BRB No. 02-0420 BLA

AMBROSE C. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Gregory E. Hull (Millikin & Fitton), Hamilton, Ohio, for claimant.

Jeffrey S. Goldberg (Eugene Scalia, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (01-BLA-0082) of Administrative Law Judge Joseph E. Kane awarding benefits on a duplicate 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 found ten years of coal mine employment established and adjudicated this duplicate claim pursuant to the regulations contained at 20 C.F.R. Part 718.[2]

[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] Claimant previously filed a claim on November 2, 1987, Director's Exhibit 20-1,

Finding that the newly submitted medical opinion evidence established the existence of pneumoconiosis, one of the elements previously adjudicated against claimant, the administrative law judge determined that a material change in conditions was established.[3] Turning to the merits, the administrative law judge found that claimant established that pneumoconiosis arose out of coal mine employment, and that the medical opinion evidence was sufficient to establish total disability, and total disability due to pneumoconiosis. Accordingly, benefits were awarded.

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which was ultimately denied by the district director on April 13, 1988, because claimant failed to establish any element of entitlement, Director's Exhibit 20-13. Claimant took no further action on this claim. Claimant filed the instant, duplicate claim, at issue herein, on February 7, 2000, Director's Exhibit 1.

[3] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to determine whether a material change in conditions is established under Section 725.309(d)(2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994); *see also Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). If claimant establishes the existence of that element, he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*.

On appeal, the Director contends that the administrative law judge erred, in rejecting the opinion of Dr. Fritzhand regarding total disability and erred in failing to fully consider Dr. Wehr's opinion. Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, claimant must prove that he suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.* Further, pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *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).[4]

Initially, the administrative law judge found that all of the pulmonary function study and blood gas study evidence of record was non-qualifying[5] and noted that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 15. Because these findings have not been challenged by any party on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Next, the administrative law judge considered the relevant medical opinion evidence and gave less

[4] Because the administrative law judge's findings as to the length of claimant's coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and a material change in conditions, have not been challenged by the Director on appeal, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] 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. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

weight to the 1980 opinion of Dr. Foldes, Director's Exhibit 19, and the 1988 opinion of Dr. Williams, Director's Exhibit 20, compared to the current opinions of Drs. Wehr and Fritzhand, due to the length of time that had passed from the time Drs. Foldes and Williams rendered their opinions and the filing of the instant claim. Decision and Order at 16; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Because this finding has not been challenged by any party on appeal, it is affirmed, *see Skrack, supra*.

In response to a Department of Labor form question asking whether claimant suffers from a respiratory or pulmonary disease or impairment which prevents claimant from performing his last coal mine work, Dr. Fritzhand, whose qualifications are not in the record, indicated "none." Director's Exhibit 4. Dr. Wehr, who was a board-certified physician in internal medicine and pulmonary disease and had treated claimant for his respiratory and pulmonary condition since 1996, found that claimant did not have the functional lung capacity to perform his prior coal mine job, which entailed consistent lifting of heavy materials, as well as standing, bending and reaching. Dr. Wehr further stated that pneumoconiosis due to coal dust exposure was directly responsible for claimant's functional limitations. Director's Exhibits 9, 13, 15; Claimant's Exhibit 1.

The administrative law judge found Dr. Fritzhand's opinion to be poorly reasoned and afforded it less probative weight because Dr. Fritzhand did not demonstrate an understanding of the physical requirements of claimant's previous coal mine employment when he concluded that claimant did not have an impairment. The administrative law judge also found Dr. Fritzhand's opinion of "no impairment" inapposite to the history of serious physical problems reported by Dr. Fritzhand in his opinion, *e.g.*, dyspnea, limited physical exertion without exhaustion, chronic cough and chest pain, Decision and Order at 17.

On the other hand, the administrative law judge found Dr. Wehr's opinion to be well reasoned, well documented, and entitled to great weight, as Dr. Wehr did demonstrate knowledge of the physical requirements of claimant's coal mine employment, as well as the limitations caused by claimant's impairment, and the source and effects of this impairment. In addition, the administrative law judge afforded Dr. Wehr's opinion greater weight in light of the fact that he was claimant's treating physician and had superior qualifications as a board-certified physician in internal medicine and pulmonary disease.

Weighing all of the evidence together, including the pulmonary function study and blood gas study evidence, the administrative law judge found Dr. Wehr's opinion to be the most probative on the issue of total disability and, therefore, found that total disability was established by a preponderance of the evidence. Decision and Order at 17-18. Further, because Dr. Wehr explicitly attributed claimant's disability to his pneumoconiosis and no other physician diagnosed disability or provided a reason other than claimant's

pneumoconiosis as to the etiology of claimant's impairment, the administrative law judge also found total disability due to pneumoconiosis established. Decision and Order at 18.

The Director contends, however, that because Dr. Fritzhand found that claimant had no pulmonary impairment whatsoever, the administrative law judge erred in rejecting his opinion because the doctor did not need to demonstrate any knowledge or understanding of the exertional requirements of claimant's previous coal mine employment in order to conclude that claimant did not have an impairment. We agree. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172-73 (4th Cir. 1997); *cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The Director also contends that the administrative law judge erred in failing to consider that Dr. Fritzhand's opinion of no impairment was supported by the objective evidence, *i.e.*, a normal pulmonary function study and blood gas study, and the absence of rales, rhonchi or wheezing on examination. We agree with the Director that the record reflects that the administrative law judge considered statements contained in the "history" portion of the doctor's report to be the "[doctor's] documentation of the serious physical problems experienced by claimant," Decision and Order at 17. These statements contrast with the doctor's findings recorded in the "physical examination" portion of the report. Hence, the Director contends that Dr. Fritzhand's actual finding of clear lungs along with the normal pulmonary function and blood gas studies, would, in fact, support the doctor's finding of no impairment, and that the only statements in Dr. Fritzhand's opinion which contradict the opinion of no impairment are the statements made by claimant.

Because it appears that Dr. Fritzhand's report contains both statements made by claimant regarding his physical limitations and findings made by Dr. Fritzhand, on examination, regarding claimant's physical condition, which may be conflicting, we vacate the administrative law judge's finding regarding Dr. Fritzhand's opinion and remand the case for the resolution of any conflict. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *see also Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365 (1983); *see also Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995) *rev'g* 14 BLR 1-37 (1990)(recon. *en banc*)(unless there is explicit evidence contained in the physician's report that the report is not the physician's opinion, but merely lists without adopting the patient's description of physical limitations, the limitations must be taken as the physician's opinion). The administrative law judge must resolve this conflict before he determines the appropriate weight to assign to Dr. Fritzhand's opinion.

Turning to Dr. Wehr's opinion, the Director contends that the administrative law

judge erred in crediting Dr. Wehr's opinion to find total disability established because the administrative law judge failed to consider that one of the pulmonary function studies relied on by Dr. Wehr, dated either August 27, 1999, or September 15, 1999, Director's Exhibits 9, 13, was non-conforming as it lacked the requisite tracings and description of claimant's effort and comprehension. The Director also argues that the administrative law judge did not consider that Dr. Wehr did not explain how claimant's pulmonary function study and blood gas study results, which were non-qualifying and which apparently improved over time, supported his disability opinion. Additionally, the Director contends that while Dr. Wehr indicates that the results of a stress test performed by claimant after exercise indicates a severe decrease in oxygen transport, supportive of his November 24, 1999 disability opinion, Director's Exhibit 9, the administrative law judge failed to consider the fact that the stress test itself was not in the record.[6] Finally, the Director asserts that the administrative law judge did not properly consider the new regulatory criteria when he afforded Dr. Wehr's opinion more weight, in part, due to the fact that he was claimant's treating physician. Specifically, the Director contends that because the last of Dr. Wehr's seven opinions in the record was developed after January 19, 2001, *see* Claimant's Exhibit 1, the administrative law judge should have considered it in accordance with the new regulatory criteria regarding treating physicians' opinions at 20 C.F.R. §718.104(d).

Regarding Dr. Wehr's opinion, contrary to the Director's contention, the opinion may not be rejected solely because it is based on non-conforming pulmonary function studies, *see Casey v. Director, OWCP*, 7 BLR 1-873 (1985); *Drenning v. Delta Mining Co.*, 6 BLR 1-60 (1983). Rather, the significance of even a non-qualifying test is for the physician to determine. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *cf. McMath*, *supra*. In addition, contrary to the Director's contention, the quality standards at 20 C.F.R. §718.103 (2000), applicable to pulmonary function studies developed prior to January 19, 2001, *see* 20 C.F.R. §718.101, are not mandatory and pulmonary function studies cannot be precluded from consideration simply because they fail to comply with a non-critical quality standard. *See Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring); *see also Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Gorman v. Hawk Contracting, Inc.*, 9 BLR 1-76 (1986). It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67

[6] The Director also contends that the administrative law judge did not consider that Dr. Wehr had previously indicated, in his August 25, 1999 report, that a stress test would help to determine if claimant has progressive dyspnea due to "heart disease," Director's Exhibit 13. Dr. Wehr, however, ultimately concluded in his most recent opinion on November 27, 2001, that pneumoconiosis, which was seen on claimant's x-rays, was directly responsible for claimant's functional limitations, *see* Claimant's Exhibit 1.

(1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Moreover, the administrative law judge permissibly gave greater weight to the opinion of Dr. Wehr, finding total disability, in light of his superior qualifications as a board-certified physician in internal medicine and pulmonary medicine, as opposed to the opinion of Dr. Fritzhand, whose qualifications were not in the record.[7] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). However, in light of the fact that the administrative law judge found that all of the pulmonary function study and blood gas study evidence was non-qualifying and the administrative law judge erred in his consideration of Dr. Fritzhand's opinion of no impairment, we, nonetheless, remand this case for reconsideration of Dr. Wehr's disability opinion along with the other relevant evidence. While the administrative law judge could permissibly accord greater weight to the opinion of Dr. Wehr based on his superior credentials, *Dillon, supra*; *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), if, on remand, he also accords Dr. Wehr's opinion greater weight because he was claimant's treating physician, he must consider Dr. Wehr's most recent opinion in accordance with the new regulatory criteria governing treating physicians' opinions at 20 C.F.R. §718.104(d). *See Jericol Mining, Inc. v. Napier*, F.3d , 2002 WL 1988221 (6th Cir., Aug. 30, 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002). Accordingly, the administrative law judge's finding that the evidence establishes a totally disabling respiratory impairment is vacated, and the case is remanded for reconsideration of the evidence relevant to total disability.

Finally, the administrative law judge found that Dr. Wehr explicitly attributed claimant's disability to his pneumoconiosis, and that no other physician stated an etiology other than pneumoconiosis for claimant's impairment, and the Director has not challenged this finding on appeal. *See Skrack, supra*. Hence, the administrative law judge's finding that causation was established, is affirmed.

[7] Although both the administrative law judge and claimant indicate that Dr. Fritzhand is board-certified merely in urology, a review of the record does not reveal his qualifications.

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 consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge