

BRB No. 01-0867 BLA

CASTEL SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: _____
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,)	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand - Awarding Benefits (95-BLA-0550) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a duplicate 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).<sup>1</sup> This case is before the Board for the second time. Previously, the Board, in *Shepherd v. Director, OWCP*, BRB No. 97-1620 BLA (July 30, 1998)(unpublished), held that the administrative law judge properly found that the newly

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<sup>1</sup>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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

submitted evidence was insufficient to establish the element of entitlement previously adjudicated against claimant, namely total respiratory or pulmonary disability under 20 C.F.R. §718.204(c) (2000).<sup>2</sup> The Board thus affirmed the administrative law judge's finding that claimant did not establish a material change in conditions under 20 C.F.R. §725.309 (2000).<sup>3</sup> The Board further affirmed the administrative law judge's denial of benefits, as well as his denial of claimant's Motion for Reconsideration.

Claimant filed a petition for review with the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, in its unpublished Order in *Shepherd v. Director, OWCP*, No. 98-4146 (6th Cir. Sept. 20, 1999)(unpublished), held that the administrative law judge's decision was neither in accordance with law nor supported by substantial evidence. The court initially noted that all of the elements of entitlement had previously been found in claimant's favor, except total respiratory or pulmonary disability because claimant was still working as a truck mechanic, which was considered to be comparable work to his coal mine employment. The court found that the administrative law judge did not acknowledge this fact but, instead, considered whether the newly submitted medical evidence established the existence of pneumoconiosis and total disability. The court held that the instant case was similar to the case in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) in which the miner's first claim was denied because he was still working, although the x-ray evidence demonstrated that he was suffering from complicated pneumoconiosis. The court noted that in *Rutter*, the fact that the miner was no longer able to work at the time he filed his duplicate claim was determined to constitute a material change in conditions. The Sixth Circuit held that because the administrative law judge in the instant case did not find a material change in

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<sup>2</sup>The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

<sup>3</sup>The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. See 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

conditions, “he did not look at all the evidence to determine whether the miner is entitled to benefits.” *Shepherd v. Director, OWCP*, No. 98-4146 slip op. at 3 (6th Cir. Sept. 20, 1999)(unpublished). The court concluded that the case must therefore be remanded for this analysis. *Id.* The Sixth Circuit further held that, even if the fact that claimant was no longer able to work did not establish a material change in conditions, the administrative law judge’s finding that the newly submitted evidence did not establish total disability was not supported by the evidence of record. In this regard, the court noted that the pulmonary function studies were indicative of total disability, although the blood gas studies were non-qualifying. *Id.* The court further held that the administrative law judge “gave no reason” for finding that Dr. Sundaram’s opinion, that claimant is totally disabled, was unreasoned, “particularly after he acknowledged that the pulmonary function study on which it was partially based was indicative of a total disability.” *Id.* The court further indicated that Drs. Sundaram and Wicker performed the same type of examination, and there was no basis for giving more credence to Dr. Wicker’s opinion, that claimant is not totally disabled, particularly in light of the qualifying pulmonary function study results. The court thus granted claimant’s petition for review and remanded the case for consideration of claimant’s entitlement on the merits of the claim based on all the evidence of record, since claimant had established a material change in conditions.

The administrative law judge awarded benefits on remand. He initially found that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000). Considering all the record evidence on the merits of the claim pursuant to the revised regulations, the administrative law judge found the existence of pneumoconiosis established based on the medical opinions under 20 C.F.R. §718.202(a)(4), but not under 20 C.F.R. §718.202(a)(1) - (3). The administrative law judge also determined that claimant established that his pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). The administrative law judge further found total respiratory disability established based on the pulmonary function studies and medical opinion evidence under 20 C.F.R. §718.204(b)(2)(i) and (iv), respectively. The administrative law judge also determined that claimant established that his total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, the Director challenges the administrative law judge’s crediting of Dr. Sundaram’s opinions in finding the medical opinion evidence sufficient, on the merits of the claim, to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Director argues that the administrative law judge credited Dr. Sundaram’s opinions without determining whether they were reasoned. The Director also states that, for the same reasons, the administrative law judge’s finding that claimant’s total disability is due to his pneumoconiosis must also be vacated.<sup>4</sup> The Director thus urges the Board to vacate the

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<sup>4</sup>The Director, Office of Workers’ Compensation Programs, indicates that he does

decision below and remand the case to the administrative law judge for further consideration. Claimant has not filed a response brief in the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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not dispute the administrative law judge's finding that claimant is totally disabled. Director's Brief at 11.

The Director contends that the administrative law judge should not have credited Dr. Sundaram's medical opinions, to find that claimant has pneumoconiosis arising out of coal mine employment and that he is totally disabled due to his pneumoconiosis, without the administrative law judge's first determining whether those opinions are reasoned.<sup>5</sup> In crediting Dr. Sundaram's opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge found that, as noted by the Sixth Circuit in *Shepherd*, the physician's opinions were based on physical examinations and objective studies and were adequately reasoned. The administrative law judge determined that this fact entitled Dr. Sundaram's opinions to probative weight equal to that assigned to Dr. Wicker's medical opinions.<sup>6</sup> The administrative law judge stated:

Upon further review of the evidence, it appears that Dr. Sundaram was probably more familiar with the Claimant's condition, in that the record shows that he examined the patient on at least five occasions from 1991 through

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<sup>5</sup>Dr. Sundaram examined claimant several times from 1991 through 1994. He diagnosed coal workers' pneumoconiosis due to coal mine employment and opined that claimant was totally and permanently disabled due to his pneumoconiosis. Director's Exhibits 8, 21, 25. In his office notes and reports, Dr. Sundaram consistently characterized claimant as never having smoked, indicating, *inter alia*, that claimant had been a non-smoker "all along." Director's Exhibits 21, 25 at 52.

<sup>6</sup>In 1991, Dr. Wicker examined claimant and diagnosed pneumoconiosis related to claimant's coal mine employment. He also found a moderate impairment. Director's Exhibit 25 at 48. In 1994, Dr. Wicker examined claimant and found no evidence of pneumoconiosis and that claimant was capable of performing his previous coal mine employment. Director's Exhibit 8.

1994, whereas Dr. Wicker had seen the patient only twice. Therefore, Dr. Sundaram's opinion will be given slightly more weight in this Decision. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). I find Dr. Wicker's opinion equivocal, as he first diagnosed pneumoconiosis, then three years later saw no evidence of the disease. Therefore, his opinion is entitled to less weight on the issue of whether the Claimant suffered from pneumoconiosis. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). Moreover, Dr. Sundaram's opinion is entitled to slightly more probative weight, as it is the most recent examination report of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Cassella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Dr. Tidal's reports neither weigh for [n]or against a finding of pneumoconiosis.

Decision and Order at 8. In determining that claimant met her burden on the disability causation issue, the administrative law judge stated, in pertinent part:

Dr. Sundaram specifically related the Claimant's inability to return to work to his diagnosis of coal workers' pneumoconiosis. (Dir. Ex. 21)[.] For the same reasons stated above, I assign greater probative weight to Dr. Sundaram's opinion and conclude that the medical evidence, particularly the reasoned and documented opinion of Dr. Sundaram, establishes that the Claimant's totally disabling respiratory impairment is due to pneumoconiosis.

Decision and Order at 12. The Director asserts that the administrative law judge committed reversible error by crediting Dr. Sundaram's opinion because Dr. Sundaram's reports are based on an incorrect view of claimant's medical history. Specifically, the Director notes that Dr. Sundaram incorrectly states that claimant is a non-smoker and that he never smoked, whereas claimant testified at the June 26, 1996 hearing that he smoked one and one-half packs of cigarettes a day from the age of "about 11, 12, maybe 14 years old" until 1993. Hearing Transcript at 19 - 20.<sup>7</sup> The Director argues that Dr. Sundaram's failure to discuss claimant's smoking history renders suspect his opinion that claimant is totally disabled due to pneumoconiosis which arose out of claimant's coal mine employment. The Director asserts that the administrative law judge should have rejected the opinion. The Director adds that the administrative law judge also ignored claimant's 1993 heart attack and angioplasty, and argues that Dr. Sundaram's failure to take into consideration claimant's heart disease made it appropriate for the administrative law judge to discount his opinion on that basis as well. The Director thus asserts that Dr. Sundaram's opinion is inadequately reasoned and

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<sup>7</sup>Claimant was born in 1931. Director's Exhibit 2.

documented and, therefore, does not constitute substantial evidence in support of the administrative law judge's finding of pneumoconiosis. The Director asserts that, based on the administrative law judge's failure to consider these flaws before crediting Dr. Sundaram's opinion, the administrative law judge's decision must be vacated and, on remand, the administrative law judge should reject Dr. Sundaram's opinion.

We agree with the Director's position, that this case must be remanded to the administrative law judge for consideration of the evidence regarding claimant's smoking history and the impact of this evidence on the credibility of the medical evidence regarding claimant's condition and its cause(s). In his Decision and Order, the administrative law judge addressed neither Dr. Sundaram's findings nor any other physician's findings regarding the nature and extent of claimant's smoking history. The Director correctly argues that the administrative law judge thus did not consider the impact, if any, that claimant's testimony detailing an extended history of cigarette smoking has on the credibility and weight of the evidence, including Dr. Sundaram's reports which the administrative law judge found to be credible. The administrative law judge thereby failed to address evidence which, if credited, could render suspect Dr. Sundaram's opinion that claimant is totally disabled due to pneumoconiosis which arose out of his coal mine employment. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Further, the record shows that the administrative law judge did not previously discuss this issue in his original consideration of the claim. Specifically, in the administrative law judge's original consideration of the claim, where he weighed the newly submitted evidence only, he noted claimant's testimony that he smoked one and one-half packs of cigarettes a day for approximately 50 years, but that he had not smoked since 1993. Decision and Order - Denial of Benefits dated January 30, 1997 at 3; *see* Hearing Transcript at 19 - 20. While the administrative law judge weighed Dr. Sundaram's newly submitted reports in this 1997 Decision and Order, he did not discuss this physician's findings regarding claimant's smoking history, nor those of any other physician. *See* Decision and Order - Denial of Benefits dated January 30, 1997. Because the administrative law judge in the instant case did not consider whether claimant's smoking habit might have caused his lung condition and his respiratory disability, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), at 20 C.F.R. §718.203 and on disability causation at 20 C.F.R. §718.204(c). We, therefore, remand the case to the administrative law judge. On remand, the administrative law judge must make factual findings regarding the nature and extent of claimant's smoking history, and must redetermine the weight and credibility of all the relevant evidence in resolving the contested issues.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge