BRB No. 10-0284 BLA

JACKIE W. HUFFMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 02/07/2011
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 on Remand and the Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and the Order on Reconsideration (04-BLA-5913) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case,

involving a subsequent claim filed on February 1, 2002,[1] is before the Board for the third time. In the initial decision, the administrative law judge found that claimant's 2002 claim was untimely filed. However, pursuant to claimant's appeal, the Board held that the statute of limitations did not apply to claimant's subsequent claim. Consequently, the Board vacated the administrative law judge's Decision and Order, and remanded the case for further consideration. *Huffman v. Consolidation Coal Co.*, BRB Nos. 05-0448 BLA and 05-0448 BLA-A (Sept. 30, 2005) (unpub.) (Hall, J., concurring).

On remand, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. After crediting claimant with 22.59 years of coal mine employment,[2] the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board, *inter alia*, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), and remanded the case for further consideration.[3] *J.W.H.* [*Huffman*] *v. Consolidation Coal Co.*, BRB No. 07-0322 BLA (Dec. 21, 2007) (unpub.).

On remand for the second time, the administrative law judge again found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to

[1] Claimant's initial claim, filed on January 28, 1994, was denied by a district director on July 12, 1994, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on January 22, 1996, which was finally denied by Administrative Law Judge Pamela Lakes Wood, in a Decision and Order on Remand dated November 15, 2000, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] The Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), as unchallenged on appeal. *J.W.H.* [*Huffman*] *v. Consolidation Coal Co.*, BRB No. 07-0322 BLA (Dec. 21, 2007) (unpub.).

20 C.F.R. §718.202(a)(4), and that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. By Order on Reconsideration dated December 2, 2009, the administrative law judge granted the Director's motion for reconsideration, and modified his Decision and Order on Remand to reflect that claimant is entitled to benefits payable as of February 2002.

On appeal, employer contends that claimant's 2002 subsequent claim was not timely filed. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Neither claimant nor the Director has filed a response brief.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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).

Timeliness of Claim

Employer contends that claimant's 2002 subsequent claim was not timely filed. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after whichever of the following occurs later -- (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. §932(f). Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). The three-year statute of limitations is applicable to the filing of both the

[4] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. As the Director, Office of Workers' Compensation Programs, asserts, the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed before January 1, 2005.

initial claim by a miner and any subsequent claims. *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-297 (6th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-122 (2009).

Employer argues that Dr. Jabour's 1994 and 1996 medical reports, wherein Dr. Jabour opined that claimant is totally disabled due to pneumoconiosis, should have triggered the three-year statute of limitations. We disagree. The United States Court of Appeals for the Fourth Circuit and the Board have each held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a misdiagnosis and thus, cannot trigger the statute of limitations for filing a subsequent claim. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006); *Obush*, 24 BLR at 1-122.

Administrative Law Judge Pamela Lakes Wood's final determination that claimant did not have pneumoconiosis as of November 15, 2000, necessarily repudiated Dr. Jabour's 1994 and 1996 opinions that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 2. Consequently, Dr. Jabour's medical reports could not trigger the running of the three-year time limit for filing this claim. *Williams*, 453 F.3d at 618, 23 BLR at 2-365; *Obush*, 24 BLR at 1-122. We, therefore, reject employer's contention that claimant's 2002 claim was not timely filed.[5] 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.[6] On remand, the administrative law judge considered the medical opinions of Drs. Rasmussen, Fino, Crisalli, and Castle. Dr. Rasmussen diagnosed legal pneumoconiosis, opining that claimant suffers from disabling lung disease caused by his coal mine dust exposure, cigarette smoking, and asthma. Claimant's Exhibit 1; Employer's Exhibit 8 at 29-30. Although Drs. Fino and Crisalli also diagnosed a respiratory impairment, they opined that it is due to asthma, and not claimant's coal mine dust exposure. Director's Exhibit 2; Employer's Exhibit 6. Dr. Castle opined that claimant suffers from cigarette smoke-induced chronic bronchitis. Director's Exhibit 17. Dr. Castle also opined that claimant suffers from asthma unrelated to his coal mine dust exposure. Employer's

[5] Other than Dr. Jabour's 1994 and 1996 medical reports, employer has not alleged that there is any medical evidence that could effectively trigger the three-year statute of limitations.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Exhibit 16 at 23.

In evaluating the conflicting evidence, the administrative law judge found that the opinions of Drs. Fino and Crisalli, that asthma is not caused by coal mine dust exposure, are inconsistent with the regulations. Decision and Order on Remand at 5-6. The administrative law judge further found that Dr. Castle's opinion was not sufficiently reasoned. *Id.* at 4. The administrative law judge also found that Dr. Rasmussen's opinion was well-reasoned and consistent with the regulations. *Id.* at 6-7. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in his consideration of Dr. Rasmussen's opinion. Employer specifically contends that Dr. Rasmussen's opinion is insufficient to support a finding of legal pneumoconiosis, alleging that the opinion is unexplained and "too uncertain to establish that [claimant's] lung disease was 'significantly related to, or substantially aggravated by' coal dust exposure. . . ." Employer's Brief at 17-18. The Board previously rejected these contentions of error. *Huffman*, BRB No. 07-0322 BLA, slip op. at 4-5 (holding that "Dr. Rasmussen's opinion is sufficient, if properly credited, to constitute substantial evidence in support of a finding that claimant's pulmonary impairment arose, in part, from coal mine employment"). The Board's previous holding on this issue constitutes the law of the case and governs the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

We additionally reject employer's assertion that the administrative law judge erred in according less weight to the opinions of Drs. Fino and Crisalli. Contrary to employer's assertion, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Crisalli because their view, that asthma cannot be attributable to coal mine dust exposure, is inconsistent with the Department of Labor's discussion of the prevailing medical science in the preamble to the revised regulations. *See* 65 Fed. Reg. 79939, 79944 (Dec. 20, 2000) (recognizing that the "term 'chronic obstructive pulmonary disease' (COPD) includes . . . chronic bronchitis, emphysema and asthma," and that the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease); *Obush*, 24 BLR at 1-125-26; Decision and Order on Remand at 5-6. The administrative law judge also permissibly questioned Dr. Crisalli's opinion because the doctor did not adequately explain how he eliminated claimant's coal dust exposure as a source of his obstructive pulmonary impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order on Remand at 4.

However, we agree with employer that the administrative law judge erred in his consideration of Dr. Castle's opinion. The administrative law judge accorded less weight to Dr. Castle's opinion, that claimant's obstructive pulmonary impairment is due to asthma, because his test results did not establish total reversibility. Decision and Order on Remand at 4. The administrative law judge also found that Dr. Castle's finding of a totally disabling respiratory impairment is inconsistent with a finding of total reversibility. *Id.* Contrary to the administrative law judge's characterization, Dr. Castle's opinion, that claimant's obstructive pulmonary impairment was attributable to asthma, was not premised upon a finding of total reversibility. Rather, Dr. Castle diagnosed asthma based on the "markedly reversible airway obstruction" demonstrated by claimant's pulmonary function study results. Employer's Exhibit 16 at 21. Moreover, Dr. Castle explained why the reversibility of claimant's obstructive impairment could vary over time. *Id*. at 23. The administrative law judge also erred in failing to address Dr. Castle's specific reasons for eliminating coal dust exposure as a cause of claimant's obstructive pulmonary impairment.[7] *Id.* Thus, the administrative law judge mischaracterized Dr. Castle's opinion. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In light of the administrative law judge's error,[8] we vacate his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.

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[7] In explaining why claimant's coal mine dust exposure did not contribute to his obstructive pulmonary impairment, Dr. Castle stated:

> [F]irst of all . . ., [the miner] has reversible airway obstruction. That is not a condition caused by coal mine dust exposure. Secondly, the changes that are present here have not been progressive . . . in a fixed and consistent fashion like one would see with coal mine dust exposure if one had that disease. All of the hallmarks here still indicate that [the miner] has bronchial asthma.

Employer's Exhibit 16 at 23.

[8] We reject employer's assertion that the administrative law judge improperly substituted his opinion for that of Dr. Castle in finding that the record establishes a combination of reversible and irreversible obstruction. Decision and Order on Remand at 5. Contrary to employer's assertion, this statement is consistent with Dr. Castle's opinion. Director's Exhibit 17; Employer's Exhibit 16.

On remand, when reconsidering whether the relevant medical opinion evidence establishes the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together at 20 C.F.R. §718.202(a), pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[9]

Because the administrative law judge must reevaluate whether the evidence establishes the existence of legal pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[9] On remand, should the administrative law judge find that the medical opinion evidence establishes the existence of legal pneumoconiosis, he need not separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) would necessarily subsume that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge