BRB No. 06-0351 BLA

JAMES S. SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/28/2007
	)	
DRUMMOND COMPANY, INCORPORATED	)	
	)	
	)	
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 Awarding Benefits and Decision and Order On Employer's Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Smyth III (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order On Employer's Motion for Reconsideration (04-BLA-06203) of Administrative Law Judge Robert D. Kaplan on a subsequent 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 found twenty-six years and ten months of coal mine employment. Decision and Order at 2. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge determined that this claim is a subsequent claim and found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and thus sufficient

to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[1] Decision and Order at 2-8; Director's Exhibit 2. The administrative law judge then considered the entire record and found that claimant established the existence of totally disabling pneumoconiosis due to coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204(b)(2)(iv), (c). Decision and Order at 8-11. Accordingly, benefits were awarded.

Employer subsequently requested reconsideration and submitted additional evidence. On reconsideration, the administrative law judge acknowledged that he had overlooked the B reader status of Dr. Goldstein but concluded that this oversight did not affect his weighing of the evidence at Section 718.202(a)(4). Decision and Order On Employer's Motion for Reconsideration at 2-3. The administrative law judge also disagreed with employer's assertion that he erred by not searching outside the record to find Dr. Goldstein's certifications and further refused to reopen the record to accept the *curriculum vitae* of the physician. Decision and Order On Employer's Motion for Reconsideration at 1-2. Accordingly, benefits were again awarded.

On appeal, employer contends that the administrative law judge erred in finding that Dr. Goldstein's credentials were not in the record and in finding that the medical opinion evidence established that claimant has pneumoconiosis and is totally disabled by it pursuant to Sections 718.202(a)(4) and 718.204(b), (c). Employer further contends, therefore, that the administrative law judge erred in determining that claimant established a change in an applicable condition of entitlement under Section 725.309(d). Employer also argues that the rationale applied in the administrative law judge's denial of employer's motion for reconsideration is unsupported by the original Decision and Order awarding benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[2]

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[1] Claimant filed his initial claim for benefits with the Department of Labor on September 18, 1984, which was denied by the district director on December 21, 1984, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim on March 2, 1987, which was again denied by the district director, as claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the instant claim on February 10, 2003, which was denied by the district director on January 13, 2004. Director's Exhibits 4, 20. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 21.

[2] The administrative law judge's length of coal mine employment determination, his findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), or the existence of a totally disabling respiratory

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

We will first address employer's contention that the administrative law judge did not properly assess the qualifications of Drs. Goldstein and Hawkins under Section 718.202(a)(4). Initially, in addressing the medical opinions pursuant to this subsection, the administrative law judge stated:

> The opinions of Drs. Hawkins and Goldstein with regard to the presence of pneumoconiosis are both reasoned and documented. The laboratory studies considered by Drs. Hawkins and Goldstein are very similar, as are their clinical findings. The major difference in the data on which they relied is that Dr. Hawkins relied on the positive chest x-ray interpretation by Dr. Ballard, while Dr. Goldstein relied on his own negative x-ray interpretation. On the other hand, Dr. Wheeler concluded that the 2003 chest x-ray was negative for pneumoconiosis, while Dr. Goldstein's qualifications for interpreting x-rays are not of record.
>
> Considering the foregoing, I conclude that the opinions of Drs. Hawkins and Goldstein are essentially in equipoise. Consequently, I turn to the physicians' qualifications to break the stalemate. The District Director reported that Dr. Hawkins is Board certified in internal medicine and pulmonary disease (DX 20: Proposed Decision and Order at 6), while Dr. Goldstein's qualifications are not of record. I therefore find that the opinion of Dr. Hawkins that Claimant has pneumoconiosis is entitled to greater weight than the contrary opinion of Dr. Goldstein.

Decision and Order at 8.

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impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Subsequently, on reconsideration, the administrative law judge, after acknowledging that he had overlooked Dr. Goldstein's status as a B reader, which was noted on his x-ray interpretation form, found that:

> ...The fact that I had overlooked Dr. Goldstein's status as a B-reader did not affect the outcome of my weighing his opinion against that of Dr. Hawkins because in the D&O I found that (1) the new x-ray evidence as a whole was negative (which would support Dr. Goldstein's opinion), and (2) the opinions of the two physicians are both reasoned and documented.
>
> At any rate, upon reconsideration, giving Dr. Goldstein the added weight of a B-reader in his interpretation of the April 5, 2005 film, I again find that the opinion (sic) of Drs. Goldstein and Hawkins are in essential equilibrium, absent the consideration of Dr. Hawkins' qualifications. Weighing Dr. Goldstein's **of-record** status as a B-reader against Dr. Hawkins' **of-record** qualifications as Board certified in internal medicine and pulmonary disease "to break the stalemate," I again find that Dr. Hawkins' qualifications to make a determination regarding the presence of pneumoconiosis under §718.202(a)(4) are superior to those of Dr. Goldstein.

Decision and Order On Employer's Motion for Reconsideration at 3 (emphasis in original).

Thus, on reconsideration, the administrative law judge relied upon what he characterized as the **of-record** qualifications of Drs. Hawkins and Goldstein. Decision and Order On Employer's Motion for Reconsideration at 3. The administrative law judge stated explicitly that he found Dr. Goldstein's B reader certification in the record. Decision and Order On Employer's Reconsideration at 1; Employer's Exhibit 1. With respect to Dr. Hawkins's qualifications, the administrative law judge found in his initial Decision and Order that Dr. Hawkins was Board-certified in Internal Medicine and Pulmonary Disease, based upon the district director's notation in the evidence summary form attached to his Proposed Decision and Order. Decision and Order at 8; Director's Exhibit 20.

Employer's contends that the administrative law judge erred in determining that Dr. Goldstein's status as a Board-certified pulmonologist is not of record. Employer asserts that the letter from the Department of Labor (DOL) to claimant, dated February

24, 2003, that included an attachment listing Approved Providers for the Black Lung Disability Program, constitutes evidence sufficient to establish Dr. Goldstein's qualifications. Employer's Brief at 9. Employer indicates that Dr. Goldstein is identified on the list as Board-certified in internal medicine with a subspecialty in pulmonary disease. *Id*. In addition, employer argues that the administrative law judge failed to "consult the internet for the qualifications of Dr. Goldstein" in compliance with the administrative law judge's Notice of Hearing stating that he "may utilize the internet to obtain the qualifications or credentials of physicians." Employer's Brief at 10-12; Administrative Law Judge's Notice of Hearing dated June 9, 2005.

These contentions are without merit. Contrary to employer's allegation, the copy of the letter from DOL to claimant, submitted with employer's brief, is not found in the record. Further, although an administrative law judge may take judicial notice of a physician's qualifications, he is not required to do so. *See Pruitt v. Amax Company*, 7 BLR 1-544 (1984). Each party has the burden to ensure that the evidence it wishes to rely on is submitted into the record for consideration by the adjudication officer. *See* 20 C.F.R. §725.414. The administrative law judge has no affirmative obligation to secure all relevant and material evidence and his findings must be based solely upon the evidence in the record before him. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004); *Pruitt v. USX Corp.*, 14 BLR 1-129 (1990); *Somonick v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-892 (1984).

Employer also asserts that the administrative law judge improperly accorded the opinion of Dr. Hawkins greater weight than the opinion of Dr. Goldstein, based upon Dr. Hawkins's qualifications, which are not in the record. Employer's Brief at 7. Employer is correct. The regulations state, in pertinent part, that with the exception of the district director's initial determination of eligibility, any findings or determinations made with respect to a claim by the district director shall not be considered by the administrative law judge. *See* 20 C.F.R. §§725.455(a), 725.421(b)(8). A review of the record indicates that Dr. Hawkins's credentials do not appear anywhere in the record other than in the district director's notation. Although the administrative law judge is empowered under the Act and the regulations to weigh the evidence, when his evidentiary analysis does not coincide with the evidence of record, as in this case, the basis for the administrative law judge's credibility determinations cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We must, therefore, vacate the administrative law judge's finding that claimant established the existence of

pneumoconiosis at Section 718.202(a)(4) and remand this case to the administrative law judge for reconsideration of the medical opinions of Drs. Hawkins and Goldstein.[3]

With respect to the issue of total disability, employer contends that the administrative law judge erred in finding that the miner was totally disabled pursuant to Section 718.204(b), as he erred in relying upon the opinion of Dr. Hawkins.[4] Employer's Brief at 5-6. We disagree. Before the administrative law judge can determine whether a miner is totally disabled, he must compare evidence of the exertional requirements of claimant's coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984). The administrative law judge, in this case, rationally determined that claimant's coal mine employment constituted heavy work based on the documentary evidence of record. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 3, 10; Director's Exhibits 5, 6. The administrative law judge also permissibly determined that the newly submitted opinion of Dr. Hawkins was sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), based on his finding that claimant's coal mine employment required heavy work, and Dr. Hawkins's assessment that claimant has a minimal to mild respiratory impairment that would prevent him from performing heavy manual labor. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath*, 12 BLR 1-6; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry*, 9 BLR 1-1; Decision and Order at 10; Director's Exhibits 5, 6, 12.

We also reject employer's assertion that, because the district director failed to find total disability established at Section 718.204(b) and no new evidence supportive of claimant's position was subsequently submitted into the record, it was error for the

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[3] On remand, the administrative law judge may, within his discretion as fact-finder, reopen the record to allow the parties to submit evidence establishing whether Drs. Hawkins and Goldstein are Board-certified in internal medicine and pulmonology.

[4] Employer acknowledges that, as found by the administrative law judge, Dr. Goldstein's report was not clear as to whether or not claimant is totally disabled. Employer's Brief at 6; *see* Decision and Order at 10. Thus, the administrative law judge permissibly discredited Dr. Goldstein's opinion and did not rely upon the respective qualifications of Drs. Hawkins and Goldstein to resolve any conflict in the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 10; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

administrative law judge to find the evidence sufficient to establish total disability. Employer's Brief at 6-7. An administrative law judge is not bound by the findings of the district director. Rather, under the Act and regulations, the parties to a case have a right to a *de novo* hearing before an administrative law judge on all questions in respect to a claim. *See* 20 C.F.R. §725.455(a); *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *see also Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *Pruitt*, 14 BLR 1-129. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is sufficient to establish that claimant is totally disabled under Section 718.204(b).

With respect to disability causation pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in failing to fully consider the opinion of Dr. Goldstein that "any disabling symptoms could not be a result of pneumoconiosis." Employer's Brief at 6. Because we have vacated the administrative law judge's findings with respect to Dr. Goldstein's opinion at Section 718.202(a)(4), we must also vacate the administrative law judge's determination that claimant's total disability is due to pneumoconiosis at Section 718.204(c). *See* 20 C.F.R. §718.204(c); Decision and Order at 11. Should the administrative law judge find the evidence sufficient to establish pneumoconiosis pursuant to Section 718.202(a) on remand, he must weigh all the relevant evidence to determine if claimant has established, by a preponderance of the evidence, that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment at Section 718.204(c). *See Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); Decision and Order at 11.

Contrary to employer's assertion, however, the administrative law judge need not reconsider on remand whether claimant has established a change in an applicable condition of entitlement at Section 725.309(d). Based upon our affirmance of the administrative law judge's determination that the newly submitted opinion of Dr. Hawkins is sufficient to establish total disability under Section 718.204(b), claimant has demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d) as a matter of law. 20 C.F.R. §725.309(d); *White*, 23 BLR 1-1, 1-3. On remand, therefore, the administrative law judge need only address the merits of entitlement.

Accordingly, the administrative law judge's Decision and Order and Decision and Order On Employer's Motion for Reconsideration awarding benefits are 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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge