BRB No. 04-0888 BLA

JESSIE CHAFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETER CAVE COAL COMPANY	)	
	)	DATE ISSUED: 09/28/2006
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

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

Barry Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-0387) of Administrative Law Judge Linda S. Chapman, with respect to 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 is the second time that this case has

been before the Board. In our prior Decision and Order, we vacated the administrative law judge's award of benefits and remanded the case for reconsideration pursuant to 20 C.F.R. §§725.309 (2000), 718.202(a)(1), and 718.204(c).[1] *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). On remand, the administrative law judge determined that because the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), claimant had established a material change in conditions pursuant to Section 725.309.[2] (2000). The administrative law judge weighed the evidence of record as a whole and determined that claimant also proved that he is totally disabled due to pneumoconiosis under Section 718.204(c). Accordingly, she awarded benefits.

Employer argues that the administrative law judge did not apply the proper analysis when finding that claimant demonstrated a material change in conditions pursuant to Section 725.309 (2000). Employer also contends that the administrative law judge did not follow the Board's remand instructions when weighing the x-ray evidence and medical opinions of record. In addition, employer maintains that the administrative law judge erred in finding pneumoconiosis established under Section 718.202(a)(1) and (a)(4) and in finding total disability due to pneumoconiosis established under Section 718.204(c). The Director, Office of Workers' Compensation Programs, has responded to employer's allegations regarding Section 725.309 (2000) and urges the Board to affirm the administrative law judge's finding. Claimant urges affirmance of the award of benefits.

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 into the

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[1] Claimant filed his first application for benefits on November 13, 1989, which was finally denied on May 7, 1990 by the district director on the grounds that claimant failed to establish any of the elements of entitlement. Director's Exhibit 38. Claimant filed a second claim on August 6, 1992, which was finally denied in a Decision and Order issued by Administrative Law Judge Jeffrey Tureck on September 19, 1995. Judge Tureck found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. 725.309 (2000). Director's Exhibit 39. Claimant filed a third application for benefits on August 14, 1997, which was finally denied by the district director, as claimant did not prove any of the elements of entitlement. Director's Exhibit 40. Claimant filed a fourth claim for benefits on January 26, 1999. Director's Exhibit 1.

[2] The new regulation pertaining to subsequent claims does not apply in this case, as claimant's fourth claim was filed before the effective date of the amended regulations. 20 C.F.R. §725.2(c).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially asserts that the administrative law judge did not properly apply the standard set forth 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), in determining that the newly submitted evidence established a material change in conditions under Section 725.309 (2000).[3] In *Ross*, the court stated that an administrative law judge must determine whether the newly submitted evidence is qualitatively different from the previously submitted evidence. Employer contends that on remand, the administrative law judge found that the newly submitted x-ray evidence was merely quantitatively different from the readings submitted with the prior claims. Employer also argues that the administrative law judge relied upon a presumption that pneumoconiosis is progressive.

These allegations of error are without merit. The administrative law judge noted that the record contained fifty-six readings of seven new x-rays. The administrative law judge addressed each x-ray individually and determined whether it was positive or negative for pneumoconiosis based upon a consideration of the qualifications of the physicians, in addition to whether negative or positive interpretations constituted a preponderance of the readings. Decision and Order on Remand at 8-9. Thus, the administrative law judge based her finding on a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.,* 23 BLR 1-1, 1-4-5 (2004). Moreover, the administrative law judge rationally relied upon this determination to find, in accordance with the Sixth Circuit's decision in *Ross*, that there was a qualitative difference in the newly submitted evidence, because "the character of the x-ray evidence has changed dramatically from overwhelmingly negative to a preponderance of positive interpretations." Decision and Order on Remand at 10.

In addition, employer is incorrect in stating that the administrative law judge relied upon a presumption that pneumoconiosis is progressive. As the Board indicated in *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*) and *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*), a claimant is not required to prove separately that the form of pneumoconiosis from which he is suffering is progressive and has actually progressed since the denial of a prior claim. Newly submitted evidence

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

which establishes the existence of pneumoconiosis when pneumoconiosis was not demonstrated in the earlier claim suffices to demonstrate that the pneumoconiosis from which the claimant now suffers is progressive. We decline employer's suggestion that we overturn our rulings in *Parsons* and *Workman*. We hold, therefore, that the administrative law judge applied the proper analysis in determining that claimant established a material change in conditions pursuant to Section 725.309 (2000).

With respect to the administrative law judge's weighing of the newly submitted x-ray evidence, employer contends that the administrative law judge erred in failing to comply with the Board's instruction to treat Dr. Binns's readings of the x-rays dated July 13, 1998, October 26, 1998, February 24, 1999, and March 17, 1999 as negative for pneumoconiosis. On remand, the administrative law judge noted that Dr. Binns indicated that although the films had no parenchymal abnormalities consistent with pneumoconiosis, the films contained pleural abnormalities consistent with the disease. Decision and Order on Remand at 6; Director's Exhibit 31; Employer's Exhibit 3. The administrative law judge concluded, therefore, that Dr. Binns's readings of these x-rays were neither positive nor negative and treated them as such when weighing the newly submitted x-ray evidence. *Id*. We hold that the administrative law judge's assessment of Dr. Binns's readings does not constitute error requiring remand. A review of the record indicates that even if the administrative law judge had treated Dr. Binns's interpretations as negative, the administrative law judge's ultimate conclusion, that the preponderance of the newly submitted films is positive for pneumoconiosis, would remain the same. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also argues that the administrative law judge did not comply with the Board's remand instructions regarding the consideration of the relative qualifications of the x-ray readers when weighing the newly submitted x-ray evidence. The Board held in its prior Decision and Order that although the administrative law judge was not required to defer to Drs. Wiot and Spitz based upon their additional qualifications as professors of radiology, the administrative law judge "should consider these qualifications on remand, as they may bear on the quality of the various x-ray interpretations of record." *Chaffin*, 22 BLR at 1-302.

On remand, the administrative law judge noted the Board's instruction and stated that "[i]n reviewing the resumes of all of the dually qualified physicians, I find that all of them are eminently qualified physicians." Decision and Order on Remand at 7. The administrative law judge also detailed the curricula vitae of Drs. Miller, Cappiello, Pathak, and Ahmed and indicated that they had academic and/or clinical expertise comparable to Drs. Wiot and Spitz. The administrative law judge concluded that "I do not find the status of Dr. Spitz and Dr. Wiot as professors of radiology, standing alone, is a factor that causes me to accord more credit to their x-ray interpretations." *Id*.

Employer alleges specifically that the administrative law judge's finding must be vacated as she failed to note that Dr. Miller's curriculum vitae does not indicate when he was an assistant professor of radiology at Columbia University, and Dr. Cappiello was an assistant professor of radiology more than twenty-five years ago. This contention is without merit. In compliance with the Board's remand instructions, the administrative law judge considered the additional qualifications of the dually qualified physicians and ultimately concluded that she would not rely upon them in weighing the newly submitted x-ray evidence. This determination was within her discretion as fact-finder to make. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Employer also renews its objection to the administrative law judge's post-hearing admission of several x-ray readings submitted by claimant. The Board rejected employer's arguments in its Decision and Order, holding that the administrative law judge acted within her discretion in admitting these readings and that the administrative law judge properly noted in her Orders providing for the admission of these readings that employer did not pose an objection. *Chaffin*, 22 BLR at 1-300. Because employer has not set forth any compelling argument for altering the Board's prior disposition, it now constitutes the law of the case and we decline to disturb it. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We affirm, therefore, the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and a material change in conditions under Section 725.309 (2000).

We will now turn to the issue of total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer contends that in determining that claimant established that he is totally disabled due to pneumoconiosis, the administrative law judge did not properly weigh the opinions of Drs. Zaldivar, Wright, and Ranavaya. Employer argues specifically that the administrative law judge erred in discrediting Dr. Zaldivar's opinion on the grounds that he did not explain why coal dust exposure was not a factor in causing claimant's asthma and because he was the only physician who diagnosed asthma. Employer has cited the Sixth Circuit's decision in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) in support of its position. In *Williams*, the court held that the administrative law judge erred in discrediting Dr. Dahhan's opinion, that pneumoconiosis did not contribute to the miner's death, on the ground that Dr. Dahhan did not explain why the miner's many years of coal dust exposure did not cause his lung impairment.[4] The court stated that "[i]t makes no sense . . . to assume that because

[4] In the case at bar, Dr. Zaldivar diagnosed asthma, which he stated was unrelated to coal dust exposure, and indicated that claimant has a moderate pulmonary impairment. Dr. Zaldivar also stated that even if claimant has simple pneumoconiosis, he would not

Dahhan does not explain why his work as a miner has not caused his lung impairment, then his work as a miner must have caused his lung impairment." *Williams*, 338 F.3d at 514, 22 BLR at 2-651.

We affirm the administrative law judge's decision to discredit Dr. Zaldivar's opinion. In our prior Decision and Order, we instructed the administrative law judge to reconsider Dr. Zaldivar's opinion under Section 718.204(c) in light of his assumption that claimant had pneumoconiosis. *Chaffin*, 22 BLR at 1-304. On remand, the administrative law judge complied with the Board's instruction and acted within her discretion in finding that Dr. Zaldivar's failure to explain why he would not alter his opinion even if claimant had pneumoconiosis detracted from the credibility of his opinion. Decision and Order on Remand at 12; Director's Exhibit 30; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). This case is distinguishable from *Williams*, as here, the issue is whether the physician's opinion, that claimant's disabling impairment was not related to pneumoconiosis, is reasoned; not whether claimant has pneumoconiosis. Thus, the administrative law judge provided a permissible rationale for according little weight to Dr. Zaldivar's opinion pursuant to Section 718.204(c).

However, employer's contentions regarding the administrative law judge's consideration of the opinions in which Drs. Wright and Ranavaya diagnosed pneumoconiosis have merit. Concerning Dr. Wright's opinion, the Board directed the administrative law judge to resolve the conflict in the evidence regarding claimant's smoking history so that she could determine whether Dr. Wright's conclusion, that smoking was not a substantial cause of claimant's airway disease, was adequately documented and reasoned. *Chaffin*, 22 BLR at 1-304. On remand, the administrative law judge acted within her discretion as fact-finder in crediting claimant's hearing testimony, that he had a smoking history spanning over thirty years, the last five or six years during which he smoked one pack of cigarettes per day, over the smoking histories recorded by the various physicians. Decision and Order on Remand at 11; Hearing Transcript at 27-28. The administrative law judge permissibly relied upon the fact that she had the opportunity to observe claimant and found him to be a credible witness whose testimony went unchallenged by employer on cross-examination. *See Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989).

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change his opinion regarding the cause and degree of claimant's breathing impairment. Director's Exhibit 30.

Employer is correct, however, in arguing that the administrative law judge did not adequately resolve the conflict between her finding that claimant's smoking history was "significant" and Dr. Wright's characterization of claimant's smoking history as "mild." Decision and Order on Remand at 11; Director's Exhibit 11. The administrative law judge stated that:

> A review of Dr. Wright's report shows that he recorded that the claimant smoked a half pack to a pack of cigarettes per day for fifteen years, but that he stopped 15 years earlier. Thus, the information available to Dr. Wright dovetails with the testimony provided by claimant, to the extent that the claimant stopped smoking 15 years before he saw Dr. Wright in 1998, and that he smoked up to a pack of cigarettes per day for the 15 preceding years. I find that the information the claimant provided to Dr. Wright on his smoking history is not so drastically different from the smoking history to which the claimant testified, such as to make Dr. Wright's opinion unreliable.

Decision and Order on Remand at 13. The administrative law judge did not explain how the additional fifteen years of smoking, to which claimant referred at the hearing and of which Dr. Wright was apparently unaware, rendered the history he recorded "not so drastically different" from that to which claimant testified at the hearing. *Id.* Similarly, the administrative law judge did not set forth the rationale underlying her finding that the disparity between the two histories did not detract from the credibility of Dr. Wright's opinion regarding the cause of claimant's breathing impairment.

We must vacate, therefore, the administrative law judge's findings regarding Dr. Wright's report and her finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). We remand the case to the administrative law judge for reconsideration of Dr. Wright's opinion in light of a comparison between the smoking history upon which he relied and the specific smoking history reported by claimant at the hearing, which the administrative law judge credited. *See Bobick v. Saginaw Mining* Co., 13 BLR 1-52 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). In so doing, the administrative law judge must base her finding upon the evidence before her, rather than relying upon her own general estimation that the extent of cigarette use reported by claimant at the hearing and the various amounts recorded by the physicians of record, including Dr. Wright, all represented "significant" smoking histories. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Employer's assertion that the administrative law judge applied a less critical standard to Dr. Ranavaya's medical report than he applied to Dr. Zaldivar's opinion also has merit. As set forth above, the administrative law judge acted within her discretion in

finding that Dr. Zaldivar's opinion was entitled to little weight because the doctor did not explain his conclusion regarding the cause of claimant's pulmonary impairment. When addressing Dr. Ranavaya's opinion, however, the administrative law judge did not assess its probative value in light of whether he explained his determination that pneumoconiosis is a contributing cause of claimant's impairment. Decision and Order on Remand at 13-14; Director's Exhibit 6. Like Dr. Zaldivar, Dr. Ranavaya appears to have set forth his conclusions without explicitly setting forth the rationale underlying them.[5] Although an administrative law judge is not required to discredit a medical opinion on this ground, if an administrative law judge relies upon this factor in weighing one medical opinion, he or she must subject the other opinions of record to the same analysis. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1998); *Hall v. Director, OWCP*, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). We vacate, therefore, the administrative law judge's findings with respect to Dr. Ranavaya's opinion under Section 718.204(c). The administrative law judge must reconsider Dr. Ranavaya's medical report on remand and reconsider whether claimant has proven that he is totally disabled due to pneumoconiosis.

[5] Dr. Ranavaya examined claimant at the request of the Department of Labor (DOL) and recorded his findings on the standard DOL form. He diagnosed coal workers' pneumoconiosis (CWP) and a totally disabling pulmonary impairment and indicated, without elaboration, that CWP contributed to the impairment "to a major extent." Director's Exhibit 6.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge