

BRB No. 00-0611 BLA

GEORGE E. MARCUM)
)
 Claimant-Petitioner))
)
 v.)
)
 CLAUDE SMITH TRUCKING)
)
 Employer-Respondent)
)
 and)
)
 CLAY TRANSPORT CORPORATION) DATE ISSUED:
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 CORPORATION)
)
 Employer/Carrier-)
 Respondents))
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Edmond Collett, Hyden, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for
Clay Transport Transportation and its carrier.

Edward Waldman (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:

Claimant appeals the Decision and Order on Remand (98-BLA-0035) of Administrative Law Judge Thomas F. Phalen, 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 The instant case involves a duplicate claim filed on March 18, 1996.² In the initial Decision and Order, Administrative

¹The 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.

²The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on March 16, 1987. Director's Exhibit 27. The district director denied benefits on September 2, 1987, December 22, 1987, February 25, 1988 and May 5, 1988. *Id.* The case was subsequently forwarded to the Office of Administrative Law Judges for a formal hearing. By Order dated July 31, 1989, Administrative Law Judge Richard E. Huddleston dismissed the claim due to claimant's failure to attend a properly scheduled hearing. *Id.* Judge Huddleston also dismissed Clay Transportation Corporation as the responsible operator. *Id.* By Decision and Order dated February 26, 1992, the Board affirmed Judge Huddleston's dismissal of the claim. *Marcum v. Claude Smith Trucking*, BRB No. 90-0976 BLA (Feb. 26, 1992) (unpublished). The Board also affirmed Judge Huddleston's dismissal of Clay Transport Corporation. *Id.* The Board denied claimant's motion for reconsideration on April 16, 1992. *Marcum v. Claude Smith Trucking*, BRB No. 90-0976 BLA (Apr. 16, 1992) (Order on Recon.) (unpublished).

Claimant subsequently filed a timely request for modification. Director's Exhibit 27. The district director denied claimant's request for modification on August 6, 1993. *Id.* There is no indication that claimant took any further action in regard to

Law Judge Thomas F. Phalen, Jr. (the administrative law judge) found that Claude Smith Trucking was not the responsible operator because it was incapable of paying benefits. The administrative law judge, therefore, designated Clay Transport Corporation as the responsible operator. The administrative law judge further found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. By Decision and Order dated August 31, 1999, the Board vacated the administrative law judge's finding that Claude Smith Trucking was not the responsible operator and remanded the case for further consideration of the responsible operator issue. *Marcum v. Claude Smith Trucking*, BRB Nos. 98-1051 BLA and 98-1051 BLA-A (Aug. 1999) (unpublished). In its consideration of the administrative law judge's findings on the merits, the Board affirmed the administrative law judge's findings that the newly submitted medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* The Board also affirmed the administrative law judge's findings that the newly submitted medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000). *Id.* The Board, however, vacated the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and remanded the case for further consideration. *Id.* In light of this holding, the Board also vacated the administrative law judge's finding that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

On remand, the administrative law judge designated Claude Smith Trucking as the responsible operator. The administrative law judge also found that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Clay Transport Corporation responds in support of the administrative law judge's designation of Claude Smith Trucking as the responsible operator. Clay Transport Corporation also responds in support of the

his 1987 claim.

Claimant filed a second claim on March 18, 1996. Director's Exhibit 1.

administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of benefits.

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 February 21, 2001, to which only the Director has responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.³ Based on the brief submitted by the Director, 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 must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

³Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, is construed as a position that the challenged regulations will not affect the outcome of this case.

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.⁴ 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1987 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 27. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or a finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000).

The Board has affirmed the administrative law judge's findings that the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Marcum v. Claude Smith Trucking*, BRB Nos. 98-1051 BLA and 98-1051 BLA-A (Aug. 1999) (unpublished). The Board has also affirmed the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000). *Id.* The Board remanded the case to the administrative law judge for the purpose of reconsidering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.*

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge credited the opinions of Drs. Broudy, Dahhan and Fino that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Bushey and Baker. Decision and Order on Remand at 8-9; Director's Exhibits 7, 29; Employer's Exhibits 1, 2, 7.

In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000), the administrative law judge properly accorded less weight to Dr. Bushey's finding of pneumoconiosis because the x-ray that he interpreted as positive for pneumoconiosis was read by more qualified physicians as negative for

⁴Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309, these revisions only apply to claims filed after January 19, 2001.

pneumoconiosis,⁵ thus calling into question the reliability of his opinion. See *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order on Remand at 12; Director's Exhibit 29; Employer's Exhibits 5, 8.

⁵Dr. Bushey, who does not possess any special radiological qualifications, interpreted claimant's February 11, 1997 x-ray as positive for pneumoconiosis. Director's Exhibit 29. Drs. Sargent, Wiot and Shipley, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 29; Employer's Exhibits 5, 8.

The administrative law judge discredited Dr. Baker's opinion that claimant suffered from pneumoconiosis because the doctor relied upon inaccurate coal mine employment and smoking histories. Decision and Order on Remand at 9. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. See *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Inasmuch as it is unchallenged on appeal, we affirm the administrative law judge's decision to discredit Dr. Baker's opinion on this basis. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge also permissibly accorded greater weight to the opinions of Drs. Broudy, Dahhan and Fino based upon their superior qualifications.⁶ See *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 9. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(4).⁷ Consequently, we also affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309

⁶Drs. Broudy, Dahhan and Fino are each Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 29; Employer's Exhibit 9. Although the administrative law judge indicated that Dr. Baker is also Board-certified in Internal Medicine and Pulmonary Disease, Decision and Order on Remand at 9, we have affirmed the administrative law judge's decision to accord less weight to Dr. Baker's opinion based upon his reliance upon inaccurate coal mine employment and smoking histories.

⁷We note that 20 C.F.R. §718.202(a)(4) has not been revised.

(2000).⁸ *Ross, supra.*

⁸In light of our affirmance of the administrative law judge's finding that claimant failed to establish a material change in conditions, we need not address the administrative law judge's consideration of the identity of the responsible operator. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge