

BRB No. 10-0341 BLA

ROBERT BRUCE MARCUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/23/2011
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits on Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Michelle S. Gerdano (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:

Claimant appeals the Decision and Order - Denying Benefits on Modification (2008-BLA-6009) of Administrative Law Judge Michael P. Lesniak rendered on a request for modification of a denied subsequent claim filed pursuant to 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).<sup>1</sup> In a

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<sup>1</sup> By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Marcum v. Director, OWCP*, BRB No. 10-0341 BLA (Sept. 10, 2010) (unpub.

Decision and Order issued on January 19, 2010, the administrative law judge credited claimant with 5.6 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>2</sup> The administrative law judge accepted the parties' stipulation that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(c). The administrative law judge further found, however, that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and did not establish total disability due to clinical pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding of 5.6 years of coal mine employment. Claimant also argues that the administrative law judge erroneously determined that Drs. Ranavaya and Gaziano did not diagnose legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) or opine that legal pneumoconiosis was a contributing cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, concurring with claimant that the administrative

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Order). Claimant and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that Section 1556 is inapplicable to this claim because claimant's coal mine employment was less than fifteen years. Based upon the parties' responses and our review of the record, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as claimant has alleged less than fifteen years of qualifying coal mine employment.

<sup>2</sup> Claimant filed a claim for benefits on January 31, 1994, which was denied by the district director on June 3, 1994, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on January 17, 2007. Director's Exhibit 3. In a Proposed Decision and Order issued on March 14, 2008, the district director found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as he failed to establish any of the requisite elements of entitlement. Director's Exhibit 16. Claimant filed a petition for modification on April 18, 2008. Director's Exhibit 17. On June 30, 2008, the district director denied claimant's request for modification. Director's Exhibit 19. Claimant requested a hearing on July 7, 2008 and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 21, 22.

law judge erred in his consideration of Dr. Gaziano's opinion, but arguing that the administrative law judge correctly found Dr. Ranavaya's opinion to be insufficient to establish legal pneumoconiosis.<sup>3</sup>

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.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **I. Length of Coal Mine Employment**

At the hearing before the administrative law judge, claimant alleged that he worked between seven and eight years as a coal miner and described a history that totaled approximately seven years and eight months. Hearing Transcript at 7, 14, 16-21. In calculating the length of claimant's coal mine employment, the administrative law judge relied on claimant's testimony and Social Security Administration (SSA) records. Decision and Order at 3-4. The administrative law judge stated:

[A]ccording to [c]laimant's testimony he worked from approximately 1955 to 1963 in various coal mines, which all paid him in cash or groceries. Many of these employments are reflected in [c]laimant's [SSA] earnings record and the record does not contradict [c]laimant's testimony by indicating he was employed otherwise during that time period. Claimant's [SSA] earnings record only documents one non-coal mining job from 1955 to 1963, which is a brief position at the Navy in 1960. Thus, according to [c]laimant's testimony and his [SSA] earnings record, he worked for Napoleon Justice in 1956 for [four] months and Cecil Preece for three years, totaling 3.6 years of coal mine employment according to [20 C.F.R.] §725.101(a)(32). . . . Claimant worked for Black Diamond in 1963 for [two] weeks, Van Bill Coal Company for approximately a year, Ramey

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability pursuant to 20 C.F.R. §718.204(b)(2), but did not establish that his total disability is due to clinical pneumoconiosis at 20 C.F.R. §718.204(c). *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

Coal Company for [three] weeks, Jack Creek Coal Company for a few days, and Aaron Hall Coal Company for approximately [two] weeks, totaling [two] years of coal mine employment according to [20 C.F.R. §]725.101(a)(32). Thus, I find that [c]laimant was a coal miner for 5.6 years.

Id. at 4 (citations omitted). Claimant argues that the administrative law judge's finding of 5.6 years of coal mine employment is in error, because claimant's "unrebutted" hearing testimony establishes that he "worked [seven to eight] years in underground coal mining . . ." Claimant's Brief in Support of Petition for Review at 10-11.

We reject claimant's allegation that the administrative law judge should have credited him with seven to eight years of coal mine employment, based on his hearing testimony. In his Decision and Order, the administrative law judge acted within his discretion in crediting claimant's testimony regarding his coal mine employment, unless it conflicted with his SSA records. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Brumley v Clay Coal Corp.*, 6 BLR 1-956, 1-959 (1984). Accordingly, the administrative law judge permissibly declined to credit claimant's testimony, that he worked for three months for Mullins Coal Company and one week with Enoch Stone Coal Company, as claimant did not indicate in which years this employment occurred and this work was not reflected on his SSA records. *See Dawson*, 11 BLR at 1-60; *Brumley*, 6 BLR at 1-959; Decision and Order at 4; Hearing Transcript at 21. Similarly, the administrative law judge acted rationally in relying on claimant's SSA records to credit him with one year of coal mine employment for work with Jacks Creek Coal Company and Aaron Hall Coal Company, despite the fact that claimant indicated that he did not recall working for those companies. *See Dawson*, 11 BLR at 1-60; Decision and Order at 4; Director's Exhibit 7; Hearing Transcript at 23. In resolving the conflict between claimant's statement, that he was employed by Van Bill Coal Company for four years, and the SSA records showing partial periods totaling approximately one year, the administrative law judge rationally accorded determinative weight to the SSA records.<sup>5</sup> *See Brumley*, 6 BLR at 1-959; Decision and Order at 4; Director's Exhibit 7. Accordingly, we affirm the administrative law judge's finding that claimant worked

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<sup>5</sup> When questioned by his attorney at the hearing, claimant initially testified that he worked for Van Bill Coal Company for four years, but later responded in the affirmative when asked whether the Social Security Administration records, which reflect earnings from Van Bill Coal Company only in parts of 1963 and 1964, were accurate. Hearing Transcript at 18, 20.

between five and six years as a miner, rather than the seven to eight years alleged by claimant.<sup>6</sup> See *Dawson*, 11 BLR at 1-60.

## II. The Subsequent Claim

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); see *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Because claimant’s prior claim, filed on January 31, 1994, was denied by the district director because the evidence did not establish any of the elements of entitlement, claimant must establish, based on the newly submitted evidence, one of the elements of entitlement, in order to obtain review of the merits of his January 17, 2007 subsequent claim. 20 C.F.R. §725.309(d)(2), (3).

In this case, involving a request for modification of the district director’s denial of the January 17, 2007 subsequent claim, the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director’s denial of claimant’s subsequent claim. The Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director’s denial of benefits. Rather, the Board has recognized that such a determination is subsumed in the administrative law judge’s decision on the subsequent claim, and that the administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director’s decision is sought. See *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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<sup>6</sup> We cannot discern precisely how the administrative law judge determined that three years and four months of work at mines operated by Napoleon Justice and Cecil Preece totaled 3.6 years of coal mine employment, which – when added to the two years of work with Black Diamond, Van Bill Coal Company, Ramey Coal Company, Jacks Creek Coal Company and Aaron Hall Coal Company – resulted in a 5.6 year history of coal mine employment. Decision and Order at 4. In light of the minimal nature of the discrepancy, however, we hold that error, if any, by the administrative law judge is harmless. See *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We note that the administrative law judge did not make a specific finding at 20 C.F.R. §725.309, as to whether claimant established a change in an applicable condition of entitlement. However, based on the administrative law judge's unchallenged determination that claimant has established clinical pneumoconiosis and total disability, we hold, as a matter of law, that claimant has established a change in an applicable condition of entitlement and, therefore, was entitled to have his claim reviewed based on all of the record evidence. Slip op. at 3 n.3; 20 C.F.R. §725.309(d); *see Hess*, 21 BLR at 1-143. Thus, the question presented on appeal is whether the administrative law judge permissibly found that claimant did not suffer from legal pneumoconiosis and was not totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c).

### **III. The Merits of Entitlement**

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the opinions of Drs. Ranavaya and Gaziano. Dr. Ranavaya examined claimant on March 14, 2007, at the request of the Department of Labor (DOL), and recorded a coal mine employment history of seven or eight years. Director's Exhibit 12. Dr. Ranavaya diagnosed complicated coal workers' pneumoconiosis, chronic bronchitis, coronary artery disease and hypertension. *Id.* He opined that the etiology of claimant's complicated coal workers' pneumoconiosis was his occupational exposure to coal dust, but did not identify the etiology of claimant's chronic bronchitis. *Id.* Dr. Ranavaya also concluded that, "[b]ased on the findings of complicated [c]oal [w]orkers' [p]neumoconiosis, [claimant] meets the total disability criteria for Federal Black Lung Benefits." *Id.*

On April 26, 2007, Dr. Ranavaya responded to a request from the district director to clarify his diagnoses in light of the 0.4 years of coal mine employment that the district director found. Dr. Ranavaya indicated that it was his opinion that there "is evidence of pneumoconiosis, the tenure in mining notwithstanding." Director's Exhibit 12. On October 4, 2007, Dr. Ranavaya responded to a list of additional questions from the district director, noting that, during his prior examination, claimant reported a history of seven to eight years of underground coal mining employment. *Id.* He also noted that claimant's pulmonary function study revealed a mild restrictive and severe obstructive

ventilatory defect. *Id.* He reiterated his opinion that claimant suffers from complicated coal workers' pneumoconiosis.<sup>7</sup> *Id.* In addressing the etiology of claimant's obstructive impairment, Dr. Ranavaya concluded:

With regard to the significant history of cigarette smoking[,] in this case of six to seven cigarettes a day over [forty-five] years[,] it is in my opinion medically reasonable to conclude this factor alone is a substantial contributing cause of [claimant's] lung disease[,] which is predominately [an] obstructive ventilatory defect.

*Id.*

Dr. Gaziano examined claimant on November 15, 2007, and noted that claimant "worked [eight] years in [the] mines." Director's Exhibit 12. He diagnosed chronic obstructive pulmonary disease (COPD) and heart disease. *Id.* He opined that the major cause of claimant's COPD was his smoking history, with a "minor contribution" from his coal dust exposure. *Id.* He further concluded that claimant suffered from a severe impairment resulting in claimant being "unable to do any coal mine work – with severe pulmonary impairment and severe heart disease." *Id.*

The administrative law judge accurately summarized the opinions of Drs. Ranavaya and Gaziano in the section of his Decision and Order devoted to a recitation of the evidence of record. Decision and Order at 7. When weighing the medical opinions at 20 C.F.R. §718.202(a)(4), the administrative law judge concluded that both physicians "report that [c]laimant's COPD is caused by [c]laimant's smoking history. Thus, [c]laimant does not have legal pneumoconiosis."<sup>8</sup> *Id.* at 10.

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<sup>7</sup> The administrative law judge determined that Dr. Ranavaya's diagnosis of complicated pneumoconiosis was outweighed by the contrary medical opinions, stating that the large opacity observed by Dr. Ranavaya was most likely related to lung cancer. Decision and Order at 10. We affirm this finding as unchallenged on appeal. *Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

<sup>8</sup> Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); see *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Claimant initially contends that the administrative law judge mischaracterized Dr. Ranavaya's opinion, as "Dr. Ranavaya also stated that [claimant's] coal mine dust exposure would still have been at least a contributing cause to the pulmonary impairment." Claimant's Brief in Support of Petition for Review at 13. We disagree. The administrative law judge's finding, that Dr. Ranavaya's opinion was insufficient to establish the existence of legal pneumoconiosis, is supported by substantial evidence, as Dr. Ranavaya did not identify coal dust exposure as a contributing cause of claimant's COPD. *See* 20 C.F.R. §718.201(a)(2); *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149; Decision and Order at 7; Director's Exhibit 12.

However, we agree with claimant that the administrative law judge did not consider the entirety of Dr. Gaziano's opinion at 20 C.F.R. §718.202(a)(4), as he did not address Dr. Gaziano's statement that coal dust exposure made a "minor contribution" to claimant's COPD. Director's Exhibit 12; *see* Decision and Order at 7. In *Williams*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to establish the existence of legal pneumoconiosis, a claimant need only establish that coal dust exposure is a contributing cause of his or her obstructive impairment. *Williams*, 453 F.3d at 622, 23 BLR at 2-372. Because the administrative law judge did not consider whether Dr. Gaziano's opinion, in its entirety, satisfies the standard set forth in *Williams*, his Decision and Order does not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).<sup>9</sup> *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we vacate the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand this case to the administrative law judge for reconsideration of whether Dr. Gaziano's opinion, that coal dust exposure is a minor cause of claimant's COPD, is sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In light of our decision to vacate the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis, we must also vacate his finding that total disability due to legal pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must reconsider this issue in light of his findings at 20 C.F.R. §718.202(a)(4). In addition, the administrative law judge must base his findings on a consideration of all of the evidence of record,

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<sup>9</sup> The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).



including the evidence submitted with claimant's initial claim for benefits, in accordance with 20 C.F.R. §725.309(d).<sup>10</sup> See *White*, 23 BLR at 1-3.

Finally, if the administrative law judge again determines that the medical opinion evidence is insufficient to establish the existence of legal pneumoconiosis, he must remand this case to the district director for supplementation of Dr. Ranavaya's opinion. We agree with the Director that Dr. Ranavaya's statement, that it is "medically reasonable to conclude [that smoking] alone is a substantial contributing cause" of claimant's COPD, does not clearly address whether coal dust exposure played a role in claimant's COPD.<sup>11</sup> See 20 C.F.R. §725.406; *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). As the Director has conceded, therefore, the DOL examination provided by Dr. Ranavaya did not fulfill his obligation to provide claimant with a complete pulmonary evaluation. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; Director's Motion for Remand at 3 n.3.

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<sup>10</sup> The evidence submitted with claimant's initial claim includes the medical opinion of Dr. Younes, based on his February 18, 1994 examination of claimant. Director's Exhibit 1. Dr. Younes diagnosed chronic obstructive pulmonary disease, as evidenced by a severe obstructive ventilatory impairment, "secondary to" cigarette smoking and coal dust exposure. *Id.*

<sup>11</sup> The Director described Dr. Ranavaya's determination, that smoking "alone is a substantial contributing cause of this miner's lung disease," as "somewhat equivocal," and stated, "Dr. Ranavaya's report is therefore not complete." Director's Motion for Remand at 3 n.3.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on Modification is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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