BRB No. 99-0761 BLA

JOE HURT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
LOCUST GROVE COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-336) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge, based on a stipulation by the parties, credited claimant with thirteen and one-half years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the newly submitted medical evidence established that claimant was totally disabled from a pulmonary standpoint, *see* 20 C.F.R. §718.204(c), further found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) and, in light of the decision of 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), found that claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge also found that the evidence of record was sufficient to establish total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.203(b) and 718.204(b). Accordingly, the administrative law judge awarded benefits as of the month in which the instant claim was filed. On appeal, employer challenges the administrative law judge's evaluation of the medical opinion evidence of record to find that claimant established the existence of pneumoconiosis and disability causation.[1] *See* 20 C.F.R. §§718.202(a)(4) and 718.204(b). Claimant replies, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal unless requested to do so by the Board.

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 the Board and may not be disturbed. 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis;

[1] As the administrative law judge's finding that the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309(d) is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

In finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge initially noted that Drs. Baker and Wicker found that claimant had both clinical pneumoconiosis, which they diagnosed by x-ray, and statutory pneumoconiosis, as both physicians related claimant's chronic obstructive pulmonary disease (COPD) to a combination of smoking and coal dust exposure. Decision and Order at 19-20. The administrative law judge also found that Drs. Myers, Harrison, Broudy, Fino and Branscomb found that claimant did not have clinical pneumoconiosis and that while Dr. Myers did not state an etiology for claimant's COPD, Drs. Harrison, Broudy, Fino and Branscomb attributed claimant's chronic obstructive pulmonary disease to asthma unrelated to coal dust exposure. Decision and Order at 19-23. The administrative law judge gave less weight to Dr. Broudy's medical opinion because he found that Dr. Broudy's opinion was hostile to the Act based on the doctor's belief that disabling impairments can only be caused by complicated pneumoconiosis, not simple pneumoconiosis. Decision and Order at 20. The administrative law judge further found that Dr. Fino's opinion was similarly hostile to the Act based on the doctor's belief that disabling obstructive impairments can only be caused by complicated pneumoconiosis, not simple pneumoconiosis. Decision and Order at 20-21. The administrative law judge also found that Dr. Fino's opinion showed a bias against claimant as the doctor did not adequately address the medical evidence that was favorable to claimant. Decision and Order at 21. The administrative law judge accorded diminished weight to Dr. Branscomb's opinion since the administrative law judge found that it was based upon an assumption that claimant was being treated for asthma, whereas the records he reviewed did not show a history of asthma. Decision and Order at 22-23. The administrative law judge found that the medical opinions of Drs. Harrison, Wicker and Baker were documented and well-reasoned, and accorded greatest weight to the report of Dr. Wicker as he was claimant's treating physician and his opinion was supported by Dr. Baker. Decision and Order at 23. In light of these determinations, the administrative law judge found that the medical opinions of Drs. Wicker and Baker established both the existence of pneumoconiosis and total disability due, at least in part, to pneumoconiosis. Decision and Order at 24-25.

Initially, employer contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Wicker pursuant to Section 718.202(a)(4) because

their opinions that claimant has pneumoconiosis are supported only by an abnormal x-ray. Employer's Brief at 21. The Act and its implementing regulations recognize both "clinical" and "legal" pneumoconiosis. *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-106 (1998). Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis. *Id*. Here, the administrative law judge found that although the chest x-ray evidence failed to establish clinical pneumoconiosis pursuant to Section 718.202(a)(1), the medical opinions of Drs. Wicker and Baker established statutory pneumoconiosis pursuant to Section 718.202(a)(4) since he found that both physicians related claimant's pulmonary obstruction to a combination of coal dust exposure and cigarette smoking. Decision and Order at 19-20. The administrative law judge considered Dr. Baker's report of an examination of claimant on October 16, 1992 as well as his October 24, 1994 deposition testimony. Decision and Order at 10, 13; Director's Exhibit 64. Dr. Baker diagnosed pneumoconiosis on the basis of an abnormal chest x-ray and a history of coal dust exposure and diagnosed COPD on the basis of abnormal pulmonary function studies. *Id*. Dr. Baker related the impairment to coal dust exposure and smoking and opined that claimant was not capable of performing his usual coal mine employment. *Id*. The administrative law judge found that Dr. Wicker concluded that claimant suffers from pneumoconiosis by x-ray due to coal dust exposure as well as COPD. Decision and Order at 11-12, 20; Director's Exhibit 29. Dr. Wicker also found a disabling impairment and attributed it to a combination of the claimant's coal dust exposure and cigarette smoking history. *Id*. Although the administrative law judge found these physicians diagnosed legal pneumoconiosis, the administrative law judge does not explain what specific factors the physicians relied upon, other than x-rays and a history of exposure, in concluding that claimant's impairment was due to coal mine employment or how the opinions of Drs. Wicker and Baker were well-reasoned and documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 19-20, 23. In addition, the administrative law judge automatically gave greater weight to Dr. Wicker's opinion on the basis that he was claimant's treating physician, without discussing the underlying basis for his conclusion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge's findings thus contravene 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). We thus vacate his findings pursuant to Section 718.204(a)(4) and remand for further consideration thereunder.

Employer's contentions that the administrative law judge erred in rejecting the opinions of Drs. Broudy, Fino and Branscomb have some merit as well. A physician that forecloses all possibility that simple pneumoconiosis can be totally disabling may constitute grounds for rejecting his medical opinion as inconsistent with congressional intent and the spirit of the Act. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987). The administrative law judge rejected the opinions of Drs. Broudy and Fino as being hostile to the Act based on his finding that they believed disabling impairments can only be caused by complicated pneumoconiosis, not simple pneumoconiosis.[2] *Id*.; Decision and Order at 20-21. In addition, the administrative law judge found that the opinions of Drs. Fino and Branscomb, that claimant's respiratory disease was due solely to his asthma, were not supported by the records they reviewed, which the administrative law judge stated did not indicate that claimant had been treated for asthma. *See Clark*, *supra*; Decision and Order at 21-23. Further, the administrative law judge concluded that Dr. Fino failed to address the evidence favorable to claimant and reached a biased opinion. Decision and Order at 21. Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the administrative law judge cannot substitute his own opinion for that of the physician. While it appears that the administrative law judge rationally concluded that Dr. Broudy's opinion was hostile to the Act under *Adams*, *supra*, it is unclear how the administrative law judge also found Dr. Fino's opinion deficient. The administrative law judge apparently equated complicated pneumoconiosis with the "significant fibrosis" Dr. Fino alluded to, which is a mischaracterization of Dr. Fino's statement. Moreover, in finding that Dr. Fino did not address the evidence favorable to claimant, it is not clear whether the administrative law judge is simply disagreeing with Dr. Fino's ultimate conclusion or there is evidence favorable to claimant which Dr. Fino failed to address and the omission of the specific evidence has been found to constitute bias. If the administrative law judge is finding the latter, there needs to

[2] Dr. Broudy stated that "it's my opinion that there is little impairment associated with simple pneumoconiosis" and that "[c]oal dust exposure does not cause disabling impairment unless the individual has progressive, massive fibrosis or what's called complicated coal workers' pneumoconiosis." Director's Exhibit 60 at 25, 29. Dr. Fino stated that "[o]bstructive lung disease may also arise from coal workers' pneumoconiosis when significant fibrosis is present." Decision and Order at 15; Employer's Exhibit 2.

be some discussion of that evidence. In addition, the administrative law judge has not explained why the diagnosis of asthma by Drs. Myers, Broudy, Fino and Branscomb was a misdiagnosis. The weighing of the evidence is for the administrative law judge, but the interpretation of medical data is for the medical experts, *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984), and it was error for the administrative law judge to interpret the medical tests and thereby substitute his conclusions for those of the physicians. As such, the administrative law judge is instructed on remand to reconsider the opinions of Drs. Fino and Branscomb as well and state specific reasons for accepting or rejecting them.

Pursuant to Section 718.204(b), employer contends that the administrative law judge erred in failing to apply the correct standard for disability causation and that the findings of the administrative law judge thereunder violate the APA. 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. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). In considering whether total disability due to pneumoconiosis was established pursuant to Section 718.204(b), the administrative law judge again credited the opinions of Drs. Baker and Wicker, but did not specifically discuss the other medical opinion evidence thereunder. Decision and Order at 24-25. Moreover, the administrative law judge did not explain how claimant affirmatively established that his pneumoconiosis is a contributing cause of some discernible consequences to his totally disabling respiratory impairment pursuant to Section 718.204(b) under *Smith*, *supra*, and *Adams*, *supra*, but merely stated that "[t]his the claimant has done with the opinions of Drs. Wicker and Baker." *Id*. Although the administrative law judge has broad discretion in procedural matters, he has provided no specific basis for accepting these reports or for rejecting the contrary reports on this issue of causation, if that is the case. 20 C.F.R. §725.456; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Consequently, the administrative law judge's determinations lack sufficient findings for the Board to review. In any event, the administrative law judge should have discussed the reports, as well as any contrary opinions, in more detail at Section 718.204(b) and assigned the appropriate weight to them based on their respective probative values in order to satisfy the APA. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge's failure to adequately discuss this relevant evidence also requires remand, *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984), as the APA requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis

therefor on all material issues of fact, law or discretion presented in the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We therefore vacate the administrative law judge's findings under Section 718.204(b) and, on remand, the administrative law judge is instructed to reconsider the evidence thereunder as well, if necessary.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part 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

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge