BRB No. 00-0573 BLA

SILAS DIXON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

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

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0614) of Administrative Law Judge Edward Terhune Miller awarding 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).[1] The instant case involves a 1993 duplicate claim.[2] In the initial Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr. found that claimant failed to establish a material change in conditions. Accordingly, Judge Gilday denied benefits. By Decision and Order dated July 21, 1995, the Board affirmed Judge Gilday's finding that claimant failed to establish a material change in conditions. *Dixon v. Arch of Kentucky, Inc.*, BRB No. 95-0943 BLA (July 21, 1995)(unpublished). The Board, therefore, affirmed Judge Gilday's denial of benefits.

Claimant filed a third claim on September 21, 1995. Since claimant's 1995 claim was filed within one year of the issuance of the last denial of his 1993 claim, the 1995 claim constituted a timely request for modification of the 1993 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). Although Administrative Law Judge Edward Terhune Miller (the administrative law judge) found that there was not a mistake in a determination of fact, he found that the newly submitted evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, considered

---

[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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on November 9, 1987. Director's Exhibit 58-58. The district director denied the claim on May 2, 1988. Director's Exhibit 58-16. There is no indication that claimant took any further action in regard to his 1987 claim.

Claimant filed a second claim on April 16, 1993. Director's Exhibit 1.

the merits of claimant's 1993 claim. The administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment. The administrative law judge also found that the evidence was sufficient to establish total disability and that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(c)(1) and (c)(4) (2000). Employer further contends that the administrative law judge failed to properly consider whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in his response brief, urges the Board to reject employer's contention regarding the relevant material change standard. In a reply brief, employer notes its disagreement with the Director's position.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all the parties have responded.[3] Based on the briefs submitted by the parties, and our review, we hold that the

[3]Claimant and the Director, Office of Workers' Compensation Programs, assert that the amended regulations do not affect the outcome of this case.

Employer contends that 20 C.F.R. §718.201(a)(2) and (c) redefines the definition of pneumoconiosis. Employer also submits that the new causation provision set out at 20 C.F.R. §718.204(c)(1) is invalid. Section 718.201(a)(2) provides that "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, noting that this definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). Section 718.201(c) recognizes that "pneumoconiosis" is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c). The United States Court of Appeals for the Sixth Circuit has recognized the distinction between "clinical" and "legal" pneumoconiosis and has acknowledged that coal mine dust can cause obstructive lung disease. *See Cornett v. Benham*

disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Gilday found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000).

Coal, Inc., 227 F.3d 569 (6th Cir. 2000); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221(6th Cir. 1987). The Sixth Circuit has expressly recognized the latent and progressive nature of pneumoconiosis. *See Crace v. Kent-Elkhorn Coal Corp.*, 109 F.3d 1163 (6th Cir. 1997); *Johnson v. Peabody Coal Co.*, 26 F.3d 618, 18 BLR 2-244 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

In regard to disability causation, we note that 20 C.F.R. §718.204(c)(1) is not among the challenged regulations.

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.[4] 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Claimant's 1987 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 58. Consequently, in order to establish a material change in conditions, the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability. Thus, in order to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability.

[4]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309, these revisions only apply to claims filed after January 19, 2001.

The administrative law judge found that the medical opinion evidence submitted since the Board's 1995 Decision and Order was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Decision and Order at 11. The administrative law judge also found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000).[5] Decision and Order at 8, 12. The administrative law judge, therefore, found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 12.

Employer contends that the administrative law judge erred in concluding that the evidence submitted since the Board's 1995 denial established a material change in conditions pursuant to the standard set forth in *Ross*. In determining whether a material change in conditions is established pursuant to the standard set forth by the Sixth Circuit in *Ross*, the Board has held that the administrative law judge must analyze whether the new evidence submitted with the duplicate claim differs qualitatively from the evidence submitted with the previously denied claim. *See Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80 (2000) (*en banc*) (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 evidence supported a finding of pneumoconiosis and total disability. Accordingly, we vacate the administrative law judge's determination that the evidence submitted since the Board's 1995 Decision and Order supports a finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and, therefore, a change in conditions pursuant to 20 C.F.R. §725.310 (2000). On remand, the administrative law judge is instructed to reconsider whether the newly submitted evidence is sufficient to establish a material change in conditions in a manner consistent with the holdings in *Ross* and *Stewart*.

In order to avoid any repetition of error on remand, we will address employer's other contentions regarding the administrative law judge's consideration of the newly submitted evidence pursuant to 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(c)(1) and (c)(4) (2000).

Employer contends that the administrative law judge committed numerous errors in finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). In finding the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge credited the opinions of

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

Drs. Baker, Westerfield, and Wier that claimant suffered from pneumoconiosis over the contrary opinions of Drs. Dahhan and Broudy. Decision and Order at 11.

Employer initially argues that the administrative law judge erred in crediting the opinions of Drs. Baker, Westerfield and Wier. Employer argues that the findings of pneumoconiosis rendered by these physicians were based upon positive x-ray interpretations that are "inconsistent with the weight of the x-ray evidence." Employer's Brief at 18. Although an administrative law judge may properly consider whether contrary readings of an x-ray that a physician relied upon in rendering his opinion call into question the reliability of his conclusion,[6] *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *see also Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983), he may not reject a physician's diagnosis of pneumoconiosis merely because it is based upon a positive x-ray interpretation that is outweighed by the interpretations of *other* x-rays. *See Winters*, 6 BLR at 1-881.

However, the administrative law judge, in the instant case, erred in failing to consider whether several negative readings of the specific x-rays relied upon by Drs. Baker and Wier call into question the reliability of their respective diagnoses.[7] *See Winters*, *supra*; *see also*

---

[6]An administrative law judge must also consider subsequent rereadings that support the x-ray interpretation upon which a physician relied in making his diagnosis.

[7]Dr. Baker, in diagnosing pneumoconiosis, relied upon his positive interpretation of a July 17, 1996 x-ray. Director's Exhibit 50. Dr. Baker is a B reader. While three physicians dually qualified as B readers and Board-certified radiologists (Drs. Barrett, Mathur and Marshall) interpreted claimant's July 17, 1996 x-ray as positive for pneumoconiosis, Director's Exhibits 53, 60, six equally qualified physicians (Drs. Sargent, Spitz, Wiot, Shipley, Scott and Wheeler) interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 52, 60.

In his October 10, 1995 Office Notes, Dr. Wier noted that claimant had a "history of coal workers' pneumoconiosis with categorization by a Grade 1 reader in 1985 of simple occupational pneumoconiosis category p/q-2/2." Director's Exhibit 60. Although Dr. Wier does not specifically identify the date of the 1985 film, the record contains several interpretations of a March 27, 1985 x-ray. Although Dr. Nelson, a physician whose radiological qualifications are not found in the record, interpreted claimant's March 27, 1985 x-ray as positive for pneumoconiosis, Director's Exhibit 35, Drs. Sargent, Spitz and Wiot, each of whom is dually qualified as a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 37, 60.

Arnoni, *supra*; *White*, *supra*.

Dr. Westerfield, in diagnosing pneumoconiosis, apparently relied upon his own positive interpretation of claimant's August 26, 1998 x-ray. *See* Director's Exhibit 60. Dr. Westerfield is a B reader. The record does not contain any rereadings of claimant's August 26, 1998 x-ray.

Employer also argues that the administrative law judge erred in failing to provide a basis for finding that the opinions of Drs. Baker, Westerfield and Wier were "well-reasoned, based on objective medical evidence, and more persuasive than the contrary opinions." *See* Decision and Order at 11. We agree. The administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). On remand, the administrative law judge is instructed to reconsider whether the opinions of Drs. Baker, Westerfield and Wier are sufficiently reasoned and more persuasive than the contrary opinions.[8] *See Lucostic v. United*

[8]Dr. Baker noted that his diagnosis of coal workers' pneumoconiosis was based on claimant's abnormal x-ray and a significant duration of exposure. Director's Exhibit 50.

In a letter dated August 26, 1998, Dr. Westerfield indicated that his diagnosis of pneumoconiosis was based upon his positive interpretation of claimant's August 26, 1988 x-ray, claimant's long history of coal dust exposure and the results of pulmonary function testing. Director's Exhibit 60.

The record contains Dr. Wier's Office Notes from February 8, 1986 through December 30, 1996. Notably, Dr. Wier did not render a diagnosis of pneumoconiosis until

States Steel Corp., 8 BLR 1-46 (1985).

October 10, 1995. On October 10, 1995, Dr. Wier noted that claimant had a "history of coal workers' pneumoconiosis" with evidence of a positive x-ray interpretation in 1985. Director's Exhibits 35, 60. On October 12, 1995, Dr. Wier noted that claimant had been "documented to have coal workers' pneumoconiosis as early as 1985...." *Id.* Dr. Wier also noted that claimant's arterial blood gas study results were "certainly consistent with black lung." *Id.* In his most recent Office Notes dated December 30, 1996, Dr. Wier diagnosed bronchitis, but made no mention of pneumoconiosis. *Id.*

In addition to diagnosing coal workers' pneumoconiosis, Dr. Baker also diagnosed chronic obstructive airway disease and chronic bronchitis. Director's Exhibit 50. To the extent that the administrative law judge finds that Dr. Baker attributed these diagnoses to claimant's coal dust exposure,[9] these diagnoses also constitute a finding of pneumoconiosis. *See* 20 C.F.R. §718.201. Employer, however, accurately notes that the administrative law judge failed to consider whether Dr. Baker relied upon an inaccurate smoking history.[10] An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Furthermore, where physicians provide conflicting opinions as to the etiology of the miner's impairment, an administrative law judge should discuss the conflicting evidence and provide a rationale for choosing one opinion over the other. *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Drs. Dahhan and Broudy attributed claimant's pulmonary disease to his cigarette smoking. Director's Exhibit 60.

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Broudy. The administrative law judge discredited Dr. Dahhan's opinion because the doctor failed to discuss what impact, if any, claimant's thirty-three years of coal dust exposure had on his pulmonary condition. Decision and Order at 11. Contrary to the administrative law judge's characterization, Dr. Dahhan explained his basis for concluding that claimant's bronchitis did not result from his coal dust exposure.[11] Director's Exhibit 60.

---

[9]Dr. Baker indicated that claimant's disease was related to his coal dust exposure. It is not entirely clear whether Dr. Baker was referring only to claimant's coal workers' pneumoconiosis or to all of claimant's pulmonary conditions. *See* Director's Exhibit 50.

[10]Dr. Baker relied upon a smoking history of one pack of cigarettes a day for thirteen to fourteen years. Director's Exhibit 50. Dr. Dahhan relied upon a smoking history of a pack of cigarettes a day for twenty-one years. Director's Exhibit 60. Dr. Broudy noted that claimant smoked a pack of cigarettes a day for twenty years or more. Employer's Exhibit 1. Dr. Westerfield noted that claimant had a twenty to thirty pack year history. Director's Exhibit 60.

[11] Dr. Dahhan explained that:

> [Claimant's] bronchitis did not result from his coal dust exposure, since he has not had any exposure to coal dust since 1987, a duration sufficient to cause cessation of any industrial bronchitis that he may have had. He has no evidence of any restrictive ventilatory abnormality

Employer next contends that the administrative law judge improperly substituted his opinion for that of Dr. Broudy. The administrative law judge noted that Dr. Broudy opined that claimant's pulmonary impairment was caused solely by chronic bronchitis from cigarette smoking. The administrative law judge further noted that "Dr. Broudy failed to explain why, if claimant only suffered from bronchitis, he did not respond to bronchodilation, an indication that there is an irreversible component to his impairment." Decision and Order at 11. In making this assessment, the administrative law judge improperly substituted his opinion for that of Dr. Broudy. *See generally Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (*en banc*); *see also Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Employer also argues that the administrative law judge erred in discrediting Dr. Fino's opinion solely because he is a non-examining physician. The Board has held that an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may, however, properly take into consideration the fact that the physician had not personally examined the miner. *See Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). The United States Court of Appeals for the Sixth Circuit has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In the instant case, the administrative law judge acted within his discretion in crediting the examining physicians of record over the non-examining physicians of record. Decision and Order at 11.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis.

---

as demonstrated by his clinical, radiological and physiological data.

Director's Exhibit 60.

Employer also argues that the administrative law judge erred in finding the newly submitted pulmonary function study evidence sufficient to establish total disability. In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability, the administrative law judge accorded the greatest weight to the most recent pulmonary function studies of record. Decision and Order at 8. The administrative law judge indicated that claimant's August 26, 1998, September 28, 1998 and June 10, 1999 pulmonary function studies produced qualifying values.[12] *Id*.; Director's Exhibit 60; Employer's Exhibit 1. The administrative law judge, therefore, found that the newly submitted pulmonary function study evidence was sufficient to establish total disability. *Id.*

[12]The administrative law judge mistakenly identified claimant's September 28, 1998 pulmonary function study as a September 15, 1998 study. *See* Decision and Order at 8; Director's Exhibit 60. The administrative law judge also failed to consider the results of a July 23, 1997 pulmonary function study. *See* Director's Exhibit 60 at 274.

Employer contends that the most recent pulmonary function study of record, a study conducted on June 10, 1999, produced non-qualifying results before the administration of a bronchodilator. Employer is correct. Utilizing claimant's height of approximately 65.5 inches (175.5 cm.)[13] and claimant's age of 69 at the time of the study, the pre-bronchodilator portion of the June 10, 1999 pulmonary function study is non-qualifying. *See* Employer's Exhibit 1. Inasmuch as the administrative law judge mistakenly indicated that claimant's June 10, 1999 pulmonary function study produced qualifying values, the administrative law judge committed error. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We, therefore, vacate the administrative law judge's finding that the newly submitted pulmonary function study evidence was sufficient to establish total disability.

Employer also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish total disability. In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), the administrative law judge stated:

> This tribunal also finds that the opinions of Drs. Baker and Westerfield, that Claimant is totally disabled at least in part due to pneumoconiosis, more persuasive than the contrary opinions of Drs. Dahhan and Broudy. Dr. Broudy, despite being aware of the existence of numerous positive x-rays, despite the fact he himself obtained pulmonary function results which meet the federal criteria for disability, and also despite his finding that Claimant [sic] pulmonary condition did not improve after administering bronchodilators, opined that Claimant does not have a respiratory impairment arising from his coal mine employment. Since Dr. Broudy failed to adequately explain his rationale in light of the noted objective medical evidence, this tribunal accords his opinion little weight. Furthermore, this tribunal credits the positive opinions of Drs. Baker and Westerfield over the one remaining negative opinion of Dr. Dahhan. Accordingly, this tribunal finds that Claimant has established total disability due to pneumoconiosis pursuant to 718.204(c)(4).

---

[13]Where there are substantial differences in the recorded heights among the pulmonary function studies of record, the administrative law judge must make a factual finding to determine claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). In the instant case, the administrative law judge rationally concluded that claimant's actual height is 175.5 centimeters. Decision and Order at 8 n.14.

Decision and Order at 12.

Employer initially argues that the administrative law judge improperly combined his findings regarding the issue of total disability with the issue of the etiology of claimant's total disability. We agree. The administrative law judge improperly combined his analysis of these two issues. On remand, the administrative law judge is instructed to separately address whether the newly submitted medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[14]

We also agree with employer that the administrative law judge erred in discrediting Dr. Broudy's opinion regarding the extent of claimant's pulmonary disability because the doctor was aware of the existence of numerous positive x-rays. The existence of pneumoconiosis and the existence of a totally disabling respiratory or pulmonary impairment are two separate elements of entitlement. S*ee generally Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986) (Brown, J., concurring and dissenting); *Arnoni*, *supra*. The administrative law judge, therefore, erred in considering x-ray evidence of pneumoconiosis in his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability.

However, we note that Dr. Broudy, in his most recent report dated June 10, 1999, opined that claimant "has significant impairment, both from a pulmonary and nonpulmonary standpoint." Employer's Exhibit 1. Consequently, the administrative law judge, in his consideration of whether the evidence is sufficient to establish that

[14]On remand, should the administrative law judge find a change in conditions established pursuant to 20 C.F.R. §725.310 (2000), he must consider claimant's 1993 claim on the merits. The administrative law judge's consideration of the merits of claimant's 1993 claim would include consideration of whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

claimant suffers from a totally disabling respiratory or pulmonary impairment, should reconsider the relevance of Dr. Broudy's opinion.

Employer also contends that the administrative law judge erred in not providing a basis for crediting the opinions of Drs. Baker and Westerfield over Dr. Dahhan's opinion. We agree. The administrative law judge's analysis does not comport with the APA.[15] S*ee Wojtowicz*, *supra*. In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish total disability.

On remand, should the administrative law judge find the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis, he must weigh all the relevant newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b), and thus whether a change in conditions is established. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

Should the administrative law judge, on remand, find the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), he should consider claimant's 1993 claim on the merits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

---

[15]Dr. Westerfield opined that claimant would be "unable to perform the *heavy, very heavy* and *arduous* energy requirements of coal mine employment with [his] level of respiratory function." Director's Exhibit 60. On remand, the administrative law judge should specifically address whether Dr. Westerfield's opinion is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge should consider the exertional requirements of claimant's usual coal mine work in connection with Dr. Westerfield's medical reports to determine whether Dr. Westerfield's opinion supports a finding of total disability. *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982); Director's Exhibit 60.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge