BRB No. 99-0683 BLA

RAY CASE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L.H. HALL COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
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-Awarding Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand-Awarding Benefits (95-BLA-1469) of Administrative Law Judge Paul H. Teitler 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). This case is before the Board for a second time.

Initially, in a Decision and Order issued on September 9, 1996, the administrative law judge credited claimant with twelve years and four and one-half months of coal mine

employment, and determined that, inasmuch as the instant claim was a duplicate claim,[1] claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). Decision and Order on Remand at 4-6. The administrative law judge further found that the newly submitted evidence established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and that pneumoconiosis was a contributing cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 7-8. Thus, because claimant established elements of entitlement previously adjudicated against him, the administrative law judge found a material change in conditions established pursuant to Section 725.309(d). Decision and Order on Remand at 8. Turning to the merits, the administrative law judge found that the entirety of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b), and that such evidence established a totally disabling respiratory impairment pursuant to Section 718.204(b), (c). Decision and Order on Remand at 8. Accordingly benefits were awarded.

On appeal, employer contends that the administrative law judge erred in concluding that the newly submitted evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and totally disabling pneumoconiosis at Section 718.204(b) and (c). In response, claimant urges that the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this 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

[1] Claimant originally filed a claim on December 28, 1979, which was denied by the district director, on November 1, 1980, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 42. After being awarded benefits by the Kentucky Workmen's Compensation Board, Director's Exhibit 26, claimant filed the instant duplicate claim on September 18, 1986. Director's Exhibit 1.

disturbed. 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).

Employer first contends that the administrative law judge erred in concluding that the newly submitted evidence established a material change in conditions at Section 725.309(d), pursuant to the standard set forth in *Ross*, *supra*, based on the medical opinion evidence of pneumoconiosis. Specifically, employer asserts that the administrative law judge failed to consider how the opinion of Dr. Cohen, who concluded that claimant suffered from pneumoconiosis, Claimant's Exhibit 1, differed qualitatively from the prior evidence considered at Section 718.202(a)(4).

In finding that claimant established a material change in conditions by establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted opinion of Dr. Cohen which found the existence of pneumoconiosis and the newly submitted opinion of Dr. Tuteur, a consulting physician, who concluded that the evidence of record did not support a finding of pneumoconiosis, Employer's Exhibit 16. Decision and Order on Remand at 4-6. The administrative law judge found that Dr. Cohen's opinion was more persuasive than that of Dr. Tuteur as it was better supported by the underlying documentation of record. Decision and Order on Remand at 6.

In determining whether a material change in conditions is established pursuant to Section 725.309(d) pursuant to the standard set forth by the Sixth Circuit court in *Ross*, *supra*, the Board has held that the administrative law judge must analyze whether the new evidence submitted with a duplicate claim differs qualitatively from the evidence submitted with the previously denied claim. *See Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997); *see also Stewart v. Wampler Bros. Coal Co.*, BRB No. 99-0246 BLA (July 31, 2000)(Hall, C.J., and Nelson, J., concurring and dissenting). In the instant case, the administrative law judge failed to make this inquiry in considering whether the newly submitted medical opinion evidence supported a finding of pneumoconiosis. *See* Director's Exhibits 9, 56, 67, and Employer's Exhibit 7, I. Accordingly, we vacate the administrative law judge's determination that the newly submitted medical opinion evidence supports a finding of a material change in conditions at Section 718.202(a)(4) and remand the claim in order for the administrative law judge to reconsider such evidence in a manner consistent with the holdings in *Ross*, *Flynn* and *Stewart*. *See* 20 C.F.R. §725.309(d).

To avoid repetition of error on remand, we address employer's other contentions regarding the newly submitted medical opinion evidence at Section 718.202(a)(4). Decision and Order on Remand at 6. The administrative law judge concluded that the opinions of the physicians diagnosing the existence of pneumoconiosis, were entitled to greater weight than those of physicians diagnosing the absence of the disease, because the latter physicians, "rely largely on their analysis that coal mine dust exposure cannot cause an obstructive defect."

Decision and Order on Remand at 6. A review of the newly submitted opinions diagnosing the absence of coal workers' pneumoconiosis, *i.e.*, those of Dr. Tuteur, Dr. Vuskovich, Employer's Exhibit 2, Dr. Dahhan, Employer's Exhibit 3, Dr. Broudy, Employer's Exhibit 4, Dr. Fino, Employer's Exhibits 6, 8, Dr. Branscomb, Employer's Exhibits 5, 11, Dr. Anderson, Employer's Exhibit 3, show that they all found that this particular claimant did not suffer from pneumoconiosis.

When this case was most recently before the Board, the Board instructed the administrative law judge "to consider the impact of the holding by the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-248 (4th Cir. 1996), if he again relies on the rationale of the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995)," when weighing the physicians' opinions. In *Warth*, the Fourth Circuit held that physicians' opinions which indicate that obstructive disorders cannot be caused by coal mine employment are based on erroneous assumptions and entitled to little weight. In *Stiltner*, however, the Fourth Circuit limited the applicability of *Warth* to those medical opinions which are not based on a "thorough review of all of the medical evidence" and instead are based on an "assumption that contravenes the Act and regulations." *Id*. In the instant case, however, the administrative law judge reviewed the medical opinion evidence in light of the rationale of *Warth*, without addressing the impact of the holding in *Stiltner*, as instructed. Accordingly, on remand, the administrative law judge must reconsider the evidence in light of the Fourth Circuit's subsequent holding in *Stiltner*.

Employer further asserts that the administrative law judge erred in concluding that Dr. Cohen's reliance on an erroneous length of coal mine employment determination did not affect the credibility of his findings. When this case was previously before the Board, the administrative law judge was instructed to address the discrepancy between his finding of twelve years and four and one-half months of coal mine employment, and the greater time found by the physicians of record. *Case*, slip op. at 4. On remand, the administrative law judge addressed the Board's directive, but concluded that since all of the physicians relied upon a length of coal mine history greater than that supported by the record and listed the same length of coal mine employment, there was "no basis for discrediting any of the medical opinion reports of record for the erroneous listing of years of coal mine employment . . . and "no basis for crediting one medical report over another medical report." Decision and Order on Remand at 5.

Contrary, to the administrative law judge's determination, however, a physician's reliance on an exaggerated and inaccurate length of coal mine employment history may affect his opinion as to the etiology of claimant's respiratory impairment. *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993). Accordingly, on remand, as previously instructed, the administrative law judge must address the discrepancy between his length of coal mine

employment finding and that relied upon by those physicians diagnosing the existence of pneumonoconiosis as defined by the Act, and explain how any discrepancy affects the credibility of those physicians' opinions.

Also, regarding the newly submitted medical opinion evidence, employer asserts that the administrative law judge erred in failing to address Dr. Cohen's reliance on an inaccurate smoking history. A review of Dr. Cohen's opinion demonstrates that the physician relied on a "very modest" smoking history of five to fifteen years, while the record demonstrates a much more extensive smoking history. Since an inaccurate smoking history may affect a physician's ultimate findings, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), on remand, the administrative law judge should also address Dr. Cohen's inaccurate smoking history and the effect, if any, it has on the credibility of Dr. Cohen's opinion. We, thus, vacate the administrative law judge's finding that the newly submitted evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in concluding that the newly submitted evidence established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Specifically, employer asserts that the administrative law judge erred in concluding that the newly submitted medical opinions of Drs. Fino and Tuteur, who concluded that claimant was not totally disabled, were entitled to little weight merely because they relied on invalid pulmonary function studies, and that the administrative law judge failed to comply with the Board's remand instructions at Section 718.204(c).

The administrative law judge found that the newly submitted evidence established the presence of a totally disabling respiratory impairment at Section 718.204(c)(1), based on the most recent pulmonary function studies, dated September 9, 1993 and May 26, 1994, Director's Exhibits 56, 67, which produced qualifying values,[2] and the newly submitted medical opinions of Drs. Mettu, Dahhan, Broudy, Sundaram, Vuskovich and Cohen, which established total disability pursuant to Section 718.204(c)(4).[3]

[2] A "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. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

[3] The administrative law judge found that the newly submitted blood gas study evidence produced no qualifying studies and that there was no evidence of cor pulmonale with right sided congestive heart failure and thus claimant was unable to demonstrate the

As discussed, *supra*, however, in determining whether a material change in conditions was established pursuant to Section 725.309(d) based on the evidence of a totally disabling respiratory impairment, inasmuch as the administrative law judge failed to determine whether the newly submitted evidence differed qualitatively from evidence submitted with the previously denied claim is error and requires remand of the case in order for the administrative law judge to make such an inquiry. *See Ross*, *supra*; *Flynn*, *supra*; *see also Stewart*, *supra*.

Further, in addressing the newly submitted evidence relevant to the issue of total disability, the administrative law judge failed to provide any basis for crediting the qualifying evidence at Section 718.204(c)(1) and (4) over the non-qualifying evidence found at Section 718.204(c)(2), (3). We thus conclude that the administrative law judge's finding in this regard violates the Administrative Procedure Act (the APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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 U.S.C. §932(a), and instruct the administrative law judge to weigh on remand, all the newly submitted evidence, both like and unlike, at 718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Accordingly, the administrative law judge's finding that the newly submitted evidence established a totally disabling respiratory impairment pursuant to Section 718.204(c) is vacated.

Lastly, employer contends that the administrative law judge erred in concluding that the newly submitted evidence established that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b). Specifically, employer asserts that the administrative law judge failed to address the newly submitted evidence pursuant to the proper standard, *i.e.*, whether the evidence shows that coal dust exposure was more than a *de minimis* cause of claimant's total disability. Employer asserts that the opinion of Dr. Cohen does not satisfy the standard and that the administrative law judge thus erred in finding that the evidence of record supports claimant's burden at Section 718.204(b).

The Sixth Circuit has held that, in order to satisfy his burden at 20 C.F.R.

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presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2) and (3). Decision and Order on Remand at 7.

§718.204(b), a claimant must establish that his totally disabling respiratory impairment was due, at least in part, to pneumoconiosis, *see Adams v. Director, OWCP*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1989), and that the role of pneumoconiosis in the miner's totally disabling impairment must be more than infinitesimal or *de minimis, see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In the instant case, the administrative law judge concluded that Dr. Cohen's opinion, that claimant's pulmonary condition had two possible etiologies, coal mine employment and cigarette smoking, and that the opinion, was supported by the conclusions of Drs. Mettu, Westerfield and Sundaram, and supported claimant's burden at Section 718.204(b).

Here, the administrative law judge's finding that claimant has carried his burden at Section 718.204(b) fails to demonstrate that he addressed the entirety of relevant evidence of record, specifically those opinions which indicate that claimant was either not disabled or that any disability suffered by claimant was the result solely of a lengthy smoking history. *See* Employer's Exhibits 3, 4, 11. The failure of the administrative law judge to address this relevant evidence requires remand, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979), and the administrative law judge's finding that the newly submitted evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b) is vacated.

Accordingly, the administrative law judge's determination that claimant has established a material change in conditions pursuant to Section 725.309 by establishing each of the elements of entitlement previously adjudicated against him is vacated and this case is remanded for further consideration.[4] *See Ross, supra*. On remand the administrative law judge must consider the newly submitted evidence in a manner consistent with our discussion, *supra*, and determine initially if claimant has established a material change in conditions. *See Ross, supra*. If the administrative law judge makes such a determination, he must then review the entirety of the relevant evidence of record in order to determine whether claimant has established entitlement to benefits.

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

SO ORDERED.

[4] In so doing, we necessarily vacate the administrative law judge's finding of entitlement based upon a review of the entirety of evidence.

ROY P. SMITH
Administrative Appeals Judge

I concur.

REGINA C. McGRANERY
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

For the reasons outlined in my dissenting opinion in *Stewart v. Wampler Bros. Coal Co.*, BRB No. 99-0246 BLA (July 31, 2000)(Hall, C.J., and Nelson, J., concurring and dissenting), I must respectfully dissent on the application of *Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997) to the facts of this case. In all other respects, I concur with the majority's decision.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge