BRB No. 96-0757 BLA

DUDLEY STEWART Claimant-Respondent v. WAMPLER BROTHERS COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

Karen Rapaport Esser (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-0599) of Administrative Law Judge Daniel L. Leland awarding benefits on a claim[1] filed pursuant to the

[1] Claimant is Dudley Stewart, the miner, whose initial application for benefits filed with the Social Security Administration (SSA) on March 15, 1973 was denied on October 5, 1973. Director's Exhibit 35 at 299, 354. On April 10, 1978, claimant filed an election card requesting SSA review of his claim pursuant to Section 435 of the

provisions of Title IV of the Federal

Act. Director's Exhibit 35 at 296. After such review, SSA again denied the claim on October 25, 1978. Director's Exhibit 35 at 297. On January 30, 1979, however, SSA mistakenly informed claimant that his claim was approved. Director's Exhibit 35 at 296. The claim was transferred to the Department of Labor (DOL), which eventually detected the error, notified claimant of the mistake, and informed him of the need to submit evidence in support of entitlement. Director's Exhibit 35 at 293. After consideration of this evidence, DOL modified SSA's award of benefits to a denial pursuant to 20 C.F.R. §725.310. Director's Exhibit 35 at 286. The case was then submitted to the Office of Administrative Law Judges for a decision on the record, and benefits were finally denied in a Decision and Order issued on March 23, 1990. Director's Exhibit 35 at 14. Claimant filed the present claim on August 13, 1993, which was administratively denied on February 14, 1994. Director's Exhibits 1-3, 18. Claimant took no action within the sixty-day period specified in the denial notice, but instead submitted a letter approximately ninety days later, which DOL construed as a request for modification of the district director's decision denying benefits. Director's Exhibits 19, 20.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with eighteen years and ten months of coal mine employment and found that he has two dependents for purposes of benefits augmentation. The administrative law judge found this claim to be a duplicate claim, determined that the newly-submitted medical opinion evidence established the existence of pneumoconiosis, and concluded that a material change in conditions had been demonstrated pursuant to 20 C.F.R. §725.309(d). Proceeding to the merits of the claim, the administrative law judge found the existence of totally disabling pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204 and, accordingly, awarded benefits as of the filing date of claimant's application.

On appeal, employer contends that the administrative law judge failed to perform a threshold modification analysis pursuant to Section 725.310. Employer also asserts that the administrative law judge erred in his duplicate claim analysis pursuant to Section 725.309(d). Employer also challenges the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4). Employer further contends that the administrative law judge erred in his analysis of the evidence pursuant to Section 718.204, and improperly awarded benefits as of the filing date of the claim. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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).

Pursuant to Section 725.310, employer contends that the administrative law judge failed to make a preliminary determination regarding whether claimant established a basis for modification of the district director's denial of benefits.

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, dependency, and pursuant to 20 C.F.R. §§718.203(b) and 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Employer's Brief at 14. The Board has held that where modification of a district director's decision is sought, the administrative law judge proceeds *de novo* and therefore, "it is not necessary for the administrative law judge to make a specific preliminary determination" that a basis for modification exists because "the modification finding is subsumed in the administrative law judge's findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc*., 17 BLR 1-14, 1-19 (1992). Here, claimant sought modification of the district director's determination that a material change in conditions was not established pursuant to Section 725.309(d). Director's Exhibit 18. The administrative law judge's *de novo* decision that a material change in conditions was established constitutes a determination that a basis for modification of the district director's denial has been demonstrated. Therefore, we reject employer's contention.

Pursuant to Section 725.309(d), employer contends that the administrative law judge misapplied the material change in conditions test. Employer's Brief at 16. Where a claimant 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). The United States Court of Appeals for the Sixth Circuit, within whose appellate 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 claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross*, *supra*.

Employer contends that the administrative law judge failed to confine his material change in conditions inquiry to the new evidence. Specifically, employer asserts that the administrative law judge improperly "reconsidered facts . . . in existence at the time the first claim was denied," when he observed that the prior administrative law judge was unaware at the time of his 1990 decision that claimant had resumed coal mine work in 1986 and worked for an additional three years and seven months. Employer's Brief at 16; [1996] Decision and Order at 6. Employer argues that, by noting that this additional coal mine employment was not documented in the record before the prior administrative law judge, Judge Leland impermissibly based his material change in conditions finding "on a mistake of fact relating to the . . . adjudication of the first claim." Employer's Brief at 16.

Contrary to employer's contention, the administrative law judge did not base his finding of a material change in conditions on a determination that the prior Decision and Order contained a "mistake of fact," but rather, on his finding that the newly-submitted medical opinion evidence established the existence of pneumoconiosis. [1996] Decision and Order at 6-7; *see Ross*, *supra*. Employer reads too much into the administrative law judge's statement that it was "noteworthy" that the prior administrative law judge did not have evidence of claimant's additional three years and seven months of coal mine employment accrued between 1986 and 1989 before him.[3] Decision and Order at 6. As far as we can discern, the administrative law judge was merely explaining that he would be viewing the newly-submitted medical evidence in light of claimant's complete coal mine employment history. Therefore, we reject employer's contention.

Employer further contends that the administrative law judge mechanically accorded greater weight to the opinion of claimant's treating physician, Dr. Sundaram, to find a material change in conditions established. Employer's Brief at 12-13. We hold that the administrative law judge's reliance on the treating physician's diagnosis of pneumoconiosis was reasonable. The record indicates that Dr. Sundaram, who is board-certified in internal medicine, has been treating claimant for shortness of breath since June 1994 and sees claimant every two to three months. Claimant's Exhibit 4 at 7. Dr. Sundaram explained that his diagnosis was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, non-smoking history, and objective study results. Director's Exhibit 28; Claimant's Exhibit 4. The administrative law judge permissibly accorded

[3] The administrative law judge correctly stated that the record as of 1990 did not contain evidence of claimant's 1986 through 1989 coal mine employment. Director's Exhibit 35. The prior administrative law judge relied solely on the Social Security earnings records, the coverage of which then ended in 1979, to find "a little over 15 years of employment . . . ending in 1979." [1990] Decision and Order at 4. At the hearing in this claim, employer stipulated to seventeen years of coal mine employment, Hearing Transcript at 6, and does not challenge Judge Leland's finding of eighteen years, ten months of coal mine employment.

greater weight to Dr. Sundaram's opinion as a treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and less weight to the opinion of Dr. Wicker, who he found examined claimant only once, and to the opinion of Dr. Dahhan, who he found based his opinion solely on a review of claimant's medical records. Therefore, we reject employer's argument.

In light of our holding that the administrative law judge permissibly accorded greater weight to the opinion of claimant's treating physician regarding the existence of pneumoconiosis, we reject employer's contention that the administrative law judge failed to explain why he accorded less weight to the opinions of Drs. Wicker and Dahhan. Employer's Brief at 21; *see Tussey*, *supra*. We also reject employer's assertion that the administrative law judge should have discredited the opinion of Dr. Sundaram because the physician relied on a positive x-ray when the administrative law judge found the x-ray evidence negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Employer's Brief at 19. Contrary to employer's contention, an administrative law judge may not discredit a medical opinion merely because it relies on a positive x-ray interpretation that conflicts with the weight of the x-ray evidence. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). We also reject employer's assertion that the administrative law judge erred in crediting Dr. Sundaram's diagnosis of pneumoconiosis when the objective studies of record were non-qualifying[4] and the x-rays were "primarily negative." Employer's Brief at 18. Whether or not the objective studies are qualifying goes to the existence of total respiratory disability, and, because Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *Beatty v. Danri Corp*., 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Dixon v. North Camp Coal Co*., 8 BLR 1-344 (1985); *see generally Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989), an administrative law judge who has found the x-ray evidence to be negative for pneumoconiosis at Section 718.202(a)(1) may rely on a documented and reasoned medical opinion diagnosing pneumoconiosis at Section 718.202(a)(4).

Employer also argues that Dr. Sundaram's opinion is legally insufficient to establish a material change in conditions. Employer's Brief at 17-18. Employer contends specifically that, because Dr. Sundaram did not begin treating claimant

[4] 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).

until June of 1994, he was in no position to determine whether or not claimant's physical condition changed in any way since the denial of benefits in 1990. Employer's Brief at 18. Employer's contention is meritless. The issue at Section 725.309(d) is whether the administrative law judge, not a particular physician, finds that the new medical evidence establishes a material change in conditions. 20 C.F.R. §725.309(d); *see Ross*, *supra*. The administrative law judge properly determined that the newly-submitted medical opinion evidence established a material change in conditions by demonstrating that "claimant has developed pneumoconiosis since the denial of his earlier claim . . . ." [1996] Decision and Order at 7. Therefore, we reject employer's contention and affirm the administrative law judge's finding that the new evidence establishes a material change in conditions pursuant to Section 725.309(d).

Employer correctly contends, however, that the administrative law judge failed to consider whether all of the evidence supported a finding of entitlement. Employer's Brief at 19; *see Ross*, *supra*. After the administrative law judge found a material change in conditions established, he declared that "[t]he evidence establishes that the claimant has pneumoconiosis," and proceeded to the remaining elements of entitlement without first weighing both the old and new evidence regarding the existence of pneumoconiosis. Decision and Order at 7. Therefore, although we affirm the administrative law judge's finding of a material change in conditions, we instruct him on remand to consider whether all of the evidence of record supports a finding of entitlement. In addition, inasmuch as employer correctly notes that the administrative law judge failed to determine whether or not Dr. Smith's diagnosis of chronic obstructive pulmonary disease constituted a diagnosis of pneumoconiosis pursuant to Section 718.201, Employer's Brief at 20-21; Director's Exhibit 28; Claimant's Exhibit 4, we instruct the administrative law judge on remand to make a finding on this issue.

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge substituted his own medical interpretation of the pulmonary function study results. Employer's Brief at 24. This contention has merit. In crediting the opinion of Dr. Sundaram that claimant was totally disabled, the administrative law judge found that, although the May 9, 1995 pulmonary function study values were "nonqualifying . . ., they are not normal as both the FEV1 and the FVC are less than 80% of the predicted values. These results support Dr. Sundaram's conclusion that claimant's pulmonary impairment is totally disabling . . . ." [1996] Decision and Order at 7. An administrative law judge exercises broad discretion in weighing the medical evidence, but may not substitute his own medical judgment for that of a physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Because the administrative law judge appears to have based his finding in part on his own interpretation of the

pulmonary function study data, we must vacate his finding pursuant to Section 718.204(c)(4).

However, we reject employer's contention that Dr. Sundaram's opinion is legally insufficient to establish the existence of a totally disabling respiratory impairment. Employer's Brief at 24. Although Dr. Sundaram did not discuss the specific exertional requirements of claimant's usual coal mine employment, he provided enough information regarding the severity of claimant's respiratory impairment for an administrative law judge to infer total respiratory disability by comparing Dr. Sundaram's opinion with the exertional requirements of claimant's usual coal mine employment.[5] *See Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge found that claimant's usual coal mine employment consisted of running a loader, [1996] Decision and Order at 3, but failed to make a finding regarding the exertional requirements of that job, which are listed at Director's Exhibit 7, or compare Dr. Sundaram's opinion with these requirements. Therefore, although we reject employer's contention that Dr. Sundaram's opinion is legally insufficient to establish total respiratory disability, we instruct the administrative law judge on remand to consider Dr. Sundaram's opinion in light of the exertional requirements of claimant's usual coal mine employment. *See Budash*, *supra*.

[5] Dr. Sundaram opined that claimant's respiratory impairment rendered him unable to "do the hard manual labor of a miner," and that claimant could not "bend, crawl, stoop, or work at unprotected heights." Claimant's Exhibit 4 at 11, 22.

In addition, employer correctly contends that the administrative law judge failed to weigh all the relevant evidence[6] together to determine whether total respiratory disability was established pursuant to Section 718.204(c), *see Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), but found that claimant was totally disabled based on the medical opinion evidence alone. [1996] Decision and Order at 8. On remand, the administrative law judge must weigh all relevant evidence pursuant to Section 718.204(c).

Pursuant to Section 718.204(b), employer asserts that the administrative law judge erred by discrediting the opinions of Drs. Mettu, Wicker, and Dahhan because they failed to diagnose pneumoconiosis. Employer's Brief at 26. Because the administrative law judge's analysis is tainted by his failure to weigh all of the evidence regarding the existence of pneumoconiosis pursuant to Section 718.202(a), *see* discussion, *supra*, we must also vacate his finding pursuant to Section 718.204(b).[7]

---

[6] Seven of the eight pulmonary function studies were non-qualifying and none of the blood gas studies was qualifying. Director's Exhibits 10, 13, 28, 35; Claimant's Exhibit 3.

[7] Although Drs. Mettu and Wicker did not address disability causation, Dr. Dahhan opined that the pulmonary impairment detected by the physicians of record was consistent with obstructive lung disease, which he would not expect to see in a patient suffering from a lung impairment due to coal dust inhalation. Employer's Exhibit 1. Since Dr. Dahhan's opinion regarding disability causation is not premised on his own belief that claimant does not have pneumoconiosis, on remand the

Regarding the date for the commencement of benefits, employer correctly contends that the administrative law judge did not explain his finding that the evidence failed to establish the onset date of total disability due to pneumoconiosis. Employer's Brief at 27; [1996] Decision and Order at 8. Therefore, we must vacate the administrative law judge's finding and instruct him to consider and explain the weight accorded to all relevant evidence on remand. However, we reject employer's contention that if the administrative law judge on remand again credits Dr. Sundaram's opinion, benefits cannot commence prior to June 14, 1994, the date on which Dr. Sundaram began treating claimant. Employer's Brief at 27. The first evidence of disability does not establish the date of onset of such disability but merely indicates that claimant became totally disabled at sometime prior to that date. *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990). Where the record fails to establish an earlier onset date, claimant is entitled to benefits from the month of filing, unless there is evidence which, if credited, indicates that claimant was not disabled at some point subsequent to the filing date. *See Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see also Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). The record contains non-qualifying objective studies and a medical opinion diagnosing no total disability obtained subsequent to the August 13, 1993 filing date but prior to June 14, 1994. Director's Exhibits 10, 12, 13, 28. However, the weighing of these items is the administrative law judge's duty. Therefore, we decline to hold as a matter of law that benefits cannot commence prior to June 14, 1994.

Therefore, we remand this case for the administrative law judge to consider all of the evidence of record regarding the existence of pneumoconiosis pursuant to Section 718.202(a). If the administrative law judge finds the existence of pneumoconiosis established, he must consider all of the evidence regarding the exertional requirements of claimant's coal mine employment in determining whether the medical opinion evidence establishes total
respiratory disability pursuant to Section 718.204(c)(4). *See Budash*, *supra*; *Onderko*, *supra*. If the administrative law judge finds that it does, and concludes that

---

administrative law judge must weigh his opinion against Dr. Sundaram's opinion. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993)(physician's report lacks probative value where its main point is that claimant does not have pneumoconiosis).

all of the relevant evidence weighed together establishes total respiratory disability, *see Beatty*, *supra*; *Fields*, *supra*; *Shedlock*, *supra*, he must then evaluate all of the relevant evidence to determine whether claimant's total disability is due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52, 2-63 (6th Cir. 1989). If so, the administrative law judge must then determine the date on which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Owens*, *supra*; *Lykins*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge