

BRB No. 04-0764 BLA

SAMUEL E. CONFAIR)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 07/18/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (03-BLA-0202) of Administrative Law Judge Janice K. Bullard on modification in a miner's claim filed

¹ Claimant is Samuel E. Confair, the miner, who filed his claim for benefits on May 18, 1998. Director's Exhibit 1. Administrative Law Judge Ainsworth H. Brown denied benefits on November 24, 2000 because claimant failed to establish total respiratory disability. Director's Exhibit 53. Claimant appealed, and the Board affirmed

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). Initially, the administrative law judge noted the parties' stipulation to six and one-half years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, 2003 Hearing Transcript at 19. Decision and Order at 2. The administrative law judge also noted the concessions of the Director, Office of Workers' Compensation Programs (the Director), to total respiratory disability pursuant to 20 C.F.R. §718.204(b) and modification pursuant to 20 C.F.R. §725.310 (2000)² and found these concessions to be supported by the record. *Id.* at 5-6. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence of record insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 9. Accordingly, the administrative law judge denied benefits on modification.

On appeal, claimant contends that the administrative law judge erred in failing to address whether claimant has established a mistake in a determination of fact at Section 725.310 (2000). Claimant's Brief at 2-4. Claimant further asserts that the administrative law judge, in rendering her findings at Section 718.204(c), failed to consider the entire evidentiary record and the 2002 opinion of Dr. Bower, which claimant submitted with his petition for modification. *Id.* at 4-7. Additionally, claimant asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c). *Id.* at 16. The Director has filed a Motion to Remand. In his motion, the Director agrees with claimant that the administrative law judge erred in failing to consider the 2002 opinion of Dr. Bower. Director's Motion to Remand at 4. The Director also asserts that the administrative law judge did not adequately explain the basis for her finding that Dr. Kraynak's opinion is not well documented and is poorly reasoned. Director's Motion to Remand at 5-6. Claimant responds to the Director's

Judge Brown's denial of benefits on December 4, 2001. Director's Exhibits 54, 64. Thereafter, claimant filed a motion for reconsideration, which the Board summarily denied on May 10, 2002. Director's Exhibits 65, 66. Claimant appealed to the United States Court of Appeals for the Third Circuit, but later agreed to dismissal of his appeal. Director's Exhibits 67, 70. On December 4, 2002, claimant filed a petition for modification, which the district director denied. Director's Exhibits 72, 75. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 76.

² Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310 in the new regulations, these revisions only apply to claims filed after January 19, 2001.

Motion to Remand, stating that he agrees with all the contentions raised in the Director's Motion to Remand.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In addressing the cause of claimant's disability, the administrative law judge noted that the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,³ held in *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), that in order to establish total respiratory disability due to pneumoconiosis, a claimant must prove that "pneumoconiosis is a substantial contributor" to the miner's disability. Decision and Order at 6. Additionally, the administrative law judge cited 20 C.F.R. §718.204(c)(1)(i), (ii), which states that:

Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii); Decision and Order at 6. Pursuant to Section 718.204(c), the administrative law judge considered the newly submitted opinions of Dr. Kraynak, who is claimant's treating physician, and Dr. Rashid.⁴ Decision and Order at 6-

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment occurred in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

⁴ The relevant new medical opinion evidence regarding the cause of claimant's respiratory impairment is as follows. Dr. Kraynak found that claimant is totally and permanently disabled due to coal workers' pneumoconiosis. Claimant's Exhibits 8 at 10, 11. Dr. Rashid opined that claimant is not disabled as a result of working in the mines and that his hypoxia "is probably as a result of smoking and his lung problem is a result of obesity and smoking." Director's Exhibit 82. Dr. Bower, a treating physician, opined that claimant's pneumoconiosis precludes him from performing his past coal mine employment or similar labor. Director's Exhibit 72. The old relevant medical opinion

9. The administrative law judge found the medical opinion evidence to be in “equipoise” and that claimant, therefore, failed to prove total respiratory disability due to pneumoconiosis. In doing so, the administrative law judge found Dr. Kraynak’s opinion to be “entitled to less weight because he failed to address Claimant’s obesity at all, and did not fully address the impact of his other impairments.” *Id.* at 8. In addition, the administrative law judge found that “Dr. Kraynak did not provide a full rationale for his opinion regarding the cause of Claimant’s total disability.” *Id.* The administrative law judge added that Dr. Kraynak’s “opinion is not entitled to controlling weight [based on] his status as a treating physician because other evidence controverts his opinion.” *Id.* at 8-9. Regarding Dr. Rashid, the administrative law judge found that this physician’s opinion is not entitled to great weight because it is “conclusory” and “not well-documented.” *Id.* at 9. The administrative law judge further stated that, notwithstanding Dr. Rashid’s superior credentials, his opinion was not entitled to controlling weight. *Id.*

Claimant and the Director first assert that the administrative law judge erred in failing to consider the November 29, 2002 opinion of Dr. Bower, a treating physician, at Section 718.204(c). Claimant also contends that the administrative law judge failed to consider the old medical opinion evidence of record in determining whether claimant’s total respiratory disability is due to pneumoconiosis. As claimant and the Director assert, the administrative law judge failed to consider Dr. Bower’s 2002 opinion, in which he opined that claimant’s pneumoconiosis precludes him from performing his past coal mine employment or similar labor. Director’s Exhibit 72. Moreover, because claimant established modification pursuant to Section 725.310 (2000), based on the Director’s concession of total respiratory disability at Section 718.204(b), the administrative law judge also failed to consider the old evidence of record in rendering her Section 718.204(c) finding. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Accordingly, we vacate the administrative law judge’s Section 718.204(c) finding and instruct the administrative law judge to consider Dr. Bower’s 2002 opinion and the previously submitted medical opinion evidence of record on remand pursuant to this subsection. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

With regard to the administrative law judge’s weighing of Dr. Kraynak’s opinion, claimant and the Director contend that the administrative law judge did not fully explain

evidence includes Dr. Kraynak’s opinion that claimant is totally and permanently disabled due to coal workers’ pneumoconiosis and Dr. Bower’s opinion that claimant’s anthrasicosis plays a significant role in his shortness of breath with exertion. Claimant’s Exhibits 7, 12; 16 at 12.

her rationale for rejecting Dr. Kraynak's opinion. The assertions of claimant and the Director have merit. The administrative law judge accorded less weight to Dr. Kraynak's opinion because she found that he "did not fully address the impact of [claimant's] other impairments" and "did not provide a full rationale." Decision and Order at 8. In considering other possible causes of claimant's disability, Dr. Kraynak testified, at his deposition, that some element of claimant's pulmonary disease could be attributable to claimant's smoking history of one pack per day for forty-five years. Claimant's Exhibit 8 at 11. Dr. Kraynak also testified that claimant has no evidence of cardiac decompensation or continuing cardiac complaints and opined that his prior cardiac condition does not impact on his pulmonary capacity in any way. *Id.* at 7, 10. Dr. Kraynak further testified that claimant's high blood pressure and diabetes are not causing him any impairment of his pulmonary capacity. *Id.* at 10. Moreover, throughout his deposition, Dr. Kraynak offered an explanation as to why he concluded that claimant's respiratory disability is due to his pneumoconiosis. In light of the foregoing, it is difficult to determine, without further elaboration, whether it was reasonable for the administrative law judge to accord Dr. Kraynak's report less weight. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Therefore, we remand this case for the administrative law judge to consider Dr. Kraynak's 2003 testimony and to clarify her rationale in weighing Dr. Kraynak's opinion. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Regarding Dr. Rashid's report, neither claimant nor the Director challenges the administrative law judge's finding that this physician's opinion is "not entitled to greater weight than Dr. Kraynak's opinion because it is conclusory" and "not well-documented."⁵ Therefore, we affirm, as unchallenged on appeal, the administrative law judge's findings pertaining to Dr. Rashid's opinion. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant also contends that the administrative law judge should have given special consideration to the opinions of Drs. Bower and Kraynak, based on their status as claimant's treating physicians. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, she is not required to do so. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Ondecko v. Director, Director, OWCP*, 14 BLR 1-2 (1989). Rather, the administrative law judge must examine all of the physicians' opinions on their merits and make a reasoned

⁵ The Director noted in his Motion to Remand that "Dr. Rashid's opinion on disability-causation is defective because the physician failed to diagnose the presence of pneumoconiosis, which the Director has conceded is present." Director's Motion to Remand at 3 n.3.

judgment about their credibility, with proper deference given to the treating physicians' opinions, when warranted. *See* 20 C.F.R. §718.104(d);⁶ *Lango*, 104 F.3d at 577-78, 21 BLR at 2-20-21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). While the administrative law judge considered Dr. Kraynak's status as treating physician, she determined that his opinion was not entitled to controlling weight on this basis "because other evidence controverts his opinion." Decision and Order at 9. In light of our affirmance of the administrative law judge's findings regarding Dr. Rashid's opinion, the only report of record that finds that claimant's disability is not caused by his coal mine employment, we also instruct the administrative law judge to reconsider her determination regarding the weight to be accorded to Dr. Kraynak's report based on his status as claimant's treating physician.

Lastly, we address claimant's contention that this case requires remand because the administrative law judge failed to consider whether the evidence of record establishes a mistake in a determination of fact pursuant to Section 725.310 (2000). In her Decision and Order, the administrative law judge noted that the Director conceded the issues of modification and total respiratory disability.⁷ Decision and Order at 2. Since the Director conceded the issue of total respiratory disability and claimant was previously denied benefits because he could not establish total respiratory disability, the administrative law judge determined that claimant established modification based on a change in conditions. *Id.*; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158. However, the administrative law judge's finding that claimant established a change in conditions based on the Director's concession of total respiratory disability is conclusory because she has not provided any explanation for her finding that the Director's concession establishes a change in conditions, rather than a mistake in fact. Therefore, we instruct the administrative law judge, on remand, to reconsider whether the Director's concession establishes a change in conditions or a mistake in fact and provide a detailed analysis for her findings, as required by the Administrative Procedure Act.⁸ *See* 5 U.S.C.

⁶ 20 C.F.R. §718.104(d) applies to the reports of Drs. Bower and Kraynak, which were developed after January 19, 2001.

⁷ The administrative law judge noted that the Director's concession of total respiratory disability was supported by the objective evidence of record. Decision and Order at 5.

⁸ Because this case involves modification, if entitlement to benefits is established, the date from which benefits commence may vary based on whether modification is based on a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000). *See* 20 C.F.R. §725.503(d).

§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); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge