

BRB No. 98-1286 BLA

HASSEL KENDRICK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CIMARON MINERALS,)	DATE ISSUED:
INCORPORATED)	
)	
Employer-Respondent)	
)	
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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Hassel Kendrick, Pikeville, Kentucky, *pro se*.

Lawrence C. Renbaum (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (95-BLA-0958) of Administrative Law Judge Daniel A. Sarno, 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). Claimant filed a claim in October 1984, which was denied by the district director in March 1985 on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 49 at 37, 137. Claimant filed the instant claim in May 1993. Director's Exhibit 1. In February 1997, the administrative law judge issued a Decision and Order Denying Benefits. The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability due to pneumoconiosis

pursuant to 20 C.F.R. §718.204. The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appealed without the assistance of counsel. The Director, Office of Workers' Compensation Programs (the Director), filed a motion to clarify the contents of the formal record. The Director specifically sought a determination as to whether the record contained a September 27, 1994 report by Dr. Wright and an April 12, 1995 report by Dr. Sutherland.¹ The Board noted that claimant's counsel had requested that these reports be made part of the record but that the administrative law judge did not mention them in his Decision and Order. Thus, the Board agreed with the Director's request that the case should be remanded to the administrative law judge for clarification of the contents of the official record and, if necessary, to address the merits in light of this evidence. Consequently, the Board vacated the administrative law judge's finding of no material change in conditions and the denial of benefits and remanded the case to the administrative law judge for additional findings. *Kendrick v. Cimaron Minerals, Inc.*, BRB No. 97-0782 BLA (Feb. 24, 1998)(unpublished).

On remand, the administrative law judge admitted these two documents into evidence. Moreover, the administrative law judge determined that the weight of the new x-ray evidence was insufficient to establish the existence of pneumoconiosis, see 20 C.F.R. §718.202(a)(1). Further, the administrative law judge found that the weight of the new medical opinion evidence did not establish the existence of pneumoconiosis, see 20 C.F.R. §718.202(a)(4). The administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, benefits were denied.

Claimant appeals, contending generally that the administrative law judge erred in denying benefits. Employer responds, advocating affirmance of the administrative law judge's denial of benefits. The Director has submitted a letter stating that he will not participate in this appeal unless specifically requested to do so by the Board.²

¹ Attached to the Director's brief was a copy of a letter by claimant's former counsel dated May 17, 1995 addressed to the Office of Administrative Law Judges with the reports of Drs. Wright and Sutherland attached.

² We affirm the administrative law judge's decision to admit into evidence the reports of Drs. Sutherland and Wright, who each diagnosed pneumoconiosis, Administrative Law Judge's Exhibits

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

In *Sharondale Corp. v. Ross*, 42 F.3d 1993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit held that in addressing whether the material change in conditions requirement of Section 725.309(d) has been satisfied, 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.

1, 2, inasmuch as this finding is not adverse to claimant and is not contested on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to the x-ray evidence under Section 718.202(a)(1), the administrative law judge found that there were 41 new x-ray readings in the record. The administrative law judge found that of these, only nine readings were positive for pneumoconiosis. Further, the administrative law judge found that of these nine readings, only three readings were rendered by a Board-certified radiologist and/or B reader. The administrative law judge found that the remaining 32 interpretations were negative for pneumoconiosis. Of these, the administrative law judge found that 31 readings were performed by a Board-certified radiologist and/or B reader. Other than the two films of Drs. Sutherland and Wright, the administrative law judge found that every film that was read as positive was also read as negative by at least two Board-certified radiologists and/or B readers. The administrative law judge properly gave the most weight to the readings of Board-certified radiologists and/or B readers. See *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Claimant's Exhibits 1, 2, 5; Director's Exhibits 19, 24, 25, 30-32, 48, 52, 54; Employer's Exhibits 3-7, 10-16, 19. Accordingly, the administrative law judge properly found that the weight of the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis, see 20 C.F.R. §718.202(a)(1).³

³ The administrative law judge did not consider whether the evidence was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) or (a)(3). However, there is no biopsy evidence of record, see 20 C.F.R. §718.202(a)(2), nor do any of the presumptions at Section 718.202(a)(3) apply, as the record is devoid of evidence of complicated pneumoconiosis in this living miner's claim filed after January 1, 1982.

At Section 718.202(a)(4), the administrative law judge found that the opinion in which Dr. Wright diagnosed pneumoconiosis was insufficient to alter his finding that the weight of the new medical opinion evidence did not establish pneumoconiosis. Decision and Order at 2. The administrative law judge stated that like the three other physicians who diagnosed pneumoconiosis, Drs. Sundaram, Guberman and Potter, Dr. Wright's qualifications were not in the record. The administrative law judge properly found that the four physicians who found claimant not to be suffering from pneumoconiosis, Drs. Dahhan, Broudy, Fino and Anderson, are all pulmonary specialists.⁴ The administrative law judge permissibly credited the opinions of the pulmonary specialists and properly found that the new medical opinion evidence was not sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). See *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

The administrative law judge did not address the issue of whether the new evidence was sufficient to establish total disability under Section 718.204(c) in his 1998 Decision and Order on Remand. However, the administrative law judge found, in his 1997 Decision and Order, that the new medical opinion evidence was insufficient to establish total disability under Section 718.204(c)(4). The administrative law judge discredited the new opinion of Dr. Sundaram of total disability, Claimant's Exhibit 4, because he relied on a pulmonary function study, taken on March 20, 1996, Claimant's Exhibit 4, that was invalidated by Drs. Fino, Employer's Exhibit 17 at 4-5, and Younes. Director's Exhibit 55; 1997 Decision and Order at 9. However, the administrative law judge erred in preferring the invalidations of the reviewing physicians, Drs. Fino and Younes, over the administering physician without providing a rationale. See *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J., dissenting). The administrative law judge also discredited Dr. Guberman's opinion on the ground that the physician never attempted to reconcile his conclusions with non-qualifying test results and found that Dr. Guberman's opinion was not well reasoned or based upon objective evidence. Inasmuch as a physician's opinion need not be based upon objective studies to be documented or reasoned, the administrative law judge erred in discrediting Dr. Guberman's opinion.⁵ See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); 1997 Decision and Order at 9; Claimant's Exhibit 5; Director's Exhibit 52.⁶ Furthermore, the

⁴ Drs. Dahhan, Broudy and Fino are Board-certified in internal medicine, including a subspecialty of pulmonary disease. Director's Exhibit 20; Employer's Exhibits 1, 13. The letterhead for Dr. Anderson lists him as specializing in "occupational pulmonary diseases." Employer's Exhibit 2.

⁵ A medical opinion is documented if it sets forth the clinical findings, observations, facts and other data upon which the physician based his opinion and a medical opinion is considered reasoned if the physician explains how the opinion's documentation supports his conclusion. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

⁶ With regard to Dr. Potter, the administrative law judge correctly found that Dr. Potter's opinion did not contain a diagnosis of total disability. 1997 Decision and Order at 9; Director's Exhibit 53.

administrative law judge failed to discuss Dr. Wright's newly submitted opinion finding that claimant is occupationally disabled. Administrative Law Judge's Exhibit 2. Therefore, we vacate the administrative law judge's finding that no material change in conditions has been established at Section 718.204(c)(4) and remand for consideration of Dr. Wright's opinion and further consideration of the opinions of Drs. Sundaram and Guberman.

Moreover, the administrative law judge did not render findings as to whether the new evidence established total disability under Section 718.204(c)(1)-(3). Therefore, the administrative law judge, on remand, must make such findings. In doing so, the administrative law judge must consider all contrary probative evidence, like and unlike, before concluding that claimant has established total disability under any subsection of Section 718.204(c). *See Fields, supra*. Should the administrative law judge find the newly submitted evidence sufficient to establish total disability under Section 718.204(c) and thus a material change in conditions under Section 725.309, he must then consider all of the evidence of record in considering entitlement on the merits. *See Ross, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration by the administrative law judge.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge