BRB Nos. 00-0813 BLA
and 00-0813 BLA-A

LUTHER W. LESTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
VIRGINIA ENERGY COMPANY	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart, & Eskridge), Abingdon, Virginia, for employer.

Dorothy L. Page (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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (99-BLA-0694) of Administrative Law Judge Daniel A. Sarno, Jr., 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] Claimant's application for benefits filed on January 23, 1995 was denied by an administrative law judge on July 16, 1996 and again after reconsideration on July 31, 1997. Director's Exhibits 1, 43, 51. The administrative law judge denied benefits because he found that claimant did not establish that he had a totally disabling respiratory or pulmonary impairment.

Within one year of the administrative law judge's decision on reconsideration, claimant submitted additional medical evidence and requested modification. At the hearing on claimant's modification request, employer conceded that claimant had become totally disabled by a respiratory or pulmonary impairment. Tr. at 10, 13. Employer alleged, however, that claimant did not have pneumoconiosis and that his total disability was not due to pneumoconiosis.

In his Decision and Order, the administrative law judge accepted the parties' stipulation to "in excess of 10 years" of coal mine employment, Decision and Order at 3, and found that the newly submitted evidence and employer's concession of total disability did not demonstrate a mistake of fact in the prior denial, but did demonstrate that a change in conditions had occurred since the prior denial, justifying modification of that decision. Turning to the merits of the claim, the administrative law judge found that the chest x-ray and medical opinion evidence established the existence of pneumoconiosis, and found that claimant's total disability is due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits commencing as of September 17, 1997, the date upon which the administrative law judge found that a change in conditions occurred.

[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.

On appeal, claimant contends that the administrative law judge erred in finding that the prior denial of benefits was not a mistake, and thus erred in setting the onset date as September 17, 1997. Employer responds that, assuming *arguendo* that the administrative law judge properly awarded benefits, substantial evidence supports his finding that claimant did not become totally disabled due to pneumoconiosis until September 17, 1997. Employer also cross-appeals, contending that the administrative law judge made several errors in weighing the medical evidence regarding the existence of pneumoconiosis and the causation of claimant's total disability. Claimant responds, urging affirmance of the award of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in either appeal.[2]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals 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 March 9, 2001, to which all parties have responded. The parties agree that none of the regulations at issue in the lawsuit affects the outcome of this case. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed with the adjudication of 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant is totally disabled by a respiratory or pulmonary impairment, and that a change in conditions was demonstrated. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

The parties agree that claimant is totally disabled, but disagree as to when he became totally disabled. Thus, they disagree as to the basis for modification. Claimant contends that he has demonstrated a mistake of fact, i.e., that he has been totally disabled all along and should not have been denied benefits previously, whereas employer asserts that claimant has demonstrated at best, a change in conditions, by showing that he has become totally disabled since the previous denial. *See* 20 C.F.R. §725.310. Because this dispute relates primarily to the designation of the correct onset date for any benefits awarded, *see* 20 C.F.R. §725.503(d), we will first discuss the administrative law judge's analysis of the merits of entitlement, then we will address the modification issue in the context of claimant's challenge to the September 17, 1997 onset date finding.

Employer contends that the administrative law judge did not properly consider the chest x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), when he relied on a numerical count of the radiological experts who read claimant's x-rays as positive or negative. This contention has merit. The record contains forty readings of seven x-rays. There were fifteen positive readings, twenty-four negative readings, and one reading which was not classified under the ILO system for the presence or absence of pneumoconiosis. All of the ILO-classified readings were rendered by physicians qualified as Board-certified radiologists, B-readers, or both. The four x-rays dated September 13, 1995, December 18, 1995, March 20, 1996, and January 13, 1999 received only negative readings. The x-ray dated February 20, 1995 received two positive readings and four negative readings, and the x-ray dated September 17, 1997 received thirteen positive readings and four negative readings.

The administrative law judge noted that all of the readers possessed radiological credentials, but did not determine whether any particular x-ray was positive or negative for the existence of pneumoconiosis based on the physicians' readings. Instead, the administrative law judge found it "compelling" that only seven physicians rendered negative readings while fifteen physicians rendered positive readings for pneumoconiosis. Decision and Order at 4. This approach to the x-ray evidence is not in accordance with law. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the practice of "counting heads (i.e., any two opinions are better than one)," is to be avoided. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *accord Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997)(Administrative law judge erred in resolving conflicting evidence "solely on the basis of the number of physicians supporting the respective parties."). Moreover, this approach hampers our review. As employer notes, thirteen of the fifteen positive readings found compelling by the administrative law judge relate to a single x-ray, dated September 17, 1997. Without more explanation from the administrative law judge, we are unable to determine why one x-ray out of seven, which is not the most recent, has apparently received the greatest weight, and thus we are unable to determine whether substantial evidence supports the administrative

law judge's finding. Accordingly, we must vacate the administrative law judge's finding and remand this case for further consideration. On remand, the administrative law judge should analyze the readings of each individual x-ray in light of the readers' radiological credentials to determine whether that x-ray is positive or negative for the existence of pneumoconiosis, *see Adkins, supra*, and then determine whether the overall weight of the x-ray evidence supports a finding of the existence of pneumoconiosis.

Employer next contends that the administrative law judge did not consider all relevant evidence relating to the medical opinions at 20 C.F.R. §718.202(a)(4) or provide valid reasons for the weight accorded to the conflicting evidence. This contention also has merit. The record contains the medical opinions of four physicians. Dr. Forehand, who is Board-certified in Pediatrics and Allergy/Immunology, examined and tested claimant and diagnosed coal workers' pneumoconiosis due to coal dust exposure and interstitial lung disease due to smoking. Director's Exhibit 11. Dr. Rasmussen, who is Board-certified in Internal Medicine, also examined and tested claimant and diagnosed coal workers' pneumoconiosis with a disabling respiratory impairment related primarily to coal dust exposure. Director's Exhibit 52, Claimant's Exhibit 1. By contrast, Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed his medical records and concluded that claimant does not have pneumoconiosis but rather suffers from disabling pulmonary emphysema due to heavy smoking. Director's Exhibit 37; Employer's Exhibits 1, 16. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed claimant's medical records and concluded that he does not have pneumoconiosis. Director's Exhibit 39.

Employer notes correctly that, in deferring to the opinions of Drs. Forehand and Rasmussen, the administrative law judge omitted any discussion of the CT scan evidence of record, evidence which Dr. Castle cited as an indicator of the absence of pneumoconiosis but the presence of bullous emphysema related to smoking.[3] Employer's Exhibit 1 at 3, 9-10; Employer's Exhibit 16 at 19-20. Additionally, we agree with employer that the administrative law judge erred in assigning "little weight" to Dr. Fino's opinion solely because "Dr. Fino never examined [c]laimant. . . ." Decision and Order at 5; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275 (administrative law judge may not discredit a physician's opinion solely because the physician did not examine claimant). Further, substantial evidence does not support the administrative law judge's finding that Dr. Castle "offered no rationale" for his certainty that claimant's emphysema was the bullous type caused by smoking rather

[3] A CT scan dated January 13, 1999 was read as negative for pneumoconiosis but positive for bullous emphysema by Drs. Castle, Fino, and Scott. Employer's Exhibits 1, 3, 11. Dr. Wheeler also read this CT scan as negative for pneumoconiosis and noted the presence of emphysema with "blebs." Employer's Exhibit 10.

than the focal type due to coal dust exposure, when Dr. Castle testified "that it is not always possible to tell the two types of emphysema apart." Decision and Order at 5. Dr. Castle explained the distinction between these two forms of emphysema and testified that, although he was unwilling to say that they could be distinguished in "100 percent" of cases, he could say that "in the vast, vast majority it is possible to distinguish between the two." Employer's Exhibit 16 at 32. Dr. Castle stated that in this case he was certain that claimant had bullous emphysema due to smoking, based on claimant's coal dust exposure and smoking histories, physiological findings, the nature of the abnormalities seen on his chest x-rays and CT scan, and his blood gas study results. Employer's Exhibit 16 at 19-20, 33-35, 37.

Therefore, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and instruct him to reweigh the medical opinions along with the CT scan evidence. On remand, the administrative law judge must conduct a full, comparative analysis of the medical opinions in terms of their documentation and reasoning, and the comparative credentials of the physicians. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Akers, supra*. Additionally, the administrative law judge must ultimately determine whether all of the relevant evidence weighed together establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR , (4th Cir. 2000).

Employer next contends that the administrative law judge erred in finding that claimant established that his total disability is due to pneumoconiosis because the administrative law judge did not provide valid reasons for according less weight to the opinions of Dr. Castle and Fino. The administrative law judge found "little probative value" in either opinion because neither physician diagnosed pneumoconiosis. Decision and Order at 6. Where a physician acknowledges that a claimant has a respiratory or pulmonary impairment, but explains that an ailment other than pneumoconiosis caused claimant's total disability, the physician's opinion is relevant to disability causation and should not be discounted merely because the physician did not diagnose pneumoconiosis. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193-94, 19 BLR 2-304, 2-315-16 (4th Cir. 1995). Dr. Fino concluded that claimant was not totally disabled and thus, contrary to employer's contention, did not address the cause of claimant's total disability. Director's Exhibit 39. However, Dr. Castle concluded that claimant has a disabling respiratory impairment, and explained why he believes that claimant's total disability is unrelated to pneumoconiosis, but is instead due to the effects of smoking. Employer's Exhibits 1, 16. In view of the erroneous reason the administrative law judge provided for according Dr. Castle's opinion little weight, and because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a), we must also vacate the administrative law judge's disability causation finding. On remand, the administrative law judge

must determine whether pneumoconiosis is a "substantially contributing cause" of claimant's total disability. 20 C.F.R. §718.204(c).

Finally, in the event that benefits are awarded on remand, the administrative law judge should revisit his mistake of fact finding as it relates to the date from which benefits are payable. *See* 20 C.F.R. §§725.310, 725.503. In support of claimant's contention that a mistake of fact was made in the prior denial of benefits, he submitted the testimony of Dr. Rasmussen, who compared the February 1995, qualifying[4] blood gas study values with the later, also qualifying blood gas studies submitted on modification. Dr. Rasmussen found "quite good agreement" between the initial blood gas studies and the modification blood gas studies, and stated that they showed "the same pattern and virtually the same degree of abnormality." Claimant's Exhibit 1 at 13. The administrative law judge did not consider Dr. Rasmussen's testimony when he found that the prior administrative law judge made no mistake in deciding that the blood gas study evidence did not establish total disability, whereas "the recent evidence shows that by September 17, 1997, [c]laimant's pulmonary condition had deteriorated to such an extent that his arterial blood gas values were qualifying." Decision and Order at 3.

A mistake in a determination of fact includes the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Therefore, the administrative law judge should address Dr. Rasmussen's testimony in the context of claimant's allegation that the ultimate fact was wrongly decided by the prior administrative law judge. Depending upon whether the administrative law judge finds that a mistake of fact was demonstrated, or instead, bases modification upon a change in conditions, he must determine the onset date accordingly. *See* 20 C.F.R. §725.503(d).

[4] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge