BRB No. 02-0184 BLA

RUSSELL COLLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2000-BLA-1056) of Administrative Law Judge Rudolf L. Jansen 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 administrative law judge determined the instant case to be a duplicate claim under 20 C.F.R. §725.309 (2000),[2] and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's November 5, 1998 filing date.[3] Initially, the administrative law judge determined that Perry County Coal Corporation (employer) was the properly named responsible operator. In addition, the administrative law judge credited claimant with thirteen years and four months of coal mine employment. Addressing the merits of the duplicate claim, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis and, thus, sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Weighing all of the evidence of record, old and new, the administrative law judge found the medical evidence sufficient to establish the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found the medical evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[4] Accordingly, the

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The amendments to the regulations 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. 20 C.F.R. §725.2.

[3] Claimant filed his initial application for benefits on May 14, 1991, which was finally denied by Administrative Law Judge Robert Hillyard in a Decision and Order issued October 31, 1997. Director's Exhibits 19-1, 19-580. Judge Hillyard named the Black Lung Disability Trust Fund liable for any benefits which may be payable. In addition, Judge Hillyard found the medical evidence of record insufficient to establish the existence of pneumoconiosis and also insufficient to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibits 19-1.

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), 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) (2000), is now found at 20 C.F.R. §718.204(c).

administrative law judge awarded benefits and determined that the date from which benefits commence is November 1, 1998.

On appeal, employer challenges the administrative law judge's award of benefits. Employer contends that the administrative law judge erred in finding that it was the properly named responsible operator. In addition, employer contends that the administrative law judge erred in finding the newly submitted evidence sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Employer also contends that the administrative law judge erred in finding the medical evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and also sufficient to establish disability causation pursuant to Section 718.204(c).

In a Motion to Remand, the Director, Office of Workers' Compensation Programs (the Director), concurs with employer that the administrative law judge failed to adequately explain his findings regarding the naming of Perry County Coal as the proper responsible operator. Likewise, the Director agrees with employer that the administrative law judge failed to make the proper inquiry in determining whether claimant established a material change in conditions pursuant to Section 725.309 (2000). The Director also argues that the administrative law judge failed to properly weigh all relevant factors in according determinative weight to the medical opinion of claimant's treating physician, Dr. Caudill. Consequently, the Director requests that the Board vacate the administrative law judge's findings and remand the case to the administrative law judge for further consideration.

Claimant has not responded to either employer's Petition for Review and Brief or the Director's Motion to Remand.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

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[5] The parties do not challenge the administrative law judge's decision to credit claimant with thirteen years and four months of coal mine employment. This finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, we address employer's contention that the administrative law judge erred in finding that Perry County Coal is the properly named responsible operator. In challenging the district director's designation of Perry County Coal as the putative responsible operator, employer raised numerous legal and factual arguments before the administrative law judge. *See* Employer's Post-hearing Brief at 7-22. In naming Perry County Coal as the responsible operator, however, the administrative law judge did not specifically address these arguments, but rather, the administrative law judge summarily concluded that employer is the properly named responsible operator without adequately discussing his rationale. *See* Decision and Order at 4. As employer and the Director correctly contend, the administrative law judge has not provided the Board with a sufficient factual foundation on which to review his findings with respect to the arguments of the parties. Therefore, we vacate the administrative law judge's determination that employer is the properly named responsible operator and remand the case to the administrative law judge to fully discuss the relevant evidence and the arguments of the parties. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see also* the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Addressing the merits of the administrative law judge's duplicate claim findings, employer contends that the administrative law judge failed to make a specific finding that claimant's condition has worsened pursuant to Section 725.309 (2000), as required in this case arising within the United States Court of Appeals for the Sixth Circuit. Citing *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2- 288 (6th Cir. 2001) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), employer contends that the new evidence reflects only an ongoing debate as to whether the medical opinion evidence establishes the existence of pneumoconiosis and, thus does not indicate an actual change in claimant's condition as required by the standard set forth in *Ross*, *supra*. Employer's Brief at 41-43. The Director concurs with employer that the administrative law judge failed to make the proper inquiry in determining whether a material change in conditions was established, as the administrative law judge failed to provide a comparative analysis of the newly submitted evidence with the prior evidence. We agree.

In the Sixth Circuit, in order to determine whether a material change in conditions is established pursuant to Section 725.309 (2000), the administrative law judge must analyze whether the new evidence submitted with the duplicate claim demonstrates a worsening of claimant's condition. *See Kirk, supra*; *Ross, supra*; *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997). In the instant case, the administrative law judge properly determined that this case was subject to the provisions of Section 725.309 (2000) as claimant filed his

duplicate claim more than one year after the final denial of his prior claim. Decision and Order at 4-5; *see* Director's Exhibits 1, 19-1. He further found that the prior claim was denied because claimant failed to establish the existence of pneumoconiosis and also that claimant suffers from a totally disabling respiratory impairment. Decision and Order at 5. Noting the proper standard of establishing a material change in conditions, Decision and Order at 4, n.2, the administrative law judge weighed the new evidence of record, favorable and unfavorable to claimant, and determined that the preponderance of the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 8-9; Director's Exhibits 10, 32, 34; Claimant's Exhibits 1-2.

However, the administrative law judge has not addressed whether the new evidence differs qualitatively from the evidence submitted with the prior claim. Rather, the administrative law judge discussed only the newly submitted evidence in determining that a material change in conditions has been established. Decision and Order at 9. Consequently, we vacate the administrative law judge's determination that the evidence submitted since the prior denial supports a finding of a material change in conditions pursuant to Section 725.309 (2000). On remand, the administrative law judge must reconsider the medical evidence of record and determine whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to the standard set forth in *Kirk*. *Kirk, supra; Ross*, *supra; Stewart, supra; Flynn, supra*.

Employer also raises several challenges to the administrative law judge's weighing of the medical evidence of record. First, employer contends that the administrative law judge erred in according determinative weight to the medical opinion of Dr. Caudill, based solely on the physician's status as claimant's treating physician. The Director concurs with employer that the administrative law judge erred in failing to adequately explain his basis for according determinative weight to Dr. Caudill. The Director contends that the administrative law judge must provide specific findings regarding the criteria set forth at 20 C.F.R. §718.104(d). We agree.

As the Director correctly contends, the deposition testimony of Dr. Caudill, which was relied upon by the administrative law judge in crediting the physician's opinion, was developed after January 19, 2001, the effective date of the amended regulations. Consequently, the administrative law judge must consider the credibility of Dr. Caudill's opinion in light of the specific criteria set forth at Section 718.104(d)(1)-(4).[6] Therefore,

[6] Section 718.104(d) requires the administrative law judge to take into consideration the nature of claimant's relationship with the physician, the duration of that relationship as well as the frequency and extent of claimant's treatment. 20 C.F.R. §718.104(d)(1)-(4).

while the opinions of treating physicians "should be '[g]iven their proper deference;'" nonetheless, the administrative law judge must fully discuss the reasoning and underlying documentation of Dr. Caudill's opinion, in comparison to the other relevant medical opinion evidence of record. 20 C.F.R. §718.104(d)(5); *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-327 (6th Cir. 2002), quoting *Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995). Accordingly, on remand, the administrative law judge must consider the relevant criteria in determining whether Dr. Caudill's opinion is entitled to enhanced weight as claimant's treating physician over the contrary evidence of record. *Id*.

Second, employer asserts that the administrative law judge erred in failing to weigh all the medical evidence together in determining whether claimant has established the existence of pneumoconiosis under Section 718.202(a), citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 20 BLR 2-164 (4th Cir. 2000).[7] We disagree.

While decisions rendered by a circuit court may provide guidance in cases that do not arise within its geographical jurisdiction, we decline to apply *Compton* in this case arising in the Sixth Circuit, as the court has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *See*, *e.g.*, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *see also Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Lastly, employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish disability causation pursuant to Section 718.204(c). In considering the evidence relevant to disability causation, the administrative law judge accorded Dr. Caudill's opinion "increased weight" due to his status as treating physician. Decision and Order at 14. Inasmuch as we have vacated the

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[7] In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 20 BLR 2-164 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit held that despite the fact that Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease.

administrative law judge's finding regarding Dr. Caudill, as well as his findings pursuant to Section 718.202(a)(4), we must also vacate the administrative law judge's finding that claimant has established that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). If, on remand, the administrative law judge again reaches this issue, he must reconsider all of the relevant medical evidence to determine whether it satisfies the requirements of Section 718.204(c) and the applicable case law. 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge