BRB No. 00-1036 BLA

JOHN B. COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY/	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
	)	DATE ISSUED:_____
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

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

Timothy S. Williams (Howard M. Radzely, Acting 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, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (00-BLA-0343) of Administrative Law

Judge Thomas F. Phalen, Jr. denying benefits on a miner's 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).[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000).[3] Decision and Order at 5-9. Therefore, the administrative law judge found the new evidence insufficient to establish a material change in conditions. Decision and Order at 9. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) (2000) and Section 718.202(a)(4) (2000). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. Claimant's Brief at 5-6. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[4]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which both employer and the Director have responded.[5] Claimant has not filed a response.[6] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

Initially, the administrative law judge noted that the miner's first claim was denied because Administrative Law Judge Daniel J. Roketenetz found that claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 24-2. Because this case involves duplicate claims, the administrative law judge, citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), initially addressed

whether the newly submitted evidence is sufficient to support a material change in conditions. To establish a material change in conditions, an administrative law judge must determine whether the new evidence is sufficient to prove one of the elements of entitlement that formed the basis of the prior denial. *See Ross, supra*. Judge Roketenetz denied this claim because claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 24-2. Therefore, the administrative law judge considered the new evidence to determine if claimant established a material change in conditions pursuant to Section 718.202(a) (2000) and Section 718.204(c) (2000). Decision and Order at 4-9.

Pursuant to Section 718.202(a)(1) (2000), the administrative law judge noted that the March 23, 1999 x-ray was interpreted as negative for pneumoconiosis by Drs. Sargent and Barrett, who are both B-readers[7] and Board-certified radiologists, and was interpreted as positive for pneumoconiosis by Dr. Baker, who is a B-reader, Director's Exhibits12. Decision and Order at 4-5. Additionally, the administrative law judge noted that Dr. Broudy, who is a B-reader, read the September 9, 1999 x-ray as negative for pneumoconiosis. *Id.* The administrative law judge stated that Dr. Ghorashi read an April 6, 1999 x-ray as showing a "normal chest" and that Dr. Polisetty read an April 23, 1999 x-ray[8] as showing a "normal study," Director's Exhibit 21. Decision and Order at 5. The administrative law judge permissibly found the x-ray interpretations of Drs. Ghorashi and Polisetty "to be probative of neither the presence nor absence of pneumoconiosis" because "it is not clear. . .that these x-rays were interpreted specifically for pneumoconiosis." *Id*; *see* 20 C.F.R. §§718.102(b) (2000), 718.202(a)(1); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). The administrative law judge stated "[a]fter weighing the quality and the quantity of the x-ray readings of record, I do not find Dr. Baker's lone positive reading sufficient to outweigh the three contrary readings." Decision and Order at 5. Accordingly, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis by the new x-ray evidence. *Id*.

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as he considered all the x-

ray evidence submitted with claimant's second claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as the administrative law judge properly concluded that claimant failed to establish a material change in conditions based on the new x-ray evidence, we affirm the administrative law judge's finding. *See* 20 C.F.R. §718.202(a)(1); *Staton, supra*; *Johnson, supra*; *Creech, supra.*

Pursuant to Section 718.202(a)(4) (2000), the administrative law judge noted that Dr. Baker found the existence of pneumoconiosis whereas Dr. Broudy did not, Director's Exhibits 12, 22. Decision and Order at 6-7. With regard to Dr. Baker's opinion, the administrative law judge stated:

> Dr. Baker's diagnosis was based large[ly] on his positive x-ray interpretation. It has been found, however, that the preponderance of the x-ray evidence is negative for pneumoconiosis. Thus, in order for Dr. Baker's report to be credited, it must contain additional support other than the positive x-ray interpretation. Although Dr. Baker stated that his diagnosis is also based on the length of the Claimant's coal dust exposure, I do not find this statement by itself sufficient to justify a diagnosis of pneumoconiosis. I note that Dr. Broudy, an equally qualified physician, also noted that the Claimant has eleven years of coal mine employment, but reached a different conclusion. Reviewing Dr. Baker's report, I find no additional support for his opinion. No additional documentation within his report supports his conclusions. Thus, I find Dr. Baker's opinion is not well-supported by the objective evidence of record.

Decision and Order at 7. Conversely, the administrative law judge found Dr. Broudy's opinion to be well-documented inasmuch as it is supported by "normal results produced by physical examination, chest x-ray, pulmonary function study, and arterial blood gas study." *Id.* Thus, the administrative law judge concluded that Dr. Broudy's opinion is entitled to more probative weight than Dr. Baker's opinion. *Id.*

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recently addressed a similar finding by an administrative law judge in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In *Cornett*, the Sixth Circuit court reviewed an administrative law judge's finding that the opinions of Drs. Vaezy and Baker were poorly reasoned because these physicians "based their diagnoses of coal workers' pneumoconiosis on their interpretations of an x-ray and a history of coal dust exposure." *See Cornett, supra*. The Sixth Circuit court stated that while it agreed that a mere

restatement of an x-ray should not count as a reasoned medical opinion at Section 718.202(a)(4) (2000), the administrative law judge's factual description of these physicians' reports in *Cornett* was clearly inaccurate inasmuch as Drs. Vaezy and Baker based their diagnoses on a number of factors including physical examinations, employment and smoking histories, and pulmonary function studies. *Id*.

The administrative law judge in the instant case stated that he found that Dr. Baker's opinion was based largely on his positive x-ray interpretation when the administrative law judge found the preponderance of the x-ray evidence to be negative for pneumoconiosis. Decision and Order at 7. Accordingly, the administrative law judge stated that in order for Dr. Baker's opinion to be credited, it must be based on other than a positive x-ray interpretation. *Id*. Noting that the only other support given for Dr. Baker's diagnosis is the claimant's significant duration of exposure to coal dust, the administrative law judge found this opinion entitled to less weight. *Id*.

However, as was the case in *Cornett*, there is more to Dr. Baker's opinion than the administrative law judge suggests. The record reflects that Dr. Baker performed a physical examination, noting claimant's subjective complaints, work, family, and smoking histories, and that Dr. Baker performed pulmonary function and blood gas studies. Director's Exhibit 12. Additionally, in Dr. Baker's medical report he noted that he found a mild obstructive defect on claimant's pulmonary function study. *Id*. This finding lends support to Dr. Baker's diagnosis of chronic obstructive pulmonary disease due to coal dust exposure and smoking, which, if credited, supports a finding of pneumoconiosis pursuant to 20 C.F.R. §718.201. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1987). Accordingly, the administrative law judge erred in finding that Dr. Baker's opinion is not well-documented inasmuch as there is other evidence associated with Dr. Baker's opinion on which he could have based his finding of pneumoconiosis. Therefore, we vacate the administrative law judge's finding that claimant failed to establish a material change in conditions based on the new medical opinion evidence and remand this case for the administrative law judge to reconsider the new medical opinion evidence regarding this issue.[9] *See Cornett*, *supra*; *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *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).

Regarding the issue of total respiratory disability,[10] claimant contends that the administrative law judge erred in failing to compare Dr. Baker's assessment of the miner's pulmonary condition with the exertional requirements of his usual coal mine employment.[11] Claimant's Brief at 5-6. The administrative law judge noted that Dr. Baker categorized claimant's pulmonary impairment as mild and Dr. Baker concluded that claimant retains the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 12.

Decision and Order at 6. The administrative law judge also noted that Dr. Broudy opined that claimant retains the respiratory capacity to perform his usual coal mine employment, Director's Exhibit 22. Decision and Order at 6-7. Inasmuch as "there is no newly submitted medical opinion evidence of a totally disabling respiratory impairment," the administrative law judge concluded that "the Claimant has failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(4)." Decision and Order at 9. In accordance with *Cornett*, *supra*, the record reflects that these physicians had knowledge of claimant's usual coal mine employment.[12] Dr. Baker noted that claimant's coal mine work was as a track layer and belt maintenance worker. Director's Exhibit 12. Dr. Broudy noted that claimant's coal mine employment consisted of "doing general labor including beltline work, laying track, general maintenance, scattering rock dust and shoveling coal dust." Director's Exhibit 22.

Contrary to claimant's contention, the administrative law judge did not err by failing to infer a finding of total respiratory disability from Dr. Baker's opinion. In this case, it was unnecessary for the administrative law judge to compare Dr. Baker's findings with the exertional requirements of the miner's usual coal mine employment inasmuch as Dr. Baker, who had knowledge of the miner's usual coal mine employment, *see* discussion, *supra*, ultimately concluded that claimant has the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 12; *see Cornett*, *supra*; *see generally Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). Accordingly, we affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability by the newly submitted medical opinion evidence. *See* 20 C.F.R. §718.204(b)(iv); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

In sum, we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions pursuant to Section 718.202(a)(1)-(a)(3) (2000) and Section 718.204(c)(1)-(c)(4) (2000). *See* 20 C.F.R. §§718.202(a)(1)-(a)(3), 718.204(b)(i)-(b)(iv). However, we vacate the administrative law judge's finding that claimant has failed to establish a material change in conditions pursuant to Section 718.202(a)(4) (2000). *See* 20 C.F.R. §718.202(a)(4). Therefore, we instruct the administrative law judge that if he finds that claimant has established a material change in conditions pursuant to Section 718.202(a)(4) on remand, then he must consider the entire evidentiary record to determine if claimant has established entitlement to benefits. *See Ross*, *supra*.

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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge