BRB Nos. 98-1594 BLA
and 98-1594 BLA-A

DALLAS CRUM	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WOLF CREEK COLLIERIES	)	
	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER
Cross-Respondent	)	

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Jill M. Otte (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, BROWN and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (96-BLA-0134) of Administrative Law Judge J. Michael O'Neill 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). A claimant becomes entitled to benefits under the Act by establishing that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant's initial application for benefits filed on October 16, 1981 was denied on April 18, 1988 by Administrative Law Judge Richard D. Mills, who found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) pursuant to the true doubt rule, but concluded that the medical evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 21. Claimant filed a second application for benefits on May 3, 1989, which was treated as a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d). Administrative Law Judge J. Michael O'Neill found that the evidence developed since the previous denial did not establish a material change in conditions as required by Section 725.309(d), and that, even assuming a material change in conditions, the record failed to establish total disability under Section 718.204(c). Director's Exhibit 46. Accordingly, he denied benefits.

On appeal, the Board affirmed as unchallenged Judge Mills' 1988 finding of pneumoconiosis pursuant to Section 718.202(a)(1), and affirmed Judge O'Neill's denial of the duplicate claim. *Crum v. Wolf Creek Collieries*, BRB No. 93-2559 BLA (Jun. 22, 1994)(unpub.); Director's Exhibit 52.

Two months after the issuance of the Board's Decision and Order, claimant submitted additional medical evidence and requested modification of the denial of benefits pursuant to 20 C.F.R. §725.310. Director's Exhibit 53. Claimant submitted a report by Dr. Sundaram based upon his August 16, 1994 examination and pulmonary function testing of claimant, and a positive reading by Dr. Sundaram of an October 3, 1991 chest x-ray. *Id*. The district director granted modification and, pursuant to employer's request, forwarded the case to the Office of the Administrative Law Judges for a hearing. Director's Exhibits 58, 61, 63.

Prior to the scheduling of a hearing, the administrative law judge issued an order directing the parties to show cause as to why a hearing should be held. Order to Show Cause, January 31, 1996. Claimant, employer, and the Director, Office of

Workers' Compensation Programs (the Director), responded, in writing, that they waived their right to a hearing and requested a decision on the documentary record. Claimant's and Director's Responses to Order to Show Cause, February 5, 1996; Employer's Response to Order to Show Cause, February 10, 1996; *see* 20 C.F.R. §725.461(a); *see Robbins v. Cyprus Cumberland Coal Co*., 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir., 1998).

Along with its response to the administrative law judge's show cause order, employer submitted several reports by consulting physicians who found the August 16, 1994 pulmonary function study administered by Dr. Sundaram to be invalid. Employer's Exhibit 1. Claimant subsequently submitted two additional reports by Dr. Sundaram, and both claimant and employer submitted additional readings of the October 3, 1991 x-ray. Claimant's Exhibit 1.

Considering the claim on the record only, the administrative law judge found that the issue before him was whether claimant's newly submitted evidence established a basis for modifying the administrative law judge's previous denial of claimant's duplicate claim. The administrative law judge found that Dr. Sundaram's reports established a change in conditions by demonstrating that claimant is now totally disabled due to pneumoconiosis, thereby entitling claimant to modification. In so finding, the administrative law judge found that the pulmonary function study that Dr. Sundaram relied upon to diagnose a respiratory impairment was valid notwithstanding employer's invalidation reports because a Department of Labor physician rated the study acceptable. Additionally, the administrative law judge found that even if the test were invalid, Dr. Sundaram's diagnosis was still a reasoned medical judgment of disability due to pneumoconiosis. Accordingly, the administrative law judge modified the duplicate claim denial to an award of benefits as of August 1994, the month in which claimant requested modification.

On appeal, employer contends that the administrative law judge erred in his analysis of the August 16, 1994 pulmonary function study. Employer further asserts that the administrative law judge erred in finding Dr. Sundaram's opinion to be a reasoned medical judgment despite his reliance on an invalid pulmonary function study. Employer additionally argues that Judge Mills' 1988 finding of pneumoconiosis based on the true doubt rule must be vacated in light of current law, and asserts that, as a matter of law, claimant cannot establish disability causation pursuant to 20 C.F.R. §718.204(b) because he is disabled by a preexisting back injury. Claimant responds, urging affirmance, and the Director has filed a limited response urging the Board to reject employer's argument that a finding of disability causation is precluded as a matter of law.

On cross-appeal, claimant contends that the administrative law judge erred by

awarding benefits as of August 1994. He argues for an earlier onset date of October 1993. Employer and the Director respond that the administrative law judge's onset determination was rational and in accordance with law.

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 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).

After consideration of the administrative record, the Decision and Order, and the arguments presented on appeal, we are unable to conclude that the award of benefits in this instance is supported by substantial evidence and that it accords with applicable law. For the reasons that follow, we vacate the Decision and Order and remand this claim to the administrative law judge for further consideration.

At the outset, we hold that the administrative law judge should have considered whether the duplicate claim evidence along with the newly submitted modification evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant's new evidence alone established a change in conditions justifying modification. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Where, as here, a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). In the prior decision, Judge O'Neill denied benefits because claimant failed to make the required threshold showing of a material change in conditions pursuant to Section 725.309(d).[1] Claimant timely requested modification of that determination, thereby invoking the administrative law judge's discretionary authority to consider whether the prior finding of no material change in conditions was a mistake or whether there was a change in conditions since the duplicate claim denial. 20 C.F.R. §725.310; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to adjudication of the merits of his claim. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 998, 19 BLR 2-10, 2-20

[1] Although the administrative law judge briefly addressed the merits of total disability at the end of his prior decision, he did so only after assuming a material change in conditions. Director's Exhibit 46 at 7. The thrust of his decision was that claimant failed to prove a material change in conditions. Director's Exhibit 46 at 1-7.

(6th Cir. 1994)(once a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted; he must show a material change in conditions). Consequently, the issue properly before the administrative law judge pursuant to claimant's modification request was whether all of the evidence in the duplicate claim plus that submitted on modification established the requisite material change in conditions pursuant to Section 725.309(d).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether the miner has established at least one of the elements previously decided against him. *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18-19. If so, the miner has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Id*.

Claimant's initial claim was denied because he failed to establish that he is totally disabled pursuant to Section 718.204(c). Director's Exhibit 21. Therefore, on remand, to establish a material change in conditions pursuant to Section 725.309(d) the duplicate claim evidence plus the new evidence submitted on modification must establish total disability. Additionally, because, as we discuss below, we must vacate the initial finding of pneumoconiosis pursuant to Section 718.202(a)(1), claimant should have the opportunity to establish a material change in conditions by showing the existence of pneumoconiosis with this same evidence. If he establishes either element, then the administrative law judge must determine whether all of the evidence supports entitlement. *See Ross, supra*.

Regarding the existence of pneumoconiosis, employer urges the Board to vacate its prior affirmance of the finding of pneumoconiosis pursuant to Section 718.202(a)(1) in light of *Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 67, 114 S.Ct. 2251, 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). Employer's Brief at 20-21. In our previous decision, issued two days after the United States Supreme Court invalidated the true doubt rule in *Ondecko*, we affirmed as unchallenged Judge Mills' finding based on the true doubt rule that pneumoconiosis was established by x-ray pursuant to Section 718.202(a)(1). At the time of our decision, employer, satisfied with the denial of benefits, had no incentive to challenge the finding at (a)(1) via motion for reconsideration of our decision affirming the denial. Under these circumstances, we do not believe that our prior affirmance of pneumoconiosis at Section 718.202(a)(1) as unchallenged on appeal should be controlling. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting)(the law of the case doctrine is a discretionary rule of practice).

Generally, we must apply the law in effect at the time of the appeal unless doing so would result in manifest injustice. *Lynn v. Island Creek Coal Co*., 12 BLR 1-146, 1-147 (1989). Applying the intervening law in this case will not result in manifest injustice because claimant at each stage of the proceedings has submitted medical evidence that is sufficient, if credited, to support a finding of pneumoconiosis under current law. Therefore, we vacate Judge Mills' (a)(1) finding and instruct the administrative law judge on remand to address the issue of pneumoconiosis pursuant to Section 718.202(a)(1)-(4).

We now turn to the administrative law judge's findings that claimant established that he suffers from a total respiratory disability due to pneumoconiosis. 20 C.F.R. §718.204. Pursuant to Section 718.204(c)(1), employer contends that the administrative law judge failed to provide a valid rationale for finding claimant's August 14, 1994 pulmonary function study valid. Employer's Brief at 14-18. We agree. This study yielded qualifying values.[2] The tracings contained in the record do not set forth the degree of claimant's effort, understanding, or cooperation in performing the test, but Dr. Kraman, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the tracings at the request of the Department of Labor and checked a box indicating that the test is acceptable. Director's Exhibit 57 at 1-3. In contrast, Drs. Vest, Tuteur, Renn, Hippensteel, and Castle, who are Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Paul, who is Board-certified in Internal Medicine and Allergy and Immunology, concluded on review of the tracings that the test is invalid because it deviates from the pulmonary function study quality standards listed at Part 718 Appendix B. Employer's Exhibit 1.

The administrative law judge accepted Dr. Kraman's check-box validation form over the contrary narrative opinions submitted by employer because he found that Dr. Kraman, as an expert retained by the Department of Labor, was "the most neutral party." Decision and Order at 12. However, the Board has held that unless the opinions of the physicians retained by the parties are properly held to be biased, based on specific evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their perceived impartiality. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). The administrative law judge identified no evidence that employer's physicians are

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

biased. Therefore, he erred in finding the August 14, 1994 pulmonary function study valid merely because the physician who validated the test was retained by the Department of Labor.

Additionally, as employer contends, Employer's Brief at 16-17, the administrative law judge erred in dismissing as cumulative all of the invalidation reports by employer's experts. The administrative law judge cited his discretion to limit the impact of voluminous, duplicative evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). However, instead of exercising that discretion by weighing perhaps one or a representative subset of employer's six reports against that of Dr. Kraman, the administrative law judge did not weigh any of them before deferring to Dr. Kraman. Because the administrative law judge did not properly consider all of the relevant evidence regarding the validity of the August 14, 1994 pulmonary function study, we must vacate his finding that the study is a valid measure of claimant's respiratory status. On remand, the administrative law judge must consider all relevant evidence and determine whether the study is valid.

Pursuant to Section 718.204(c)(4), employer argues that the administrative law judge erred by finding Dr. Sundaram's opinion to be a reasoned medical judgment of respiratory disability when it was based upon an arguably invalid pulmonary function study. Employer's Brief at 19. In weighing a medical opinion, the administrative law judge must "examine the validity of the reasoning of [the] medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983). Because the August 14, 1994 pulmonary function study provided support for Dr. Sundaram's opinion that claimant is totally disabled due to pneumoconiosis[3] and the administrative law judge did not properly resolve whether the data resulting from that test was valid, we instruct the administrative law judge on remand to assess the credibility of Dr. Sundaram's opinion after resolving the pulmonary function study evidence.[4] *See Rowe, supra*;

[3] Dr. Sundaram indicated that claimant has a pulmonary impairment as shown by pulmonary function studies below 80% of predicted, and interpreted the study as consistent with restrictive airway disease. Director's Exhibit 53; Claimant's Exhibit 1. His reports do not list any blood gas study results.

[4] We are mindful that the administrative law judge also cited Dr. Sundaram's examination of claimant and notations of shortness of breath as reasons for finding his opinion a reasoned diagnosis of disability. Decision and Order at 14. However, the administrative law judge did not explain how these factors led him to find that

Director, OWCP v. Siwiec, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990).

Pursuant to Section 718.204(b), employer contends that on remand a finding of disability causation is precluded as a matter of law because claimant's disability due to a back injury predates any respiratory disability from pneumoconiosis. Employer's Brief at 21-22. Employer's contention lacks merit. Under the law of the Sixth Circuit, a claimant must establish that his totally disabling respiratory or pulmonary impairment is due at least in part to pneumoconiosis. *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). This standard permits a claimant to establish causation notwithstanding the presence of a preexisting, nonpulmonary disability. *See Hunt*, 124 F.3d at 743, 21 BLR at 2-210 (preexisting heart condition no impediment to establishing causation); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216-17, 20 BLR 2-360, 2-368-72 (6th Cir.

"Dr. Sundaram was, therefore, of the opinion, even absent the pulmonary function stud[y], that claimant would be unable to engage in coal mine employment . . . ." *Id*. On remand, the administrative law judge should discuss how these factors support Dr. Sundaram's medical reasoning, *see Rowe, supra*; *Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989), and connect Dr. Sundaram's observations with claimant's specific coal mine employment duties. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir.1996); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Previously, the administrative law judge determined that claimant's job as a beltman required a moderate degree of labor with periods of heavy exertion, Director's Exhibit 46 at 4, but on modification unexplainedly stated that claimant's job was "all heavy manual labor." Decision and Order at 14.

1996)(same holding in context of a back injury); *Youghiogheny & Ohio Coal Company v. McAngues*, 996 F.2d 130, 134-35, 17 BLR 2-146, 2-151-53 (6th Cir. 1993)(back injury), *cert. denied*, 510 U.S. 1040, 114 S.Ct. 683, 126 L.Ed.2d 650 (1994). Therefore, notwithstanding his back condition, if claimant can establish on remand that pneumoconiosis arising out of coal mine employment contributes, at least in part, to his total respiratory disability, he will be entitled to benefits.

If the administrative law judge finds entitlement established on remand, he must then determine the date of onset of total disability due to pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Therefore, we turn to claimant's cross-appeal alleging error in the administrative law judge's method of onset determination.

Based upon his crediting of Dr. Sundaram's new opinion, the administrative law judge selected August 1994, the month in which claimant requested modification, as the onset date. Claimant contends that if Dr. Sundaram's opinion is again accorded determinative weight, the onset date must be October, 1993, the month after the administrative law judge's previous denial. Claimant's Brief at 4-6. Benefits are payable beginning with the month of onset of total disability due to pneumoconiosis. 20 C.F.R. §725.503(b). The administrative law judge correctly noted that where the evidence does not establish the month of onset, benefits are payable beginning with the month in which the claim was filed. *Id*. Claimant filed his claim in May, 1989, but the administrative law judge properly determined not to use that date because of his September, 1993 determination that claimant was not disabled. *See Lykins*, 12 BLR at 1-183 (1989)(claimant is entitled to benefits from the month of filing, unless the administrative law judge credits evidence indicating that claimant was not disabled at some point subsequent to the filing date).

Dr. Sundaram's medical opinion stating that claimant is totally disabled due to pneumoconiosis was dated August 16, 1994, which indicates that claimant became totally disabled at sometime prior to that date. *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-50 (1990). Since Dr. Sundaram did not specify when claimant's total disability began, the administrative law judge reasonably selected the month in which claimant requested modification, August 1994. The stated purpose of the Act is to provide benefits to miners who are totally disabled due to pneumoconiosis. 30 U.S.C. §901(a). Claimant's argument that benefits must be awarded as of October 1993 could result in compensating him for a period during which he was not eligible. *Lykins*, 12 BLR at 1-183; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989). Therefore, we hold that it was reasonable for the administrative law judge to consider the month of claimant's modification request as the onset date under the circumstances, and that he may use it again on remand if he properly credits Dr.

Sundaram's opinion in finding a material change in conditions and entitlement established.[5]

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5] If the administrative law judge were to conclude that his prior finding of no material change in conditions was a mistake in fact, his conclusion would raise the possibility of an earlier onset date. *See Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991). The administrative law judge would have to carefully explain his findings in this regard.