BRB No. 98-0417 BLA

SCOTT FRASURE	)	
	)	
Claimant-	)	
Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 9/13/99
HOPE MINING COMPANY,	)	
INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand - Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (94-BLA-1242) of Administrative Law Judge Paul H. Teitler 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 is before the Board for the second time. In his original decision, the administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 and, thus, considered claimant's 1993 claim on the merits.[1] After crediting claimant with fourteen and one-half years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4). In addition, the administrative law judge found

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[1] Claimant filed his initial claim on May 29, 1984. Director's Exhibit 55. On July 16, 1984, the district director issued an Order to Show Cause ordering claimant within thirty days to show cause why his claim should not be denied by reason of abandonment. *Id.* In the absence of further contact by claimant, the Order noted that it would serve as the district director's final notice of denial. *Id.* A "Memo to File" dated September 18, 1984 indicates that the claim was considered abandoned inasmuch as no response was received within the time period specified in the Order to Show Cause. *Id.* Claimant subsequently filed a second claim on June 28, 1993. Director's Exhibit 1.

that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the relevant evidence. Initially, the Board affirmed the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309. The Board also noted that the administrative law judge properly considered this claim on the merits because 20 C.F.R. §725.409 provides that once a claim has been deemed abandoned, a new claim may be filed at any time and new evidence submitted. The Board also affirmed the administrative law judge's finding that total disability was established under Section 718.204(c)(1) and (c)(4). However, the Board vacated the administrative law judge's finding that the x-ray evidence and medical opinion evidence were sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), remanding the case to the administrative law judge for further consideration of the relevant evidence. Furthermore, the Board vacated the administrative law judge's Section 718.204(b) finding and remanded the case for the administrative law judge to provide a more detailed analysis of his findings pursuant to Section 718.204(b). *Frasure v. Hope Mining Co.*, BRB No. 96-0947 BLA (May 23, 1997)(unpub.).

On remand, the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to

Section 718.202(a)(1). However, he found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found that the medical evidence was sufficient to establish that claimant's total disability, which was determined previously, was due, at least in part, to his pneumoconiosis pursuant to Section 718.204(b). Accordingly, the administrative law judge awarded benefits payable from June 1, 1993.

Employer challenges the administrative law judge's award of benefits, contending that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Additionally, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal. Employer reiterated its arguments in its reply brief.

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

In weighing the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge found that the record contains the opinions of seventeen physicians, of which ten physicians provided diagnoses supportive of a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), whereas seven physicians stated that the evidence was insufficient to provide a diagnosis of pneumoconiosis. Decision and Order at 14. The administrative law judge, however, accorded little weight to seven of these opinions,[2] finding that they were at least ten years older than the more recent opinions. *Id*. Of the remaining medical opinions, the administrative law judge accorded little weight to the opinions of Drs. Fino and Branscomb because they did not personally examine claimant. *Id*. In addition, the administrative law judge accorded less weight to Dr. Anderson's 1994 opinion because his 1994 deposition relied only on his review of the medical evidence and did not reference his 1983 examination of claimant and, thus, was not based on a personal examination of claimant *Id*. The administrative law judge also accorded little weight to the opinion of Dr. Vuskovich, that claimant's respiratory condition was due to his smoking history, because the physician overestimated claimant's smoking history and, thus, was unaware of claimant's actual history

[2] The administrative law judge found the medical opinions of Drs. O'Neill, Ameji, Ladaga, Bangudi, deGuzman, El-Amin, and an unidentified physician, as well as the 1983 report of Dr. Anderson, entitled to little weight because they were all over ten years old. Decision and Order at 14; Director's Exhibits 13-16, 50.

when he formed his diagnosis.[3] *Id*.

With respect to the remainder of the medical opinions, the administrative law judge found that the opinions of Drs. Wright, Mettu, Myers and Sundaram, each of which concluded that claimant was suffering from pneumoconiosis, as well as the contrary opinions of Drs. Broudy and Dahhan, were well reasoned and documented. Decision and Order at 14-15. However, the administrative law judge found the opinion of Dr. Myers, diagnosing the existence of pneumoconiosis, entitled to the greatest weight based on his superior professional qualifications. Decision and Order at 15. Consequently, the administrative law judge found that the weight of the medical evidence, the opinion of Dr. Myers, as supported by the opinions of Drs. Mettu, Sundaram and Wright, were sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Id*.

In challenging the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), employer raises numerous arguments regarding the administrative law judge's characterization and weighing of the medical evidence of record. Specifically, employer contends that the

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[3] The administrative law judge found that Dr. Vuskovich relied a smoking history of one hundred (100) pack years, *see* Employer's Exhibits 10, 17, whereas the remainder of the physicians relied on an approximate fifty (50) pack year history of smoking. Decision and Order at 14.

administrative law judge erred in his summary of the evidence of record, inasmuch as he mischaracterized the record and also failed to weigh the relevant evidence and explain his findings as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Based on the administrative law judge's findings and the issues raised by employer on appeal, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Initially, however, we hold that the administrative law judge reasonably exercised his discretion in according little weight to the older medical opinions, those dated 1985 and before, inasmuch as they were not reflective of claimant's current condition at the time of the formal hearing.[4] Decision and Order at 14; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also reasonably accorded little weight to the opinion of Dr. Vuskovich inasmuch as the physician

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[4] Moreover, in light of our affirmance of the administrative law judge's decision to accord less weight to the older medical reports, those reports submitted in 1985 and before, errors, if any, in the administrative law judge's summaries and conclusions regarding those opinions, are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

relied upon an inaccurate smoking history, one that was significantly greater than the history relied upon by the other physicians of record. Decision and Order at 14; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Furthermore, contrary to employer's contention, the administrative law judge reasonably found the opinion of Dr. Mettu was supportive of a finding of pneumoconiosis inasmuch as Dr. Mettu, in a supplemental report, stated that claimant had a severe pulmonary impairment with etiology factors including his smoking history and his work in the coal mines. Decision and Order at 14-15; Director's Exhibits 20, 21; 20 C.F.R. §§718.201, 718.202(a)(4); *see Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

However, as employer correctly contends, the administrative law judge erred in stating that the professional qualifications of Drs. Broudy and Dahhan were not in the record and, therefore, erred in according their opinions, that claimant was not suffering from pneumoconiosis, less weight than the opinion of Dr. Myers, based on his finding that Dr. Myers possessed superior qualifications. Decision and Order at 15. Contrary to the administrative law judge's finding, the record contains the deposition testimony of Dr. Dahhan, Director's Exhibit 52, and Dr. Broudy, Director's Exhibit 51, in which each physician testified that he is Board-certified in Internal Medicine and Pulmonary Medicine. *See* Director's Exhibits 51, 52. Therefore, since the administrative law judge's findings do not accurately reflect the evidence of record, we vacate his finding at Section 718.202(a)(4) and remand the case for the administrative law judge to re-

evaluate the relevant evidence of record. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP* , 2 BLR 1-111 (1979).

On remand, the administrative law judge must reconsider all of the relevant medical opinion evidence of record. In addition to determining whether each medical opinion is well reasoned and well documented, the administrative law judge must also consider the qualifications of all of the physicians, if he determines that a physician's opinion is entitled to greater weight, based upon that physician's medical credentials. *See generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Wetzel, supra*. Moreover, in weighing the relevant evidence the administrative law judge may not mechanically discredit the medical opinions of Drs. Branscomb and Fino, or the 1994 report and deposition of Dr. Anderson, because these physicians did not personally examine claimant. Decision and Order at 14. Rather, the administrative law judge must consider these medical opinions, in their entirety, and determine whether they are well reasoned and well documented and then determine their probative value. *See generally Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *reh'g denied* 877 F.2d 495, 12 BLR 2-303 (6th Cir.); *Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.). Additionally, the administrative law judge must consider the medical opinion of each physician, in its entirety, including whether any physician provided more than one report, and determine whether such reports, taken as a whole, are supportive of the physician's ultimate

conclusion. *See Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Lastly, in light of our holding vacating the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), we further vacate his finding that this evidence was sufficient to establish that claimant's total respiratory disability was due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). Consequently, if reached on remand, the administrative law judge must consider all of the relevant medical evidence to determine whether this evidence is sufficient to establish that claimant's pneumoconiosis was a contributing cause of his total respiratory disability pursuant to *Adams*. 20 C.F.R. §718.204(b); *Adams, supra*. In weighing the medical evidence on remand, the administrative law judge must weigh all of the relevant medical opinions of record and may not mechanically discredit those opinions which do not diagnose the existence of pneumoconiosis. Rather, the administrative law judge must evaluate each opinion, in its entirety, and determine whether it was influenced by the physician's finding that the miner did not have pneumoconiosis.[5] *See Trujillo*

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[5] We note that the administrative law judge relied upon the holding of the United States Court of Appeals for the Sixth Circuit in *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), in discrediting the medical opinions of physicians who did not diagnose pneumoconiosis. *See* Decision and Order at 15. However, pursuant to a petition for writ of *certiorari*, the Supreme Court of the United States granted the petition and vacated the holding in

v. Kaiser Steel Corp., 8 BLR 1-472, 1-474 (1986); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Adams, supra; Clark*, *supra*. Moreover, on remand, the administrative law judge must comply with the requirements of the APA, and, thus, adequately explain the bases for his findings and state, with specificity, upon which opinions he relies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

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

SO ORDERED.

Skukan, remanding the case for consideration in light of *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *cert. granted* and *judgment vacated by Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994).

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge