BRB No. 00-0737 BLA

WALTER ELKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification and the Order Denying Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Modification and the Order Denying Motion for Reconsideration (98-BLA-1251) of Administrative Law Judge Fletcher E. Campbell, Jr. denying 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).[1]

Claimant filed an application for benefits on December 8, 1986. Director's Exhibit 29-1. On June 28, 1989, Administrative Law Judge Clement J. Kichuk issued a Decision and Order - Denying Benefits. Director's Exhibit 29-36. Judge Kichuk adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718(2000) and found the evidence insufficient to establish the existence of pneumoconiosis and insufficient to establish total disability. Accordingly, he denied benefits. Director's Exhibit 29-36.

On August 14, 1990, claimant signed a new application for benefits. Director's Exhibit 1. On September 28, 1993, Administrative Law Judge Daniel A. Sarno, Jr. issued a Decision and Order - Denying Benefits. Director's Exhibit 60. Judge Sarno credited claimant with at least seventeen years of coal mine employment and noted that the case involved a duplicate claim. Applying the standard in effect at that time, Judge Sarno found a material change in conditions established and considered all of the evidence of record. Finding the x-ray evidence in equipoise, Judge Sarno afforded claimant the benefit of the doubt and found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1)(2000). Judge Sarno found that claimant's pneumoconiosis arose out of his coal mine employment and that claimant suffered from a totally disabling pulmonary impairment. However, Judge Sarno determined that pneumoconiosis did not cause claimant's totally disabling impairment. Accordingly, Judge Sarno denied benefits. Director's Exhibit 60.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, the Board declined employer's request to apply the standard for establishing a material change in conditions enunciated by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director, OWCP*, [*McNew*] 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991),[2] and affirmed Judge Sarno's finding that claimant established a material change in conditions based on the law in effect at that time. The Board also affirmed Judge Sarno's finding that the evidence was insufficient to establish that claimant's disability was due to pneumoconiosis.[3] *Elkins v. Eastern Associated Coal Corp.*, BRB No. 94-0197 BLA (Dec. 22, 1994)(unpub.)

Claimant appealed to the United States Court of Appeals for the Fourth Circuit. Director's Exhibit 73. In an Order dated July 5, 1995, the court granted employer's Motion to Dismiss the appeal for lack of jurisdiction. Director's Exhibit 74; *Elkins v. Eastern Associated Coal Corp.*, 95-1337 (4th Cir. July 5, 1995)(Order)(unpub.).

> On October 6, 1995, claimant filed a Petition for Modification stating: the grounds of said petition are that Judge Sarno's decision denying benefits is premised upon legal and factual error and that the failure to consider the report of Dr. D.L. Rasmussen (copy attached) substantially affected the outcome below and should change the consideration herein.

Director's Exhibit 75. On September 13, 1996, Judge Sarno issued a Decision and Order Denying Motion for Modification. Judge Sarno noted that claimant did not submit any report by Dr. Rasmussen with his request for modification and found that claimant failed to establish a basis for modification. Decision and Order Denying Motion for Modification at 2 (footnote omitted).

On claimant's appeal, the Board determined that Judge Sarno's finding that there was no new report for him to review, was supported by substantial evidence. The Board affirmed Judge Sarno's finding that neither a change in conditions nor a mistake in a determination of fact was established. Director's Exhibit 85; *Elkins v. Eastern Associated*

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[2] The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

[3] Because the Board affirmed Judge Sarno's disability causation finding, and affirmed the denial of benefits on this basis, the Board declined employer's request to remand the case for reconsideration of Judge Sarno's finding of pneumoconiosis in view of *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 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). Director's Exhibit 71; *Elkins v. Eastern Associated Coal Corp.*, BRB No. 94-0197 BLA (Dec. 22, 1994)(unpub.).

Coal Corp., BRB No. 96-1761 BLA (Sept. 23, 1997)(unpub.).

On September 29, 1997, claimant requested modification and submitted the September 20, 1995 report of Dr. Rasmussen. Director's Exhibit 86. Administrative Law Judge Fletcher Campbell, Jr., (the administrative law judge) issued a Decision and Order on Modification on February 7, 2000. The administrative law judge reviewed the procedural history of this case, and noted the standard for establishing modification detailed in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge determined that Judge Sarno's finding that the x-ray evidence was in equipoise was incorrect, and determined that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. The administrative law judge, however, found the medical opinion evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge also found the evidence sufficient to establish that claimant's pulmonary disability was due to his coal workers' pneumoconiosis. The administrative law judge concluded that "[c]laimant has successfully established a mistake in determining whether he has CWP as well as whether a causal nexus between CWP and his pulmonary impairment exists." Decision and Order on Modification at 15. Accordingly, the administrative law judge awarded benefits.

Employer filed a Motion for Reconsideration. The administrative law judge rejected employer's assertion that Dr. Rasmussen's report should be excluded and rejected employer's assertion concerning the appropriateness of modification. The administrative law judge upheld his weighing of the evidence. Order Denying Motion for Reconsideration.

On appeal, employer asserts that the administrative law judge erred in finding a basis for modification established. Employer maintains that the administrative law judge erred in admitting two medical opinions into evidence. With respect to the administrative law judge's weighing of the medical evidence, employer asserts that Dr. Rasmussen's opinion should not be credited and that the administrative law judge erred in discounting the opinions of Drs. Fino, Tuteur and Zaldivar. Employer contends that the administrative law judge erred in finding that claimant's disability is due to pneumoconiosis, and urges the Board to enter final judgment in favor of employer. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief restating its assertions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

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 Association 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 March 2, 2001, to which all of the parties have responded. Claimant and the Director maintain that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer states that the issue of disability causation may be affected by the lawsuit. 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).

Employer asserts that the administrative law judge erred in finding a basis for modification in this case. Employer argues that the administrative law judge must look to the most recent denial, which would be the 1993 denial of the prior request for modification and determine whether there has been a change in conditions since then, or whether there was a mistake in a determination of fact in that denial. Employer also asserts that claimant's use of the modification procedures is improper.

We reject employer's assertion that claimant's use of the modification procedures is improper. The administrative law judge is granted broad discretion in considering modification. The United States Supreme Court has held that under the modification procedures, an administrative law judge may "correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises stated, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that:

> a claimant may simply allege that the ultimate fact...was mistakenly decided, and the deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence.

Jessee, 5 F.3d at 725, 18 BLR at 2-28. In *Jessee*, the Court remanded the case "for a hearing to determine *whether the finding of ultimate fact – [claimant's] eligibility for*

benefits – should be modified." *Jessee*, 5 F.3d at 725, 18 BLR at 2-29 (emphasis added). The Court also noted that on modification the administrative law judge may "simply rethink a prior finding of fact." *Jessee*, 5 F.3d at 725, 18 BLR at 2-29. We, therefore, reject employer's assertion that the administrative law judge erred in finding a basis for modification and hold that the administrative law judge was not bound to look only at the most recent denial in determining whether a basis for modification is established.[4]

We next consider employer's assertion that the administrative law judge erred by admitting into evidence the reports of Dr. Rasmussen dated September 20, 1995 and December 10, 1996. At the hearing, employer objected to the admission of these two medical reports on the grounds that they were in the possession of claimant's counsel while the case was before the district director, but were not submitted at that point. The administrative law judge did not admit these documents at the hearing, but indicated that he would take the matter under advisement. Hearing Transcript at 15-17, 23.

> In the Decision and Order, the administrative law judge stated:
> At the hearing, Employer's counsel objected to the admission of a December 10, 1996 letter from Dr. Donald L. Rasmussen (CX 2) on grounds that it had not been timely submitted at the district director level (Tr. 15). The standard for the admission of evidence is found at 20 C.F.R. 725.456 [sic], which states that I am required to exclude evidence only if any of the following did not occur: (1) the evidence was not submitted to the other parties at least twenty days before the hearing or (2) the evidence was not timely submitted but the opposing party waives or (3) the evidence was not timely submitted, the opposing party did not waive, but good cause is shown for the late submission. Id at 725.456(b)(2). Employer's counsel did not object to CX 1 on the grounds that he was not provided a copy of CX 1 twenty days prior to the October, 1999 hearing. Therefore, I find that CX 1 is admissible.

Decision and Order at 2, n.2. On reconsideration, the administrative law judge stated "as

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[4] Implicit in the administrative law judge's award of benefits is a determination that modification is in the interest of justice in the instant case. *See generally McCord v. Ciphas*, 523 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).

Employer acknowledges, these documents were indeed offered at the District Director level (DX 90). This is all the regulation requires." Order on Motion for Reconsideration at 3.

The regulations address the introduction of documentary evidence. 20 C.F.R. §725.456(2000) states:

> Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim.

20 C.F.R. §725.456(d)(2000).[5]

We vacate the administrative law judge's finding regarding the admission of Dr. Rasmussen's December 10, 1996 report. The administrative law judge has not specifically considered the provisions contained in Section 725.456(d)(2000) in determining whether this report, which was available for submission while the case was before the district director in 1997, should be admitted at this point. Further, inasmuch as the administrative law judge does not appear to have specifically ruled on the admissibility of Dr. Rasmussen's September 20, 1995 report, he must do so on remand. The administrative law judge must determine whether extraordinary circumstances have been demonstrated for the withholding of these reports and whether they should have been admitted into the record during the proceedings on claimant's second petition for modification. *See* 20 C.F.R. §725.456(d)(2000); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988).

Employer contends that the administrative law judge must consider whether the evidence, as a whole, establishes the existence of pneumoconiosis pursuant to the standard enunciated in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th

[5] 20 C.F.R. §725.456(2000) has been amended. However, the changes to this regulation do not apply to the instant case which was filed prior to January 19, 2001. *See* 20 C.F.R. §725.2.

Cir. 2000). We agree. Inasmuch as the administrative law judge did not consider, together, all of the evidence relevant to the existence of pneumoconiosis, we vacate the administrative law judge's finding that claimant has established the existence of pneumoconiosis and remand the case for the administrative law judge to consider the evidence in accordance with *Compton*. In addition, since the administrative law judge must apply current law, on remand, he must also determine whether claimant has established a material change in conditions, based on the standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Employer asserts that the administrative law judge erred in relying on Dr. Rasmussen's opinions because they are not reasoned as a matter of law. Employer also challenges the administrative law judge's statement that:

> Dr. Rasmussen also relied upon specific medical data of record to support his analysis. In addition, Dr. Rasmussen made specific citations to all medical literature upon which he relied (DX 86; CX 1-2D; ALJ 2). Indeed, he went so far as to provide the actual tests of articles supporting his assumptions as well as those which he criticized (Id).

Decision and Order at 12-13.

In order to be relied upon, a medical opinion must be both documented and reasoned. The administrative law judge is charged with determining whether the medical opinion evidence is reasoned and documented. In order to be considered reasoned, the documentation must support the physician's assessment of the miner's health. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We reject employer's assertion that Dr. Rasmussen's opinion is unreasoned as a matter of law. Dr. Rasmussen provided a definite, unqualified opinion that claimant's coal mine dust exposure is a significant contributing factor to his respiratory insufficiency. Director's Exhibit 12; Administrative Law Judge Exhibit 2. *Cf. Director, OWCP v. U.S. Steel Mining Co., Inc.* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999)(holding that Dr. Rasmussen's opinion that "it is possible" that the miner's death "could" have contributed to his death, does not constitute a reasoned medical opinion that pneumoconiosis contributed to the miner's death). Moreover, contrary to employer's assertion, there is no requirement that the administrative law judge discredit the report of a physician who states that he is unable to separate the effects of a miner's cigarette smoking from his coal mine dust exposure in determining the cause of the miner's disabling respiratory insufficiency. In addition, we reject employer's challenge to the

administrative law judge's comments concerning the medical literature cited by Dr. Rasmussen. The administrative law judge merely noted that Dr. Rasmussen considered medical literature which was submitted into evidence.

Employer further contends that the administrative law judge erred in discounting the opinions of Drs. Fino, Zaldivar and Tuteur on the issue of pneumoconiosis. Employer maintains that the administrative law judge treated the medical evidence disparately by subjecting the opinions of Drs. Fino, Zaldivar and Tuteur to much more scrutiny than he applied to the opinion of Dr. Rasmussen. Employer also asserts that the administrative law judge mischaracterized the opinions of Drs. Fino and Tuteur, and that he erred by relying on *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) to discredit the opinions of Drs. Tuteur and Fino. Employer also challenges the administrative law judge's use of evidence not contained in the record in discrediting Dr. Tuteur's opinion. Employer asserts that the administrative law judge erred by substituting his opinion for that of Dr. Fino. Employer contends that "the ALJ...suggests, without actually deciding, that the opinions of Drs. Tuteur, Fino and Zaldivar should be rejected as somehow hostile to the Act." Employer's Brief at 31.

Initially, we note, as employer asserts, that the administrative law judge does appear to have subjected the medical opinions of Drs. Fino, Tuteur and Zaldivar to a greater degree of scrutiny than the opinion of Dr. Rasmussen. On remand, the administrative law judge must apply the same degree of scrutiny to each medical opinion.

In considering Dr. Tuteur's opinion, Director's Exhibit 55, the administrative law judge stated that Dr. Tuteur "emphasized the fact that Claimant has an obstructive, but not a restrictive, pulmonary impairment." Decision and Order at 10. The administrative law judge stated that, based on Dr. Tuteur's assumption that when coal workers' pneumoconiosis produces an impairment "one expects to find not an obstructive, but a ventilatory defect," Dr. Tuteur "opined that coal-dust exposure is not a factor in this case." Decision and Order at 10. Inasmuch as Dr. Tuteur does not state that pneumoconiosis does not cause an obstructive impairment, *see* Director's Exhibit 55, we hold that his opinion does not violate the mandates of *Warth,* as clarified in *Stiltner v. Island Creek Coal Co.,* 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).[6] Accordingly,

[6] In *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the court held that a medical opinion that claimant does not suffer from pneumoconiosis, based on the assumption that obstructive disorders cannot be caused by coal mine employment, is erroneous. *See Warth*, 60 F.3d at 174, 19 BLR at 2-268-69. Subsequently, the court issued *Stiltner v. Island Creek Coal Co.,* 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), describing its earlier decision in *Warth* as holding that:

we vacate the administrative law judge's findings regarding Dr. Tuteur's opinion and remand this case for further consideration of this opinion. In addition, we agree with employer that in weighing Dr. Tuteur's opinion, the administrative law judge erred by relying upon evidence not contained in the record in this case. *See* 20 C.F.R. §725.477(b); Decision and Order at 11.

Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Zaldivar, urging that this opinion is not the same as the opinion of Dr. Donnerberg in *Warth*. The administrative law judge found that "Dr. Zaldivar's opinion is quite similar to that of Dr. Donnerberg in Warth (DX 36 at 6) and is contrary to both Fourth Circuit case law and the regulations. Thus, Dr. Zaldivar's opinion is entitled to little, if any, weight." Decision and Order at 12.

In *Warth*, Dr. Donnerberg stated "a diagnosis of pneumoconiosis or silicosis cannot be made without evidence by x-ray of a nodular or linear infiltrate, an autopsy or a tissue examination." *Warth* n.1. While, in this case, Dr. Zaldivar did note that claimant

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> chronic obstructive pulmonary disease (COPD) falls within the regulatory definition of pneumoconiosis if the COPD is significantly related to or aggravated by coal mine employment. We therefore cautioned ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of impairment, thereby eliminating the possibility that coal dust exposure also can cause COPD.

Stiltner, 86 F.3d at 341, 20 BLR at 2-253.

does not have x-ray evidence of pneumoconiosis, *see* Director's Exhibits 29, 35; Employer's Exhibit 5, this statement does not rise to the level of Dr. Donnerberg's opinion in *Warth*. Further, we note that Dr. Zaldivar explains his diagnosis, in a sentence omitted from the administrative law judge's recitation of his opinion, stating that "Mr. Elkins has pulmonary impairment due to emphysema as shown by the low diffusing capacity and irreversible airway obstruction." Director's Exhibit 35. Accordingly, we vacate the administrative law judge's findings regarding the credibility of Dr. Zaldivar's opinion. On remand, the administrative law judge must consider Dr. Zaldivar's entire opinion.

Employer also challenges the administrative law judge's findings concerning Dr. Fino's opinion. *See* Employer's Exhibit 2. Employer contends that the administrative law judge substituted his opinion for that of Dr. Fino when he discounted this opinion. While the administrative law judge may discredit a medical opinion which he finds is not adequately supported by its underlying documentation, *see Lucostic v. U.S. Steel* Corp., 8 BLR 1-46 (1985), or not well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*), the administrative law judge's grounds for discrediting Dr. Fino's opinion, based on the administrative law judge's comparison of his own analysis of the pulmonary function study evidence with Dr. Fino's evaluation of the pulmonary function study evidence, *see* Decision and Order at 12, raise questions as to whether the administrative law judge impermissibly substituted his judgment for that of the physicians, particularly since Dr. Fino's reasoning has not been challenged by any other physician whose opinion is contained in the record. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We, therefore, vacate the administrative law judge's findings concerning Dr. Fino's opinion and remand the case for further consideration of this opinion.

In addition, we agree with employer that since the opinions of Drs. Fino, Tuteur and Zaldivar do not foreclose all possibility that simple pneumoconiosis can be totally disabling, *see* Director's Exhibits 35, 55; Employer's Exhibit 2, they are not in conflict with the spirit of the Act. *See Searls v. Southern Ohio Coal Co.,* 11 BLR 1-161 (1988).

We now turn to employer's assertions regarding disability causation. Employer contends that the administrative law judge discredited the opinions of Drs. Tuteur, Fino and Zaldivar because they did not find medical pneumoconiosis or legal pneumoconiosis. *See* Decision and Order at 14. Drs. Zaldivar, Tuteur and Fino opined that claimant's inhalation of coal dust played no role in claimant's disability. Director's Exhibits 35, 55; Employer's Exhibit 2. In view of *Hobbs v. Clinchfield Coal Co.,* 45 F.2d 819, 19 BLR 2-86 (4th Cir. 1995) and *Dehue Coal Co. v. Ballard,* 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), where the court held that a physician's opinion which does

not diagnose pneumoconiosis may be probative in determining disability causation, even if the administrative law judge finds pneumoconiosis established, we vacate the administrative law judge's basis for according little weight to the opinions of Drs. Fino, Zaldivar and Tuteur, and remand the case for further consideration of the issue of disability causation.

In addition, we reject employer's suggestion that the administrative law judge erred by failing to consider that claimant stopped working because of a non-respiratory injury, and employer's assertion that claimant's disability is therefore not related to pneumoconiosis. No other circuit has adopted this standard, and the Board has consistently declined to extend the holding of the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), to cases arising outside the Seventh Circuit. Inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, we decline to apply the holding in *Vigna* to this case.

Finally, we reject employer's request that this case be reassigned to another administrative law judge in view of the administrative law judge's intransigence. The record does not reflect that the administrative law judge is not fair and impartial or that he has demonstrated a bias against employer. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Modification and Order Denying Motion for Reconsideration are affirmed in part, vacated in part, and this 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