BRB No. 04-0150 BLA

RAY MAGGARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 09/15/2004
	)	
Employer/Carrier-Respondents	)	
	)	
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 – Denying Benefits of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

Claimant appeals the Decision and Order on Remand - Denying Benefits (00-BLA-0513) of Administrative Law Judge Rudolf L. Jansen 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).[1] This case has a protracted procedural history, which is fully set forth in the Board's December 13, 2002 Decision and Order. Considering employer's appeal of the administrative law judge's denial of its March 19, 1999 request for modification, the Board affirmed as unchallenged the administrative law judge's findings that invocation of the interim presumption was not established under 20 C.F.R. §727.203(a)(1)-(3) (2000), that rebuttal of the interim presumption was not established under 20 C.F.R. §727.203(b)(1) and (b)(2) (2000), and that a change in conditions was not established under 20 C.F.R. §725.310 (2000). *Maggard v. Peabody Coal Co.*, BRB No. 02-0465 BLA (Dec. 13, 2002)(unpublished). The Board vacated, however, the administrative law judge's findings at Sections 727.203(a)(4), (b)(3) and (b)(4) (2000), as the administrative law judge had not articulated a sufficient rationale for crediting the opinions of Drs. Calhoun, Norsworthy, and West over the contrary opinions of Drs. Dahhan, O'Neill, Renn, and Tuteur. In light of the above-referenced errors, the Board further vacated the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and remanded the case for further consideration. The Board instructed that, on remand, should the administrative law judge find a mistake in a determination of fact, he must ultimately determine whether reopening the claim would render justice under the Act pursuant to *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) and *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).[2] *Id.*

In a Decision and Order on Remand dated October 14, 2003, the administrative law judge found that reopening the claim would render justice under the Act pursuant to *O'Keeffe*, 404 U.S. at 254, and *Kinlaw*, that invocation of the interim presumption was not established under 20 C.F.R. §727.203(a)(4) (2000), and that, therefore, employer had demonstrated a mistake in a determination of fact in the prior decision. Accordingly, 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. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (*citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)).

administrative law judge granted employer's request for modification and denied benefits. On appeal, claimant initially challenges the timeliness of employer's March 19, 1999 Petition for Modification. Claimant further contends that the administrative law judge erred in failing to find invocation of the interim presumption established under 20 C.F.R. §727.203(a)(4) (2000), and, consequently, he erred in finding that employer had demonstrated a mistake in a determination of fact and in denying benefits. Employer responds, urging affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in this appeal.[3]

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).

Pursuant to 20 C.F.R. Part 727, a miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis, arising out of coal mine employment, if one of the medical criteria set forth at Section 727.203(a)(1)-(4) (2000) is met.[4] If the administrative law judge properly finds invocation of the interim presumption established pursuant to any subsection of Section 727.203(a), the burden shifts to the party opposing entitlement to establish rebuttal of the presumption by a preponderance of the evidence pursuant to one of the four methods provided in 20 C.F.R. §727.203(b) (2000).

Claimant initially asserts that employer's March 19, 1999 Petition for Modification was untimely filed with the district director. Claimant's argument lacks

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that that reopening the claim would render justice under the Act pursuant to *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) and *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7-8.

[4] In a living miner's claim, invocation of the interim presumption may be established through (1) a chest x-ray, biopsy, or autopsy establishing the existence of pneumoconiosis; (2) ventilatory studies establishing the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrating the presence of an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishing the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(1)-(4) (2000).

merit. It is undisputed that the claim was in payment status when the employer filed its petition for modification. Director's Exhibit 122. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a), provides that on his own initiative, or on the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, *at any time prior to one year after the date of the last payment of benefits*, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310 (2000) (emphasis added). Thus, as it is undisputed that the claim was in payment status when employer filed its March 19, 1999 Petition for Modification with the district director, employer's petition for modification was timely filed.

Regarding the administrative law judge's evaluation of the medical opinion evidence at Section 727.203(a)(4) (2000), claimant asserts that the administrative law judge erred in departing from his prior findings, as set forth in his February 28, 2002 decision. Claimant's Brief at 5. Specifically, claimant notes that the administrative law judge previously accorded less weight to the opinions of Drs. Tuteur, Dahhan, and Renn because, although they were reasoned and documented, these physicians did not examine claimant. Administrative Law Judge's February 28, 2000 Decision and Order at 11. Yet, on remand, the administrative law judge chose to credit the opinions of Drs. Tuteur, Dahhan, and Renn despite the fact that these physicians did not examine claimant. Claimant's Brief at 5. Contrary to claimant's arguments, however, an administrative law judge is not bound by his prior findings which have been vacated by the Board. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985); s*ee Bartley v. L&M Coal Co.*, 901 F.2d 1311, 1313, 13 BLR 2-414, 2-417 (6th Cir. 1990); *see also Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

Finally, claimant asserts that the administrative law judge "should have concluded that the reports and opinions of Drs. Calhoun, West, Norsworthy, and Chick, outweighed the reports of Drs. O'Neill (who also never examined the claimant) and Getty as well as the newly submitted reports of Drs. Tuteur, Dahhan and Renn" because in addition to having examined claimant, they are better reasoned. Claimant's Brief at 6-7. Specifically, claimant asserts that Dr. Tuteur failed to explain how claimant's eighteen-year coal mine dust exposure could have had no effect on his pulmonary impairment, that Drs. Dahhan and Renn committed similar errors in their reports, and that each of these physicians failed to diagnose pneumoconiosis, which is in direct conflict with every previous determination made in this matter. Claimant's Brief at 7. Claimant's arguments amount to a request that the Board reweigh the medical opinion evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, reject claimant's arguments.

A review of the record reveals that the administrative law judge properly resolved the conflicting medical opinions and thus, we reject claimant's argument to the contrary. Specifically, before weighing the medical opinion evidence on remand, the administrative law judge incorporated the findings of fact and conclusions of law stated in the prior decision, except to the extent that they were found to be erroneous by the Board, or to the extent that they are inconsistent with the findings and conclusions made in the instant Decision and Order on Remand. Decision and Order at 3. The administrative law judge then noted that he had been specifically ordered by the Board to "articulate a clearer rationale for crediting the opinions of Drs. Calhoun, Norsworthy, and West over the opinions of Drs. Dahhan, O'Neill, Renn, and Tuteur under Sections 727.203(a)(4), (b)(3) and (b)(4)." Decision and Order at 3. In re-weighing the medical opinions, the administrative law judge initially noted that Drs. Calhoun, West, and Norsworthy[5] who last examined claimant on November 5, 1976, March 16, 1978, and May 23, 1998 respectively, concluded that claimant had pneumoconiosis and was totally disabled due to the disease. Director's Exhibits 12-14; Decision and Order at 4-5. The administrative law judge further properly noted that the qualifications of these three physicians were not contained in the record. Decision and Order at 6. The administrative law judge permissibly accorded less weight to Dr. Calhoun's opinion because it was based in part on his belief that a November 5, 1976 pulmonary function study revealed severe impairment, where the pulmonary function study did not yield qualifying values and was invalidated by Dr. Tuteur, whom the administrative law judge found possessed superior qualifications and whose opinion the administrative law judge found more credible and persuasive. Director's Exhibit 12; Employer's Exhibit 2; Decision and Order at 4. An administrative law judge may discredit a doctor's opinion regarding the extent of a miner's disability if it is based in part upon pulmonary function studies found invalid by a better qualified physician. *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds* 14 BLR 1-37, 1-40 (1990)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Therefore, we affirm the administrative law judge's finding that the opinion of Dr. Calhoun is entitled to diminished weight.

The administrative law judge also permissibly accorded less weight to Dr. Norsworthy's opinion as not credible, not persuasive and poorly documented and reasoned. The administrative law judge specifically found that although the physician

[5] The record includes Dr. Norsworthy's treatment notes for office visits dating back to 1970, with numerous office visits from 1995 through 1998 relating to treatment for a variety of conditions, including heart disease, peptic ulcer disease, chronic bronchitis, and an orthopedic condition. Director's Exhibit 129. The record also reflects that claimant sustained a neck injury in a 1975 mine accident.

was claimant's long-time treating physician, his opinion was not entitled to enhanced weight because he provided little reasoning for his diagnosis, his opinion was based in part upon a non-qualifying objective study, he did not provide any basis other than his examination for finding the existence of a totally disabling respiratory impairment, and it is unclear from his report whether he considered claimant's smoking history. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983)(holding that the determination of whether an opinion is reasoned and documented requires the fact finder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986)(stating that an administrative law judge may properly assign less weight to a medical opinion which presents an incomplete picture of the miner's health); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985)(stating that a brief and conclusory report that is lacking any supporting medical evidence may be discredited); Director's Exhibit 14; Decision and Order at 4-5. We thus affirm the administrative law judge's discrediting of Dr. Norsworthy's report.

The administrative law judge also permissibly accorded less weight to Dr. West's opinion because he did not perform any blood gas studies, and did not perform, or review, any pulmonary function studies, and, therefore, he did not have as complete a picture of claimant's health as the other physicians of record. Director's Exhibit 13; Decision and Order at 5. *Stark*, 9 BLR at 1-37. Therefore, we affirm the administrative law judge's findings regarding Dr. West's opinion.

The administrative law judge then reviewed the opinions of Drs. Dahhan, O'Neill, Renn, and Tuteur, noting that these physicians were each Board-certified in internal medicine and pulmonary diseases, and that they each reviewed the medical evidence of record and opined that claimant did not have pneumoconiosis and was not totally disabled from a pulmonary or respiratory standpoint. Director's Exhibits 127, 129, 131; Employer's Exhibits 1, 2, 3, 5; Decision and Order at 6. These physicians indicated that claimant had a mild, reversible chronic obstructive pulmonary disease related to a heavy cigarette smoking history of one-half to three-quarter packs per day for twenty years. The administrative law judge permissibly accorded less weight to Dr. O'Neill's opinion, that "[i]t is equivocal as to whether Mr. Maggard has coal workers' pneumoconiosis or not" because it is not definitive and because while the physician addressed the objective evidence of record, he failed to address the physical examination findings of record regarding claimant's dyspnea or other symptoms of lung disease. Director's Exhibit 41; Decision and Order at 6. A physician's opinion which is qualified or equivocal may properly be discredited by an administrative law judge. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7 (6th Cir. 1995). In addition, a medical opinion may be rejected if the physician did

not have a complete picture of the miner's health, or if the doctor lacked knowledge of the miner's symptoms. *Stark*, 9 BLR at 1-37; *Campbell v. North American Coal Corp.*, 6 BLR 1-244, 1-249 (1983). Therefore, we affirm the administrative law judge's assignment of diminished weight to Dr. O'Neill's opinion.

Further, contrary to claimant's assertion, the administrative law judge permissibly accorded greatest weight to the reports by Drs. Dahhan, Renn, and Tuteur, who opined that claimant did not have pneumoconiosis, finding that their opinions were well-reasoned and well-documented and that they possessed superior qualifications to those of Drs. Calhoun, Norsworthy, and West. Decision and Order at 7. An administrative law judge may credit the medical reports which he determines are better supported by the objective evidence of record. *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829, 1-832 (1985). In addition, an administrative law judge may, in his discretion, assign more weight to a physician's report based on that physician's superior qualifications, *Scott*, 14 BLR at 1-37; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988); *Dillon*, 11 BLR at 1-114; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24, 1-26 (1987); *Wetzel*, 8 BLR at 1-139, 1-141. The administrative law judge then permissibly concluded that the opinions of Drs. Dahhan, Renn, and Tuteur, bolstered by the lesser weighted opinion of Dr. O'Neill, outweighed the contrary opinions of Drs. Calhoun, Norsworthy, and West and established that a mistake in fact had been made in the prior determination at Section 727.203(a)(4) (2000) because invocation had been not established thereunder. Director's Exhibits 12-14, 127, 129, 131; Employer's Exhibits 1, 2, 3, 5; Decision and Order at 7.

Based on the foregoing, we hold that the administrative law judge, upon reopening the record and considering all of the evidence of record, properly concluded that, based on his weighing of the medical opinion evidence, invocation of the interim presumption at Section 727.203(a)(4) (2000) was not established. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish invocation of the interim presumption at Section 727.203(a)(4) (2000). We, therefore, also affirm the administrative law judge's granting of employer's request for modification and denial of the claim for benefits under Part 727.

Finally, we note that the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989), if an administrative law judge finds that entitlement to benefits is not established under 20 C.F.R. Part 727, he must consider entitlement pursuant to 20 C.F.R. Part 718, where, as in the instant case, the claim for benefits was filed before March 31, 1980 and the case was adjudicated by the administrative law judge after that date. *See Knuckles*, 869 F.2d at 996, 12 BLR at 2-217. Therefore, following his denial of benefits

under Part 727, the administrative law judge should have considered whether claimant established his entitlement to benefits under Part 718. In this case, however, while the administrative law judge did not weigh the evidence pursuant to Part 718, the error was harmless, as his finding that claimant does not have a totally disabling respiratory or pulmonary impairment precludes a finding of entitlement thereunder.[6] *See Shupe*, 12 BLR at 1-204 (holding in an analogous situation that a finding of rebuttal at 20 C.F.R. §727.203(b)(2) (2000) precludes a finding of entitlement under Part 718).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[6] As the administrative law judge in this case found that claimant had more than ten years of coal mine employment, consideration of entitlement is not required under 20 C.F.R. §410.490. *See The Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989).