requested a hearing. The case was transferred to the Office of Administrative Law Judges for a hearing, which was held on June 13, 1996 before Administrative Law Judge Samuel J. Smith (the administrative law judge).[3] In his Decision and Order dated October 2, 1997, the administrative law judge found that inasmuch as claimant established that Judge Fath made mistakes of fact under Sections 718.202(a)(1) and (a)(4), claimant was entitled to consideration of his claim on the merits. The administrative law judge determined that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, the administrative law judge awarded benefits. Employer appealed, and claimant filed a cross-appeal, challenging the administrative law judge's finding with respect to the date of onset of total disability due to pneumoconiosis.

[2]On remand, after notice to the parties, the case was transferred to Judge Fath as Judge Giesey was unavailable to render a decision.

[3]The case was transferred to Judge Smith as Judge Fath was unavailable.

The Board affirmed the administrative law judge's finding that claimant established modification under Section 725.310, holding that the administrative law judge permissibly concluded that Judge Fath made a mistake in a determination of fact with regard to his weighing of the opinions of Drs. Vasudevan and Zaldivar under Section 718.202(a)(4). *Joyce v. Eastern Associated Coal Corp.*, BRB Nos. 98-0221 BLA and 98-0221 BLA-A (Nov. 9, 1998)(unpublished). The Board then agreed with employer's contention that the administrative law judge should have performed a duplicate claims analysis pursuant to Section 725.309 before turning to the merits of the instant duplicate claim filed in 1988. *Id*. The Board held that its previous holding that a material change in conditions was established, *see Joyce v. Eastern Associated Coal Corp.*, BRB No. 91-1227 BLA (Aug. 30, 1993)(unpublished), was no longer in accord with controlling precedent since, subsequent to its previous decision, the United States Court of Appeals for the Fourth Circuit adopted a new standard relevant to Section 725.309 in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 19996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[4] *Id*. The Board thus remanded the case for the administrative law judge to determine whether claimant established a material change in conditions in accordance with the standard set forth in *Rutter*. *Id.* The Board further vacated the administrative law judge's findings with respect to the opinions of Drs. Rasmussen, Tuteur and Zaldivar pursuant to Section 718.202(a)(4), instructing the administrative law judge to reconsider these opinions thereunder.[5] *Id*. The Board affirmed the administrative law judge's finding that claimant established total disability under Section 718.204(c). *Id*. The Board vacated, however, the administrative law judge's finding that total disability due to pneumoconiosis was established under Section 718.204(b), inasmuch as the administrative law judge's determination under Section 718.204(b) depended heavily on his findings under Section 718.202(a)(4). *Id*. In vacating the administrative law judge's finding under Section 718.204(b), however, the Board rejected each of employer's arguments in support of its contention that the administrative law judge did not properly weigh the opinions of Drs. Tuteur, Zaldivar and Rasmussen under Section 718.204(b). *Id*. Finally, the Board vacated the administrative law judge's finding regarding the date of onset of total disability due to pneumoconiosis, and instructed the administrative law judge to reconsider this finding on

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[4]The United States Court of Appeals for the Fourth Circuit held in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 19996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), that in order to establish a material change in conditions under 20 C.F.R. §725.309, a claimant is required to prove, based on newly submitted evidence, at least one of the elements of entitlement previously adjudicated against him.

[5]The Board affirmed the administrative law judge's finding with respect to Dr. Morgan's opinion that claimant does not have pneumoconiosis. The Board held that the administrative law judge properly discounted Dr. Morgan's opinion on the basis that Dr. Morgan was equivocal and did not adequately explain, in reviewing the evidence of record, his apparent preference for Dr. Zaldivar's opinion that claimant does not have pneumoconiosis. *Joyce v. Eastern Associated Coal Corp.*, BRB Nos. 98-0221 BLA and 98-0221 BLA-A (Nov. 9, 1998)(unpublished).

remand, if reached. *Id*.

In his Decision and Order on Remand, the administrative law judge found that claimant established a material change in conditions pursuant to Section 725.309. The administrative law judge then credited Dr. Rasmussen's opinion, as supported by Dr. Zaldivar's opinion, over the contrary opinion of Dr. Tuteur in finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). The administrative law judge omitted reconsidering the opinions under Section 718.204(b), stating that the Board had affirmed his finding that claimant's total disability was due to pneumoconiosis. Consequently, the administrative law judge awarded benefits. In addition, the administrative law judge concluded that the evidence of record did not clearly establish the date on which claimant became totally disabled due to pneumoconiosis. The administrative law judge thus found that claimant was entitled to benefits commencing on February 1, 1988, the first day of the month in which claimant filed the instant claim. On appeal, employer argues that the administrative law judge improperly credited Dr. Rasmussen's opinion over the opinion of Dr. Tuteur in finding the existence of pneumoconiosis established under Section 718.202(a)(4). Employer further challenges the administrative law judge's finding relevant to the date of the commencement of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter opposing employer's contention with regard to the commencement of benefits finding and indicating that he does not otherwise intend to participate presently in this appeal. Employer has filed a reply brief, challenging the Director's response to its argument regarding the date of onset of total disability due to pneumoconiosis.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

On appeal, employer first argues that the evidence in this case proves that claimant's condition did not worsen since the denial of benefits in claimant's previous 1986 claim, and that the administrative law judge erred in summarily concluding on remand that a material change in conditions was established under Section 725.309 without adequately discussing the evidence, contrary to the mandate of the Administrative Procedure Act (the APA). *See* 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). We disagree. As discussed *supra*, claimant's prior claim, filed on January 14, 1986, was finally denied on March 19, 1986 by the district director, who found that the miner failed to establish any of the elements of entitlement under Part 718. Director's Exhibit 37. Thus, the relevant inquiry for the administrative law judge on remand under Section 725.309 was whether the evidence submitted with the duplicate claim was sufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(c). *See* 20 C.F.R. §725.309; *Rutter, supra.* The administrative law judge concluded on remand that claimant

demonstrated a material change in conditions inasmuch as the Board affirmed his finding in his previous October 2, 1997 Decision and Order that the evidence submitted since the prior 1986 denial of benefits relevant to the issue of total disability was sufficient to establish total disability under Section 718.204(c). Decision and Order on Remand at 1-2; *see Joyce v. Eastern Associated Coal Corp.*, BRB Nos. 98-0221 BLA and 98-0221 BLA-A (Nov. 9, 1998)(unpublished). Accordingly, we affirm the administrative law judge's finding that claimant established a material change in conditions as a matter of law under Section 725.309.[6] *See* 20 C.F.R. §725.309; *Rutter, supra*.

Employer also contends that the administrative law judge improperly credited Dr. Rasmussen's medical opinion over Dr. Tuteur's opinion in finding the existence of pneumoconiosis established under Section 718.202(a)(4) on remand. Employer's contention has merit. Dr. Rasmussen opined that while claimant has aortic stenosis, it is insignificant and that, therefore, claimant suffers from pneumoconiosis. Director's Exhibit 46; Claimant's Exhibit 1. In contrast, Dr. Tuteur opined that claimant has documented, significant aortic stenosis, and not pneumoconiosis, which is the sole cause of claimant's symptoms. Employer's Exhibit 1. In crediting Dr. Rasmussen's opinion as well-reasoned and documented, the administrative law judge was persuaded by Dr. Rasmussen's explanation that claimant does not have significant aortic stenosis because a precipitant drop in claimant's pH value after exercise would be expected with aortic stenosis, but such a drop did not occur. Decision and Order on Remand at 2-3; Claimant's Exhibit 1 at 10-12. Employer correctly argues that the administrative law judge erred in failing to consider testimony from Drs. Zaldivar and Tuteur criticizing Dr. Rasmussen's explanation. Specifically, employer points to Dr. Zaldivar's opinion that only a cardiac catheterization or echocardiogram can indicate the severity of aortic stenosis, and not, as Dr. Rasmussen found, merely an answer to the question of whether claimant exceeded his anaerobic threshold. *See* Employer's Exhibit 3 at 15-17. Employer also cites Dr. Tuteur's testimony calling into question Dr. Rasmussen's reasoning, *i.e.*, testimony indicating that the non-occurrence of a significant drop in claimant's pH values resulted from the fact that claimant stopped exercising before a drop could occur. Employer's Exhibit 12.

[6]Employer asserts that if all that were required was a finding as a matter of law, the Board could have made that determination previously rather than remanding the case for the administrative law judge to consider this issue. This argument does not support, however, employer's contention that the administrative law judge's finding on remand did not comport with the standard set forth in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 19996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

There is also merit in employer's argument that the administrative law judge improperly rejected, as unreasoned, Dr. Tuteur's opinion on the ground that Dr. Tuteur based his conclusion that claimant's aortic stenosis is significant solely on claimant's predominantly negative x-rays. Decision and Order on Remand at 4. The administrative law judge found that this was an inadequate basis for finding that claimant does not have pneumoconiosis because Dr. Tuteur himself admitted that a miner with a normal x-ray may still suffer from significant pneumoconiosis. *Id*. Employer correctly contends that the administrative law judge erred in failing to consider that Dr. Tuteur testified he based his opinion that aortic stenosis is the sole cause of claimant's problems on factors other than the predominantly negative x-rays. Employer points to Dr. Tuteur's testimony indicating that he also based his opinion on claimant's symptoms, results of an echocardiogram and Doppler study, arterial blood gas tests, x-ray evidence of calcification around claimant's aortic valve, and a cardiac catheritization. Employer's Exhibit 2 at 6-7, 12-13, 18-20. Additionally, employer is correct in contending that the administrative law judge improperly discounted Dr. Tuteur's opinion as inconsistent, without considering the entirety of Dr. Tuteur's testimony. The administrative law judge noted that Dr. Tuteur, like Dr. Rasmussen, indicated that he would expect a drop in pH values if aortic stenosis were present. Decision and Order on Remand at 4-5. The administrative law judge noted that Dr. Tuteur also agreed there was no significant drop in pH values. *Id*. The administrative law judge found that the fact that Dr. Tuteur diagnosed significant stenosis anyway rendered the doctor's opinion inconsistent. *Id*. Employer correctly contends that the administrative law judge did not consider Dr. Tuteur's testimony explaining that the reason there was no significant drop in claimant's pH value was because claimant did not exercise long enough for there to be a dramatic drop. *See* Employer's Exhibit 2 at 12. In addition, we agree with employer that the administrative law judge appears not to have considered the relative qualifications of Drs. Rasmussen and Tuteur.[7] In weighing medical opinions and resolving conflicts posed by the evidence, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We thus vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4). On remand, the administrative law judge should reconsider the opinions of Drs. Rasmussen, Zaldivar and Tuteur, consistent with the Fourth Circuit's decisions in *Hicks* and *Akers*. *See Hicks, supra; Akers, supra*.

[7]The record reflects that Dr. Rasmussen is Board-certified in internal medicine, while Dr. Tuteur is Board-certified in internal medicine and pulmonary diseases. Director's Exhibits 42, 46; Claimant's Exhibit 2; Employer's Exhibit 2.

Additionally, we note that, subsequent to the administrative law judge's Decision and Order on Remand and employer's appeal, the United States Court of Appeals for the Fourth Circuit held in *Island Creek Coal Co. v. Compton,* 211 F.3d 203, BLR (4th Cir. 2000), that although Section 718.202(a) enumerates four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board will apply the law in effect at the time of its decision. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Hill v. Director, OWCP*, 9 BLR 1-126 (1986). Because the administrative law judge previously was not required to weigh all of the evidence together under Section 718.202(a)(1)-(4), but is now required to do so pursuant to *Compton*, the administrative law judge must weigh on remand all of the evidence together under Section 718.202(a)(1)-(4); *i.e.*, make a finding with regard to whether the miner suffered from pneumoconiosis consistent with the Fourth Circuit's recent decision. *See Compton, supra*. If the administrative law judge determines on remand that claimant has established the existence of pneumoconiosis, he must render a specific finding as to whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b).[8] *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir 1990).

Finally employer challenges the validity of the regulatory scheme pursuant to which the administrative law judge determined that claimant's benefits in this case commenced on February 1, 1988, the first day of the month in which claimant filed the instant claim for benefits. Specifically, employer argues that 20 C.F.R. §725.503(b) violates the APA and runs afoul of the United States Supreme Court's ruling in *Ondecko, supra*, by improperly shifting the burden of production with regard to the onset date of claimant's total disability due to pneumoconiosis from claimant to employer.[9] Employer's contention lacks merit. As

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[8]In its prior Decision and Order, the Board vacated the administrative law judge's finding that total disability due to pneumoconiosis was established under 20 C.F.R. §718.204(b), and instructed the administrative law judge to reconsider this finding if reached on remand. *Joyce v. Eastern Associated Coal Corp.*, BRB Nos. 98-0221 BLA and 98-0221 BLA-A (Nov. 9, 1998)(unpublished). In his Decision and Order on Remand, the administrative law judge mistakenly did not render an explicit finding on this issue, erroneously stating that the Board affirmed his finding at Section 718.204(b). Decision and Order on Remand at 1. We do note, however, that the Board previously rejected employer's specific arguments relating to Section 718.204(b). *Joyce, supra*, *slip op.* at 11-13.

[9]20 C.F.R. §725.503(b) provides in pertinent part:

> In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of the onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed....

the Director states in his response brief, Section 725.503(b) does not improperly shift the burden of establishing the onset date of total disability due to pneumoconiosis from a miner to the party opposing entitlement, but rather adopts a presumptive onset date where the evidence does not establish an actual date on which the miner became totally disabled due to pneumoconiosis, and shifts the burden to the party opposing entitlement. Where the party opposing entitlement submits credible evidence that the miner was not totally disabled due to pneumoconiosis during a period covered by the presumptive onset date, then the miner has the burden to prove by a preponderance of the evidence that he was, in fact, totally disabled due to pneumoconiosis during the disputed period. Thus, Section 725.503(b) does not violate the APA or run afoul of *Ondecko*. *See* 5 U.S.C. §556(d), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a); *Ondecko, supra*.

In the instant case, the administrative law judge determined that the examinations and testing of record were not performed with sufficient regularity through the years to permit him to determine the specific date on which claimant became totally disabled due to pneumoconiosis. Decision and Order on Remand at 5. The administrative law judge properly stated that the onset date is not established, in and of itself, by the first medical opinion establishing total disability due to pneumoconiosis, since the first such medical opinion only indicates that the miner became totally disabled due to pneumoconiosis at some point prior to it. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Id*. The administrative law judge properly found that because the medical evidence did not clearly establish the date on which claimant became totally disabled due to pneumoconiosis, claimant was entitled to benefits commencing on February 1, 1988, the first day of the month in which claimant filed the instant claim for benefits. See 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); Decision and Order on Remand at 5. While we must vacate this finding in light of our decision to remand this case for further consideration, as discussed *supra*, in the event the administrative law judge determines on remand that claimant is entitled to benefits, his finding that claimant is entitled to benefits commencing on February 1, 1988 is reinstated.

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.

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20 C.F.R. §725.503(b).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge