BRB No. 98-1016 BLA

JESSE H. HIGGINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	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 Upon Third Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Upon Third Remand (91-BLA-2515) of Administrative Law Judge Robert D. Kaplan awarding 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). This case is on appeal before the Board for a fourth time. In his initial Decision and Order issued on September 14, 1992, Administrative Law Judge Peter McC. Giesey determined that claimant took no action within one year of the final denial on August 25, 1989, of claimant's original claim filed on June 16, 1988. Judge Giesey then adjudicated this duplicate claim, filed on September 21, 1990, pursuant to the provisions at 20 C.F.R. Part 718, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.302, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, the Board vacated Judge Giesey's award of benefits and remanded the case for a determination of whether the new evidence submitted in support of this duplicate claim established a material change in conditions at 20 C.F.R. §725.309 pursuant to the standard articulated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (6th Cir. 1991). The Board additionally vacated Judge Giesey's findings pursuant to Sections 718.202(a)(1) and 718.204, and instructed him that if, on remand, he determined that claimant established a material change in conditions, he must then consider the entirety of the relevant evidence in determining whether it is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4); total respiratory disability at Section 718.204(c)(1)-(4) pursuant to *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); and disability causation at Section 718.204(b) pursuant to *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990). *Higgins v. Old Ben Coal Co.*, BRB No. 93-0201 BLA (May 11, 1994)(unpublished).

On remand, this case was assigned to Administrative Law Judge Robert D. Kaplan. In a Decision and Order on Remand issued on April 4, 1995, the administrative law judge credited claimant with thirty-five years of qualifying coal mine employment, and found that the new evidence established total respiratory disability and thus was sufficient to establish a material change in conditions pursuant to Section 725.309(d). The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's finding of a material change in conditions at Section 725.309, holding that the administrative law judge mischaracterized Dr. Tuteur's opinion,[1] and that, consistent with *McNew*, the administrative law judge was additionally required to determine whether claimant's total disability was due to pneumoconiosis. The Board affirmed the administrative law judge's factual finding that claimant's height was 71 inches for purposes of reviewing the pulmonary function studies, and his finding that the weight of the new pulmonary function studies established total respiratory disability at Section 718.204(c)(1), but vacated the administrative law judge's weighing of the new medical opinions at Section 718.204(c)(4) and remanded this case for

[1] Contrary to the administrative law judge's finding that Dr. Tuteur did not state whether claimant was totally disabled, the Board indicated that Dr. Tuteur specifically diagnosed no respiratory impairment. Further review of the record, however, revealed that Dr. Tuteur actually diagnosed a moderate obstructive impairment due to smoking and unrelated to pneumoconiosis. Director's Exhibit 20.

the administrative law judge, in determining whether the evidence was sufficient to establish a material change in conditions at Section 725.309, to reweigh Dr. Tuteur's opinion at Section 718.204(c)(4), reweigh all the contrary probative evidence pursuant to Section 718.204(c), and then determine whether the new evidence established that claimant's total respiratory disability was due to pneumoconiosis. On the merits, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1)-(4), 718.203(b), but vacated his findings pursuant to Section 718.204(c), inasmuch as he considered only the evidence submitted with claimant's prior claim, and instructed the administrative law judge on remand to evaluate both the newly submitted evidence and the old evidence under each subsection, and then to weigh all the evidence together, like and unlike, and determine whether claimant established total respiratory disability. The Board also vacated the administrative law judge's causation findings pursuant to Section 718.204(b) for reevaluation of the opinions of Drs. Tuteur, Sanjabi, Rao and Kelly, and a full explanation for the weight assigned to the evidence thereunder. *Higgins v. Old Ben Coal Co.*, BRB No. 95-1370 BLA (Apr. 29, 1996)(unpublished).

In a Decision and Order Upon Second Remand issued on October 24, 1996, the administrative law judge found that "the opinion attributed to Dr. Tuteur by the Board" was unreasoned at Section 718.204(c) and irrelevant to disability causation at Section 718.204(b), and in reliance on these findings found that the new evidence established total disability due to pneumoconiosis and a material change in conditions pursuant to Section 725.309(d). On the merits, the administrative law judge found total respiratory disability established at Section 718.204(c), and again rejected Dr. Tuteur's opinion as irrelevant in finding disability causation established at Section 718.204(b). Consequently, the administrative law judge awarded benefits.

On appeal, the Board vacated the administrative law judge's findings pursuant to Section 725.309(d), and remanded this case for the administrative law judge to reevaluate Dr. Tuteur's opinion, weigh all of the contrary probative evidence at Section 718.204(c), and weigh Dr. Tuteur's opinion that no part of claimant's respiratory impairment was related to pneumoconiosis at Section 718.204(b) in determining whether the new evidence established that claimant's physical condition had changed materially since the time of the previous denial pursuant to *McNew*, *supra*. If a material change in conditions was established, the administrative law judge was instructed to weigh both the old and new medical opinions at Section 718.204(c)(4), then weigh all of the contrary probative evidence together to determine whether it established total respiratory disability at Section 718.204(c), and then determine whether all of the relevant evidence established that claimant's pneumoconiosis was a contributing cause of his total disability pursuant to Section 718.204(b). *Higgins v. Old Ben Coal Co.*, BRB No. 97-0373 BLA (Nov. 20, 1997)(unpublished).

In his Decision and Order Upon Third Remand, issued on March 26, 1998, the

administrative law judge found that the new evidence established a material change in conditions at Section 725.309(d), and that the evidence of record established total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.309(d) and 718.204(b), (c), and argues that the law of the case doctrine should not apply to preclude employer from again challenging the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Claimant responds, urging affirmance, to which employer replies, urging remand. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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

Employer initially challenges the administrative law judge's finding that the newly submitted evidence is sufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c), and thus establishes a material change in conditions pursuant to Section 725.309(d). In evaluating the new evidence relevant to the issue of total respiratory disability at Section 718.204(c)(1)-(4), the administrative law judge reasonably determined that the non-qualifying blood gas studies did not undermine the qualifying pulmonary function studies because the two types of tests measured different forms of impairment. Decision and Order at 5; *see generally Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995). The administrative law judge further determined, based on claimant's uncontradicted testimony, that claimant's usual coal mine employment as a truck driver involved some strenuous work, including the repair and replacement of parts in the coal tipple such as the stacker belt and rollers, and cleaning up coal spills in the tipple. Decision and Order at 4-5; *see* Hearing Transcript at 11. The administrative law judge then found that the new opinions of Drs. Tuteur, Rao, Kelly and Goodenberger,[2] while insufficient to

[2] Drs. Rao and Tuteur diagnosed a mild to moderate respiratory impairment, Director's Exhibits 7, 20; Dr. Kelly diagnosed a moderate respiratory impairment and opined that claimant was unable to perform heavy work, such as coal mining, Claimant's Exhibit 1; and Dr. Goodenberger did not render an opinion relevant to disability, Director's Exhibit 20. Contrary to employer's arguments, inasmuch as the administrative law judge found these opinions insufficient to enable him to determine whether or not claimant was capable of

establish total respiratory disability, also did not support a finding that claimant was able to perform the exertional requirements of his usual coal mine employment. Decision and Order at 4-5; *see Migliorini v. Director, OWCP*, 898 F.2d 1292 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 385 (1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). The administrative law judge thus reasonably concluded that the new qualifying pulmonary function studies,[3] which met the regulatory standards for establishing total respiratory disability, were sufficient to satisfy claimant's burden pursuant to Section 718.204(c), and his findings thereunder are affirmed as supported by substantial evidence.

---

performing his usual coal mine employment, the opinions do not constitute contrary probative evidence.

[3] Employer again notes its disagreement with the administrative law judge's factual finding in his 1995 Decision and Order that claimant is 71 inches tall for purposes of evaluating the pulmonary function studies of record. Employer's Brief at 6. The Board previously rejected employer's arguments and affirmed the administrative law judge's factual finding. *See Higgins v. Old Ben Coal Co.*, BRB No. 95-1370 BLA, slip op. at 3 (Apr. 29, 1996)(unpublished). Inasmuch as no exception to the law of the case doctrine has been demonstrated, we decline to revisit this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

In evaluating the new evidence relevant to disability causation at Section 718.204(b), however, after finding that Dr. Goodenberger expressed no opinion regarding the issue, and that the opinions of Drs. Rao and Kelly supported a finding that pneumoconiosis was a necessary cause of claimant's disability,[4] the administrative law judge reinstated the analysis from his 1995 Decision and Order, in which he determined that, at most, Dr. Tuteur opined that claimant had a mild to moderate pulmonary defect, whereas the administrative law judge found that the pulmonary function studies, including those obtained by Dr. Tuteur, established total respiratory disability. The administrative law judge speculated that perhaps this was due to Dr. Tuteur's reliance on a height of 66 inches, which was contrary to the administrative law judge's finding that claimant was 71 inches tall. The administrative law judge then concluded that "had Dr. Tuteur found that Claimant was totally disabled or, at least, had a severe pulmonary impairment, presumably he then would have addressed the question of whether Claimant's pneumoconiosis was a necessary condition of the impairment, as required by *Shelton*." 1995 Decision and Order at 18-19. We agree with employer's argument that the administrative law judge provided invalid reasons for discounting Dr. Tuteur's opinion. The degree of impairment which Dr. Tuteur found demonstrated by claimant's pulmonary function studies is not relevant to the disability causation analysis; Dr. Tuteur explicitly attributed claimant's respiratory impairment to smoking and organic heart disease, and ruled out pneumoconiosis as any contributing cause of claimant's impairment.[5] Director's Exhibit 20; *see Shelton*, *supra*. Consequently, we

[4] We reject employer's argument that the opinion of Dr. Kelly, that coal dust contributed at least 20% and probably more to claimant's ventilatory impairment, Claimant's Exhibit 1, cannot support a finding of disability causation under the *Shelton* standard. We also reject employer's argument that the administrative law judge cannot credit the opinion of Dr. Rao, that claimant's two diagnosed conditions, COPD and pneumoconiosis due to smoking and coal mine employment, contributed a mild to moderate extent to claimant's ventilatory impairment, Director's Exhibit 7, on the issue of disability causation because the administrative law judge rejected the opinion as unreasoned on the issue of pneumoconiosis. While the administrative law judge credited Dr. Rao's 1988 opinion at Section 718.202(a)(4), he found that Dr. Rao's 1990 diagnosis of pneumoconiosis was based entirely on a positive x-ray and thus insufficient to establish pneumoconiosis under that subsection. At Section 718.204(b), however, the administrative law judge found that Dr. Rao's 1990 opinion on disability causation was supported by its underlying documentation, *i.e.*, a positive x-ray, blood gas studies and pulmonary function studies, and thus was reasoned. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[5] Additionally, we note that the interpretation of medical data is for the medical experts, and it is error for an administrative law judge to interpret medical tests and thereby substitute his conclusions for those of the physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Moreover, a physician may find that a miner has no respiratory

vacate the administrative law judge's findings pursuant to Section 718.204(b), and his finding of a material change in conditions pursuant to Section 725.309(d), and remand this case for reevaluation of Dr. Tuteur's opinion and a reweighing of the new evidence relevant to disability causation.

Employer also contends that the administrative law judge misapplied the material change in conditions test of *McNew*, which requires claimant to demonstrate by new evidence that his pneumoconiosis, which was established at the time of his first application for benefits, *see* Director's Exhibit 24, has progressed to the point that claimant is now totally disabled by it, although he was not at the time of his first application. *See McNew*, *supra*. While the administrative law judge found that the weight of the new evidence was sufficient to establish total respiratory disability due to pneumoconiosis, employer asserts that it is not sufficient to simply relitigate the question of entitlement on the basis of new evidence; rather, claimant must establish that his physical condition materially changed and actually deteriorated. Employer's arguments have merit.

In *McNew*, the Seventh Circuit noted that "[i]t is not enough that the new application is supported by new evidence of disease or disability, because such evidence might show merely that the original denial was wrong, and would thereby constitute an impermissible collateral attack on that denial." *McNew*, 946 F.2d at 556, 15 BLR at 2-229. Rather, a claimant must establish that his present condition is substantially worse than it was the first time he applied. *McNew*, *supra*; *see Freeman United Coal Mining Co v. Hilliard*, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995). In the instant case, the administrative law judge found that the valid and qualifying new pulmonary function studies dated October 8, 1990, and May 21, 1991, outweighed the contrary new medical evidence and established total respiratory disability, which, when coupled with the weight of the new medical opinions finding that claimant's disability was due in part to pneumoconiosis, established a material change in conditions. Decision and Order at 5-7. In adjudicating the merits, however, the administrative law judge, when evaluating both the old and the new evidence at Section 718.204(c), also determined that the valid qualifying pulmonary function studies dated July 7, 1986 and July 5, 1988, submitted in conjunction with claimant's original claim, outweighed the contrary pre-1990 medical evidence. Decision and Order at 8-9. Inasmuch as the administrative law judge did not explain how the new evidence demonstrated a deterioration in the miner's condition, as distinct from a long-standing total disability misassessed by the finder of fact in the initial claim, on remand the administrative law judge

---

impairment or is not totally disabled even though clinical studies have qualifying results. *See Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Conversely, a moderate respiratory impairment may be found totally disabling upon consideration of the exertional requirements of a miner's usual coal mine employment.

must provide an analysis of whether claimant established a worsening in his physical condition in compliance with *McNew*, *supra*.

Turning to the merits, employer contends that the administrative law judge's finding that the weight of the medical opinions of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), previously affirmed by the Board, cannot stand in light of the Seventh Circuit's decision in *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). We agree. In *Fitts*, the Seventh Circuit concluded that an administrative law judge's mechanical nose count of witnesses was not a rational method of decision making, particularly where one physician's diagnosis of pneumoconiosis relied in part on a positive x-ray interpretation of a film which was subsequently interpreted by more experienced radiologists as negative for pneumoconiosis. *Fitts*, *supra*. In the present case, the administrative law judge determined that Dr. Selby's opinion that claimant did not have pneumoconiosis was reasoned, but the administrative law judge credited the contrary opinions of Drs. Tuteur, Rosecan and Rao, which he determined were not based entirely on positive x-ray interpretations, noting that Dr. Tuteur probably reviewed more of the medical record than any other physician. Employer correctly maintains, however, that the film which Dr. Tuteur interpreted as positive for pneumoconiosis was subsequently reread as negative by better-qualified readers. Employer additionally maintains that Drs. Rosecan and Rao did not clearly explain the basis for their diagnoses,[6] and argues that while Dr. Tuteur considered a variety of data aside from his positive x-ray interpretation, he based his diagnosis of pneumoconiosis solely on his x-ray findings,[7] which is insufficient to satisfy claimant's

[6] We reject employer's argument that because the evidence submitted in support of claimant's initial claim, including reports by Drs. Rosecan and Rao, was found insufficient to establish entitlement, principles of *res judicata* preclude the administrative law judge from relying on the opinions of Drs. Rosecan and Rao to support a finding of pneumoconiosis in this duplicate claim. A review of the record indicates that the district director denied benefits in the original claim based on his finding that the evidence was insufficient to establish total respiratory disability due to pneumoconiosis; he found pneumoconiosis established by x-ray evidence at Section 718.202(a)(1), however, and thus did not reach the issue of whether the medical opinions established the existence of pneumoconiosis at Section 718.202(a)(4). Director's Exhibit 24.

[7] In his medical report of May 21, 1991, and his supplemental report of June 1, 1991, Dr. Tuteur diagnosed an obstructive ventilatory defect due to smoking, and opined that while claimant had the earliest stage of radiographically significant pneumoconiosis, he did not exhibit any clinical symptoms, physical examination signs, or physiologic impairment associated with his radiographic pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 4.

burden at Section 718.202(a)(4). *See generally Worhach v. Director, OWCP*, 17 BLR 1-1005 (1993); *Anderson v. Valley Camp Coal Co.*, 12 BLR 1-111 (1989). Inasmuch as employer has demonstrated an exception to the law of the case doctrine, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting), we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) for reevaluation of the evidence thereunder on remand in light of *Fitts*, *supra*.

Employer next contends that the administrative law judge, in weighing both the old and the new contrary probative evidence at Section 718.204(c), erred in discounting the medical opinions of Drs. Tuteur, Selby and Kelly, and relying solely on qualifying pulmonary function studies to find total respiratory disability established. While we affirmed *infra* the administrative law judge's finding that the opinions of Drs. Tuteur and Kelly were insufficient to enable him to infer whether claimant was capable of performing his usual coal mine employment, we agree with employer's argument that the administrative law judge provided an invalid reason for discounting Dr. Selby's opinion, *i.e.*, that Dr. Selby found claimant was not totally disabled and was capable of performing the job of a truck driver, whereas the administrative law judge determined that claimant's usual coal mine employment involved more strenuous work than that of simply driving a truck. Decision and Order at 8. A review of the record, however, reveals that Dr. Selby opined that claimant "has the respiratory pulmonary capacity to perform his coal mine employment duties as a gob truck driver, shooter, driller, cutting machine operator, general materials and labor, or any of the other past capacities that he has been able to perform in the coal mine." Director's Exhibit 24. Inasmuch as the administrative law judge mischaracterized Dr. Selby's opinion, we vacate his findings pursuant to Section 718.204(c) for a reweighing of the evidence thereunder on remand.

Lastly, employer challenges the administrative law judge's finding of disability causation at Section 718.204(b). Inasmuch as the administrative law judge must reevaluate the opinion of Dr. Tuteur, as discussed *infra*, we vacate the administrative law judge's findings pursuant to Section 718.204(b) for a reweighing of the evidence thereunder on remand.

Accordingly, the Decision and Order Upon Third Remand of the administrative law judge awarding benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge