BRB No. 99-0758 BLA

BRYANT HESS	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen Chartered), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (91-BLA-1088) of Administrative Law Judge Alexander Karst 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 the third time. As set forth in the Board's previous Decision and Order, this case has a long and detailed procedural history, *see Hess v. Dominion*

Coal Corp. [*Hess III*], BRB No. 97-0279 BLA (Nov. 25, 1997)(unpub.). In his current decision, the administrative law judge found the instant claim was filed on July 17, 1990, more than one year after the February 1988 denial of claimant's previous claim and, therefore, determined that this case was a duplicate claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that the newly submitted evidence was sufficient to establish total respiratory disability and, therefore, was sufficient to establish a material change in conditions pursuant to Section 725.309(d). Addressing the merits, the administrative law judge found the evidence, old and new, sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (4), 718.203(b). In addition, the administrative law judge found the evidence sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) and that the impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits and determined that the date from which benefits commence was July 1990.

On appeal, employer contends that the administrative law judge erred in finding the evidence of record sufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. In particular, employer contends that the administrative law judge erred in weighing the medical evidence pursuant to Section 718.202(a)(1) and (4). Additionally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(1) and (4). Employer also raises several procedural challenges to the administrative law judge's award of benefits. In response, claimant urges affirmance of the administrative law judge's award of benefits, arguing that the administrative law judge reasonably found the evidence sufficient to establish entitlement to benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

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).

Initially, we address the procedural issues raised in employer's appeal. Employer first contends that the administrative law judge erred in failing to reopen the record on remand. Specifically, employer contends that, in remanding the case to the Board, the United States Court of Appeals for the Fourth Circuit, within

whose jurisdiction this case arises, allowed for the reopening of the record to permit either side to submit additional evidence. Additionally, employer states that in its 1995 remand instructions, the Board stated that the administrative law judge should consider reopening the record in light of the holding of the Fourth Circuit. Consequently, employer contends that the administrative law judge's denial of its motion to reopen the record constituted prejudicial error and the case should be remanded for the administrative law judge to reopen the record and allow the submission of additional evidence. We disagree.

In addressing employer's 1998 motion to reopen the record, the administrative law judge found that following the remand from the Fourth Circuit and the Board, employer did not request that the record be reopened to permit it to submit additional evidence, even though employer submitted a brief on remand. Consequently, the administrative law judge denied "employer's request to submit evidence at this late date." Decision and Order at 14, n.4. The decision to reopen the record on remand is a matter within the discretion of the administrative law judge. 20 C.F.R. §725.455(c); *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989). Here, the administrative law judge reasonably found that employer failed to avail itself of the opportunity to request that the record be reopened when the case was originally reconsidered pursuant to the remand from the Fourth Circuit in 1996. Rather, employer did not raise the issue of the reopening of the record until 1998, following the Board's most recent remand to the administrative law judge. Moreover, contrary to employer's contention, the instructions of the Fourth Circuit did not require that the record be reopened for the submission of new evidence. The Fourth Circuit stated that "for good cause shown" the Board should allow the submission of additional evidence by either party. *Hess v. Director, OWCP*, No. 94-1066, slip op. at 2 (4th Cir. Sep. 30, 1994)(unpub.).

Based on the facts of this case, we reject employer's contention and affirm the administrative law judge's denial of employer's motion to reopen the record as it was within a reasonable exercise of his discretion as trier-of-fact and such denial does not lead to manifest injustice inasmuch as employer had the opportunity to request that the record be reopened in 1996 but did not avail itself of this opportunity. 20 C.F.R. §725.455(c); *see Lynn, supra*; *White v. Director, OWCP*, 7 BLR 1-348 (1984); *see also Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991). Moreover, we reject employer's contention that a change in the law, the duplicate claim standard pursuant to Section 725.309, requires that the record be reopened to allow for the submission of evidence responsive to this new standard. Contrary to employer's suggestion, the change in the duplicate claim standard in the Fourth Circuit, *see Lisa Lee Mines v. Director, OWCP* [*Rutter II*], 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), did

not change the standard for employer's burden, but rather, refined the requirements that claimant must meet in prosecuting duplicate claims. Therefore, due process does not require that employer be given the opportunity to submit additional evidence inasmuch as employer's burden had not changed, and, therefore, the administrative law judge's exercise of discretion in denying employer's request to reopen the record was not unreasonable. *See Lynn*, *supra; see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Furthermore, we reject employer's contention that since there was no new evidence submitted nor a change in law since the 1992 Decision and Order of Administrative Law Judge George Fath, wherein he found that pneumoconiosis was not established, this finding constitutes law of the case and is thus binding on the current administrative law judge. Specifically, employer contends that this finding was not disturbed by the Fourth Circuit or the Board and, thus, was affirmed. Contrary to employer's contention, the Board in its 1995 Order remanding the case pursuant to the decision of the Fourth Circuit, vacated its affirmance of Judge Fath's findings and remanded the case to the administrative law judge for further consideration of the issues of entitlement, including Section 718.202(a). *See Hess v. Dominion Coal Corp.* [*Hess II*], BRB No. 92-1702 BLA (Dec. 14, 1995)(Order)(unpub.); *see also Hess*, No. 94-1066, *supra*.

In challenging the administrative law judge's findings on the merits, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total respiratory disability pursuant to Section 718.204(c) and, thus, a material change in conditions pursuant to Section 725.309. With regards to the administrative law judge's weighing of the medical evidence under Section 718.204(c), employer contends that the administrative law judge erred in finding the pulmonary function study evidence sufficient to demonstrate a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1). In particular, employer contends that the administrative law judge erred in rejecting the two pulmonary function studies which were found to be invalid, arguing that this violated the Board's previous remand instructions inasmuch as the administrative law judge did not weigh these studies as contrary probative evidence. We agree.

In its 1998 Decision and Order on Reconsideration, the Board noted that a pulmonary function study that is invalidated for poor effort and poor cooperation may be weighed by the administrative law judge as contrary probative evidence since the non-qualifying high scores would have been higher with sufficient effort. *See Hess v. Dominion Coal Corp*. [*Hess IV*], BRB No. 97-0279 BLA, slip op. at 6

(Jul. 21, 1998) (Order on Recon.)(unpub.); *Crapp v. United States Steel Corp.*, 6 BLR 1-476 (1983). The administrative law judge, however, did not consider these invalid studies, other than to state again that they were invalid and, therefore, he rejected the August 22, 1990 and December 21, 1990 studies completely.[1] Decision and Order at 14; Director's Exhibit 10; Employer's Exhibit 1. Inasmuch as the administrative law judge did not weigh these pulmonary function studies, along with the contrary probative evidence, as instructed in the Board's prior decision, we vacate the administrative law judge's Section 718.204(c) finding and remand the case for the administrative law judge to specifically weigh the contrary probative evidence under Section 718.204(c), as previously instructed. *Hess IV, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

However, we reject employer's challenge to the administrative law judge's finding that the medical opinion evidence was sufficient to demonstrate total respiratory disability pursuant to Section 718.204(c)(4). Contrary to employer's contention, the administrative law judge reasonably exercised his discretion in according little weight to the opinions of Drs. Castle and Tuteur, based on his finding that they did not have the most recent evidence in opining that claimant was not suffering from a totally disabling respiratory impairment. Decision and Order at 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Moreover, the administrative law judge reasonably accorded little weight to the opinion of Dr. Castle because his opinion was equivocal on the issue of total disability, inasmuch as Dr. Castle stated that claimant "does *likely* retain the respiratory capacity to perform his usual coal mine employment." Decision and

[1] The parties do not challenge the administrative law judge's finding that the lone valid pulmonary function study, dated May 23, 1991, yielded qualifying results and, therefore, was sufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1). We, therefore, affirm this finding as unchallenged on appeal. Decision and Order at 14-15; Claimant's Exhibit 4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Order at 15; Employer's Exhibit 28; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge reasonably found the opinion of Dr. Abernathy to be entitled to little weight because the physician did not render a definite opinion as to the presence or absence of total respiratory disability. While employer is correct in stating that the lack of a diagnosis may be taken to show that claimant was not totally disabled, nonetheless, it was not inherently unreasonable for the administrative law judge to determine that Dr. Abernathy's opinion was not relevant at Section 718.204(c)(4) because of the lack of a definitive diagnosis. Decision and Order at 15; Director's Exhibit 12; *see Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Inasmuch as the administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant demonstrated total respiratory disability pursuant to Section 718.204(c)(4). Decision and Order at 15; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

However, since the administrative law judge did not adequately discuss all of the contrary probative evidence, particularly the invalidated pulmonary function studies, as instructed in the Board's prior Decision and Order, we vacate his finding that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) and remand the case for further consideration. In particular, the administrative law judge must weigh the evidence he credited as demonstrating total respiratory disability, *i.e.*, the qualifying pulmonary function study and the medical opinion of Dr. Robinette, against all of the contrary probative evidence, including the August and December 1990 pulmonary function studies, the non-qualifying blood gas studies and the contrary medical opinions. Director's Exhibits 10-12; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 8, 23, 24, 26-28; 20 C.F.R. §718.204(c); *see Fields, supra*; *Shedlock, supra.*

Additionally, with regards to the administrative law judge's material change in conditions finding, employer contends that the administrative law judge erred in crediting the opinion of Dr. Robinette since the physician did not render an opinion regarding the prior evidence of record and whether claimant had undergone a material change in conditions. This contention lacks merit.

Contrary to employer's argument, the issue of whether the evidence

supports a material change in conditions is a legal determination for the administrative law judge to render based on his weighing of all of the relevant medical evidence. *See* 20 C.F.R. §725.309; *Rutter II, supra*. Consequently, we reject employer's contention regarding Dr. Robinette's opinion. However, in light of our holding which vacates the administrative law judge's Section 718.204(c) finding, *see* discussion, *supra*, we also vacate the administrative law judge's material change in conditions finding inasmuch as this finding was based thereon, and remand this case for the administrative law judge to reconsider the new evidence of record pursuant to Section 725.309. *See Rutter II, supra*.

If, on remand, the administrative law judge again finds the newly submitted evidence sufficient to establish a material change in conditions pursuant to Section 725.309, he must then consider whether the record as a whole establishes entitlement to benefits. *See Rutter II*. In order to avoid a possible repetition of error on remand, we will address employer's contentions regarding the findings of the administrative law judge under Sections 718.202(a) and 718.204(b). As employer correctly contends, the administrative law judge failed to follow the Board's remand instructions in his consideration of the evidence pursuant to Section 718.202(a)(1). The administrative law judge failed to provide an adequate discussion of his weighing of the x-ray interpretations, in particular, the administrative law judge failed to discuss the relatively contemporaneous dates of the more recent x-ray films, as instructed in the Board's previous Decision and Order. See *Hess IV*, *supra*; 20 C.F.R. §802.405(a); *see generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Stanley v. Director, OWCP*, 7 BLR 1-386 (1984). Additionally, the administrative law judge did not follow the Board's instructions to discuss the relative radiological qualifications of the physicians providing interpretations, specifically, he did not discuss his decision to accord greater weight to Dr. Robinette, a B-reader, over the physicians dually qualified as B readers and Board-certified in Radiology. *Hess IV*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Inasmuch as the administrative law judge has not followed the previous remand instructions, we vacate his findings at Section 718.202(a)(1) and remand the case to the administrative law judge to consider the x-ray evidence pursuant to the instructions set forth in *Hess IV*. 20 C.F.R. §802.405(a); *see Hess IV, supra*, slip op. at 4-5.

Furthermore, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). As employer correctly contends, the administrative law judge did not provide an adequate rationale for

his findings pursuant to Section 718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Specifically, the administrative law judge concluded that both chronic bronchitis and restrictive disease can be "a chronic dust disease of the lung, and that coal dust exposure/pneumoconiosis can cause restriction [and chronic bronchitis], thereby meeting the definition of pneumoconiosis under §718.201." Decision and Order at 16, 17. However, the administrative law judge failed to adequately explain how, in this case, these conditions constitute statutory pneumoconiosis pursuant to Sections 718.201 and 718.202(a)(4), in light of the contrary evidence of record. We, therefore, vacate the administrative law judge's finding and remand the case for the administrative law judge to provide a more detailed explanation of his conclusions regarding the relevant medical evidence. *See Wojtowicz, supra; Tenney, supra*.

Moreover, subsequent to the issuance of the administrative law judge's current Decision and Order, the Fourth Circuit court held that while Section 718.202(a) lists alternative methods for establishing the existence of pneumoconiosis, the administrative law judge must, nonetheless, weigh all types of relevant evidence together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000). Consequently, if, on remand, the administrative law judge again finds the medical evidence sufficient to establish the existence of pneumoconiosis pursuant to either Section 718.202(a)(1) or (4), he must then weigh all of the evidence relevant to Section 718.202(a)(1)-(4) together in determining whether claimant has established the existence of pneumoconiosis. *Id*.

Lastly, we vacate the administrative law judge's finding that the evidence was sufficient to establish that claimant's respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b). The administrative law judge found that the opinion of Dr. Robinette establishes that claimant's total disability is due to pneumoconiosis because the physician opined that claimant is totally disabled from a pulmonary standpoint and related this total disability to a restrictive ventilatory defect consistent with the changes on claimant's x-ray, which Dr. Robinette opined consisted of pneumoconiosis and atelectasis. Decision and Order at 17; Claimant's Exhibit 1. However, as employer correctly contends, the administrative law judge failed to adequately explain the bases for his conclusion that this finding was sufficient in light of the contrary evidence of record. *See Wojtowicz, supra; Tenney, supra*. In his discussion of Section 718.204(b), the administrative law judge did not discuss the contrary opinions of Drs. Abernathy, Castle, Endres-Bercher and Tuteur, each of whom provided non-coal mining related causes for claimant's respiratory problems. Inasmuch as the

administrative law judge has not discussed all of the relevant evidence pursuant to Section 718.204(b), we vacate his findings thereunder and remand the case for further consideration of all of the relevant evidence of record. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Therefore, if on remand, the administrative law judge finds that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) and that claimant suffers from a total respiratory disability pursuant to Section 718.204(c), he must then determine whether claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability pursuant to Section 718.204(b). *Director, OWCP v. Richardson*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge