BRB No. 96-1417 BLA
Case No. 93-BLA-0959

PRIMITIVO GRANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PITTSBURG & MIDWAY COAL MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER ON
Party-in-Interest	)	RECONSIDERATION

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Primitivo Grano, Raton, New Mexico, *pro se*.

William C. Erwin, Raton, New Mexico, for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and requests that the Board reconsider its Decision and Order in *Grano v. Pittsburg & Midway Coal Mining Co.*, BRB No. 96-1417 BLA (June 26, 1997)(unpublished).[1] In his Decision and Order, the administrative law judge accepted the parties' stipulation to forty-one years of coal mine

[1]Claimant's Motion to Reconsider was received by the Board on July 29, 1997, more than thirty days after the date of filing of the Board's Decision and Order. Claimant mailed the Motion to Reconsider on July 24, 1997, however, thereby rendering it timely under 20 C.F.R. §802.407(a). *See* 20 C.F.R. §802.221(b).

employment and noted the presence of a duplicate claim in the record. The administrative law judge stated that inasmuch as the United States Court of Appeals for the Tenth Circuit, under whose jurisdiction this claim arises, had not yet ruled on the appropriate standard for determining whether a material change in conditions has been established pursuant to 20 C.F.R. §725.309(d), he would apply the standard adopted by the United States Courts of Appeals for the Third, Fourth, and Sixth Circuits.[2] The administrative law judge determined that the newly submitted evidence did not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Without assessing whether the newly submitted evidence indicated that claimant is now totally disabled pursuant to 20 C.F.R. §718.204(c)(1)-(4), the administrative law judge denied benefits.

In *Grano*, the Board vacated the administrative law judge's determination that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The Board remanded the case to the administrative law judge for reconsideration of this issue under the standard adopted by the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), a decision issued subsequent to the date of the administrative law judge's Decision and Order. The Board also considered and rejected the allegations of error raised by claimant, through counsel, concerning the administrative law judge's weighing of the newly submitted evidence pursuant to 20 C.F.R. §718.202(a)(1) and 718.202(a)(4).

In his Motion to Reconsider, claimant asserts, for the first time, that the history of coal mine employment recorded in the medical reports of Drs. James and Repsher is in error and suggests that the medical opinions of Drs. James and Repsher are flawed on that basis. Claimant also raises a new allegation of error regarding the history of cigarette use recorded by Dr. Repsher. In addition, claimant asks the Board to consider the district director's finding that claimant is entitled to benefits. Finally, claimant requests that the Board reconsider its disposition of the contentions raised in claimant's Petition for Review and brief, particularly those regarding the administrative law judge's determination that the medical opinions of record do not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). Neither employer nor the Director, Office of Workers' Compensation Programs, has responded to claimant's motion.

We grant claimant's Motion to Reconsider, but deny the relief requested. As an initial matter, we note that in the Petition for Review and brief submitted on his behalf by

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, as claimant's qualifying coal mine employment occurred in New Mexico. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

counsel, claimant did not raise any allegations of error with respect to the coal mine employment history relied upon by Drs. James and Repsher and the smoking history relied upon by Dr. Repsher. Rather, based upon Dr. Repsher's alleged concessions at the administrative hearing, claimant challenged the administrative law judge's finding that Dr. Repsher's opinion was entitled to more weight than the opinion of Dr. James under Section 718.202(a)(4). The fact that these allegations of error concerning the administrative law judge's findings were raised for the first time in claimant's Motion to Reconsider the Board's Decision and Order militates in favor of holding that the Board will not reach them at this stage in the proceedings. *See* 20 C.F.R. §802.407(a); *see generally Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986). In light of the fact that claimant now appears without the assistance of counsel, however, we will consider them.

With respect to the issue of the length of claimant's coal mine employment, the administrative law judge accepted the parties' stipulation that claimant worked for forty-one years as a miner. Decision and Order - Denial of Benefits at 3. In his summary of the newly submitted medical evidence, the administrative law judge indicated correctly that in the reports prepared in conjunction with their respective examinations of claimant, Drs. James and Repsher recorded a coal mine employment history of seventeen years. Decision and Order - Denial of Benefits at 6, 7; Director's Exhibits 11, 23. The administrative law judge also discussed the diagnoses contained in the subsequent reports submitted by each physician, but did not acknowledge that in these reports, both Dr. James and Dr. Repsher referred to a history of coal mine employment in excess of forty years. Decision and Order - Denial of Benefits at 6, 7; Director's Exhibits 13, 23. Inasmuch as both physicians ultimately relied upon a length of coal mine employment that comports with the figure agreed to by the parties, the administrative law judge's omission of this fact from his summary of the newly submitted medical reports does not constitute error requiring reconsideration on remand.[3] *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3]The administrative law judge did not weigh the probative value of the medical opinions of Drs. James and Repsher in terms of their findings regarding the length of claimant's coal mine employment. In weighing the newly submitted medical opinions under 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Repsher's opinion was entitled to more weight than the opinion of Dr. James on the ground that it is more thorough and well supported by the objective evidence of record. Decision and Order - Denial of Benefits at 9.

Claimant further alleges that the administrative law judge erred in crediting Dr. Repsher's opinion under Section 718.202(a)(4) despite the fact that Dr. Repsher relied upon an inaccurate smoking history. Claimant also maintains that he disagrees with any statement attributing his impairment to cigarette smoking rather than coal dust exposure. Claimant testified at the administrative hearing in this case that he smoked three cigarettes per day for seven or eight years. Hearing Transcript at 25-26. In his initial report, Dr. Repsher indicated that claimant smoked one-quarter of a package of cigarettes per day for approximately thirty-two years. Director's Exhibit 23. Dr. Repsher concluded that claimant does not have pneumoconiosis, but has a reversible obstructive impairment caused by asthma. The doctor attributed claimant's asthma to "heredity." *Id.*.

In his second report, which was based upon his review of claimant's medical records in addition to his examination of claimant, Dr. Repsher described a similar smoking history and further noted that the medical records reflected statements suggesting that claimant's use of cigarettes may have been more extensive. *Id.*. Dr. Repsher also noted that a number of physicians who had examined claimant in the past had attributed his respiratory impairment to cigarette smoking. *Id.*. In the section of his report labeled "Impression," Dr. Repsher stated that the chest x-ray obtained during his examination of claimant showed increased interstitial markings in the middle and lower lung zones "probably secondary to previous cigarette smoking and advanced age." *Id.*. Dr. Repsher concluded that claimant has bronchial asthma and is not suffering from coal workers' pneumoconiosis or any other dust related respiratory disease. He did not state that claimant's asthma was caused by cigarette smoking. Dr. Repsher essentially reiterated these findings when he testified at the administrative hearing. Hearing Transcript at 28-47.

The administrative law judge found that Dr. Repsher's opinion was entitled to more weight than the opinion in which Dr. James diagnosed pneumoconiosis and further found, therefore, that the newly submitted medical reports of record did not support a finding of pneumoconiosis under Section 718.202(a)(4). Decision and Order - Denial of Benefits at 9. In light of the fact that Dr. Repsher did not render a specific conclusion attributing claimant's obstructive impairment and asthma to cigarette smoking, the administrative law judge did not err in crediting Dr. Repsher's opinion under Section 718.202(a)(4) without resolving the conflict between claimant's testimony regarding his use of cigarettes and the smoking history recorded by Dr. Repsher. *See generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Moreover, inasmuch as the administrative law judge did not rely upon Dr. Repsher's reports or any other evidence of record to make a finding as to the specific source of claimant's impairment, claimant's allegations regarding the veracity of statements attributing his respiratory condition to cigarette smoking are not relevant.

In his Motion to Reconsider, claimant has also asked the Board to consider the district director's determination that claimant is entitled to benefits. Any findings of fact

or conclusions of law made by the district director are not binding upon either the administrative law judge or the Board. Under the Act and the regulations, the administrative law judge must perform a *de novo* review of the evidence in order to determine whether entitlement to benefits has been established. *See* 20 C.F.R. §§725.351, 725.450, 725.452; *see Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). The Board, in turn, has the duty of reviewing the administrative law judge's Decision and Order to determine whether the administrative law judge's findings are supported by substantial evidence and consistent 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 is not empowered, therefore, to weigh the evidence or to render findings of fact. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). Accordingly, the determination made by the district director regarding claimant's entitlement to benefits is not pertinent to the disposition of claimant's current appeal.

Finally, claimant asks the Board to reconsider its holdings with respect to the administrative law judge's consideration of the newly submitted evidence under Section 718.202(a)(1) and 718.202(a)(4). We decline to modify these portions of our Decision and Order. With respect to the administrative law judge's weighing of the newly submitted x-ray evidence under Section 718.202(a)(1), claimant argued that the administrative law judge erred in determining that Dr. E.N. Sargent is a more highly qualified interpreter of x-rays than Dr. James, a B reader, and in giving greater weight to Dr. E.N. Sargent's 0/1 reading of the x-ray dated September 11, 1992, on that basis. The Board rejected this contention and held that the administrative law judge acted within his discretion as fact-finder in accepting the notations on the x-ray reading form indicating that, in contrast to Dr. James, Dr. Sargent is a Board-certified radiologist in addition to being a B reader. *Grano v. Pittsburg & Midway Coal Mining Co.*, BRB No. 96-1417 BLA (June 26, 1997)(unpublished), *slip opinion at 3-4*., *citing* 20 C.F.R. §718.102(c); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The Board concluded properly, therefore, that the administrative law judge acted within his discretion in according more weight to Dr. Sargent's x-ray interpretation under Section 718.202(a)(1). *Grano*, *slip opinion at 4*, *citing Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Aimone v. Morrison Knudson Coal Co.*, 8 BLR 1-32 (1985). Inasmuch as our disposition of claimant's arguments on appeal regarding the administrative law judge's findings pursuant to Section 718.202(a)(1) does not contain any error, we decline to modify this portion of our Decision and Order.

Concerning the administrative law judge's weighing of the newly submitted medical opinions under Section 718.202(a)(4), claimant alleged that the administrative law judge erred in crediting the opinion of Dr. Repsher over the opinion of Dr. James. Claimant suggested that Dr. Repsher made a number of admissions during his testimony on cross-examination at the administrative hearing that diminish the credibility of his opinion. Claimant alleged that these admissions include: that the linear opacities

found on claimant's chest x-ray sometimes constitute evidence of coal worker's pneumoconiosis; that claimant may have a small component of industrial bronchitis; that claimant's history of coal dust exposure is lengthy while his smoking history is modest; and that the medical reports reviewed by Dr. Repsher do not contain a diagnosis of asthma. Hearing Transcript at 38-39, 41-47. The Board held that claimant's characterization of Dr. Repsher's statements as concessions that he was perhaps wrong in concluding that claimant is not suffering from an occupationally related lung disease, was not accurate. The Board noted that Dr. Repsher maintained throughout his testimony on cross-examination that the medical data in this case supported his determination and that he provided a rationale for his conclusion. The Board held properly, therefore, that claimant's contentions were without merit, as the administrative law judge acted within his discretion in finding Dr. Repsher's opinion entitled to more weight than the opinion of Dr. James on the grounds that it is more thorough and is better supported by the objective evidence of record. *Grano*, *slip opinion at 4*, *citing Clark*, *supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as we did not err in affirming the administrative law judge's treatment of the medical opinions of Drs. James and Repsher, we decline to modify our holdings under Section 718.202(a)(4).

In light of the foregoing, we grant claimant's Motion to Reconsider, but deny the relief requested. The new allegations of error raised by claimant do not have merit and the Board did not commit any error in disposing of claimant's initial arguments on appeal.

Accordingly, we reaffirm our Decision and Order affirming in part and vacating in part the administrative law judge's Decision and Order - Denial of Benefits. This case is remanded to the administrative law judge for further proceedings consistent with our

Decision and Order in *Grano v. Pittsburg & Midway Coal Mining Co.*, BRB No. 96-1417 BLA (June 26, 1997)(unpublished).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge