

BRB No. 01-0158 BLA

JACK R. CLINE)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
ROCKY CREEK MINING,)	
INCORPORATED)	
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,))	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, P.L.L.C.), Charleston, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1999-BLA-0668) of Administrative Law Judge Daniel L. Leland awarding 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 In this duplicate claim,² the administrative law judge found the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), after determining that the weight of the newly submitted x-ray interpretations and medical opinions of record established the existence of pneumoconiosis.³ Decision and Order at 3-8. The parties stipulated that claimant established seventeen years of coal mine employment, and based on the filing date, the administrative law judge adjudicated

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 20 C.F.R. Parts 718, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

²The record indicates that claimant filed his initial claim for benefits on February 14, 1995. Director's Exhibit 28-1. This claim was denied by the district director on July 19, 1995, due to claimant's failure to establish any required element of entitlement. Director's Exhibit 28-13. Claimant took no further action on this claim until the filing of the duplicate claim herein on April 7, 1998. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). *See 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).

³Since the miner's last coal mine employment took place in the State of West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

this claim pursuant to 20 C.F.R. Part 718. Hearing Transcript at 15; Decision and Order at 3. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1),(4), 718.203(b) (2000), and sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge that claimant established total disability due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.⁴

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).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal, and the relevant evidence of record, we conclude that the administrative law judge's Decision and Order awarding benefits must be vacated and the case remanded to the administrative law judge for further consideration.

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Gaziano and Younes to support his finding that the weight of the evidence established a totally disabling respiratory impairment at Section 718.204(c)(4) (2000) and disability causation at Section 718.204(b) (2000). Claimant's Exhibit 1; Director's Exhibits 9, 28-9. Employer maintains that these opinions are not supported by the objective evidence of record, and that the administrative law judge did not assign appropriate weight to the contrary opinion of Dr. Zaldivar, that claimant's respiratory impairment was caused by traumatic injuries suffered in a motorcycle accident and a mining accident, but was not sufficient to prevent claimant from performing his usual coal mine employment duties. Employer's

⁴We affirm the findings of the administrative law judge on the length of coal mine employment, and at 20 C.F.R. §§718.202(a), 718.203(b), and 725.309 (2000), as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Exhibit 3. Employer's arguments have some merit.

In concluding that claimant established a totally disabling respiratory impairment, the administrative law judge provided the following rationale:

Although the pulmonary function and blood gas studies have not produced qualifying values, the values from the pulmonary function studies are well below the predicted values and are indicative of a pulmonary impairment. Furthermore, Drs. Younes and Gaziano determined that claimant's pulmonary impairment prevents him from performing his usual coal mine work. Only Dr. Zaldivar concluded that claimant can perform his usual coal mine work, but his opinion is against the weight of the evidence.

Decision and Order at 8.⁵ The administrative law judge, however, failed to explain the

⁵A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2) (2000).

Although the administrative law judge stated that all the objective tests produced non-qualifying values, the record indicates that the pre-bronchodilator results of the pulmonary function study dated May 6, 1998, produced qualifying values. Decision and Order at 8; Director's Exhibit 7.

relative weight he assigned to the conflicting evidence, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), and impermissibly substituted his own expertise for that of a physician by independently evaluating the objective evidence.⁶ *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); Director's Exhibits 7, 9, 10, 28-8, 28-9, 28-10; Employer's Exhibit 3; Claimant's Exhibits 1, 9.

⁶While non-qualifying objective tests alone do not establish the absence of a totally disabling respiratory impairment, *see Estep v. Director, OWCP*, 7 BLR 1-904 (1985), the determination of the significance of such tests is within the purview of a physician. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge must then compare the physician's assessment with the exertional requirements of the miner's usual coal mine employment duties. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

In assigning weight to the various medical opinions of record, the administrative law judge must subject all relevant opinions to the same scrutiny and determine whether they are reasoned and documented, and therefore credible. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Furthermore, in evaluating the evidence, the United States Court of Appeals for the Fourth Circuit has held that an administrative law judge should assess “the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.” *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In this case, as the administrative law judge did not consider all factors relevant to the quality of the evidence and provide explicit reasons for either crediting or discrediting the conflicting medical opinions,⁷ we vacate the administrative law judge’s findings pursuant to Section 718.204(b), (c)(4) (2000), and remand for the administrative law judge to reevaluate the relevant evidence in accordance with the principles enunciated by the Fourth Circuit in *Hicks, supra*, and *Akers, supra*, resolve the conflicts, and provide an analysis which comports with the requirements of the Administrative Procedure Act.⁸ *Hobbs v. Clinchfield Coal Co.*,

⁷Although the administrative law judge found that Dr. Zaldivar’s opinion must be given little weight on the issue of disability causation because the physician did not diagnose pneumoconiosis, Decision and Order at 8, the administrative law judge is instructed on remand to determine whether the opinion is probative in light of *Hicks, supra*; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

⁸The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the

45 F.3d 819, 19 BLA 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Collins v. J&L Steel*, 21 BLR 1-181 (1999).⁹ Director's Exhibits 7, 9, 10, 28-8, 28-9; 28-10; Claimant's Exhibits 1, 9; Employer's Exhibit 3.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and §932(a). *Wojtowicz, supra; Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

⁹The administrative law judge applied the disability regulation set forth at 20 C.F.R. §718.204(c)(2000), and the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability regulation is now set forth at Section 718.204(b) (2001), and the disability causation regulation is now set forth at Section 718.204(c) (2001).

NANCY S. DOLDER
Administrative Appeals Judge