BRB No. 05-0290 BLA

JIMMIE D. BUCHANAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/14/2006
	)	
RAG AMERICAN COAL COMPANY	)	
	)	
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 Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard Radzely, Solicitor of Labor; Allen H. Feldman, 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 Decision on Motion for Reconsideration (00-BLA-0498) of Administrative Law Judge Rudolf L. Jansen 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).

This case is before the Board for the second time. In his original Decision and Order, the administrative law judge found that this case involves a duplicate claim filed pursuant to 20 C.F.R. §725.309(d) (2000).[1] The administrative law judge credited claimant with twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's August 27, 1998 filing date. The administrative law judge found that medical opinion evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and therefore demonstrated a material change in conditions pursuant to Section 725.309(d) (2000).[2] The administrative law judge further found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Buchanan v. Rag American Coal Co.*, BRB No. 02-0648 BLA (Aug. 29, 2003)(unpub.). Initially, the Board held that the administrative law judge applied the proper material change in conditions standard. *Buchanan*, slip op. at 4-5. The Board also rejected employer's argument that the administrative law judge erred in assuming that claimant could contract legal pneumoconiosis after he stopped working in the mines. *Id*.

However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis and a material change in conditions, and remanded the case for him to reassess the medical opinion evidence and explain his findings. *Buchanan*, slip op. at 7-10. Specifically, the Board

---

[1] Claimant filed his initial claim for benefits on July 29, 1993. Director's Exhibit 34. By Decision and Order dated June 25, 1996, Administrative Law Judge J. Michael O'Neill denied benefits because the evidence did not establish either the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. 1993 Decision and Order at 5-10; Director's Exhibit 34. Judge O'Neill found that the record was "convincing that even if the claimant had never worked in surface coal mines but had worked in an unpolluted environment, he would be disabled today because of cigarette-smoke-induced emphysema and bronchitis, together with chronic back pain and somewhat limited range of motion." *Id.* The Board affirmed Judge O'Neill's finding that claimant did not establish the existence of pneumoconiosis, and affirmed the denial of benefits. *Buchanan v. Amax Coal Co.*, BRB No. 96-1415 BLA (Jul. 18, 1997)(unpub.). Claimant took no further action on his 1993 claim.

[2] Although 20 C.F.R. §725.309(d) has been revised, those revisions apply only to claims filed after January 19, 2001. 20 C.F.R. §725.2(c).

instructed the administrative law judge reconsider his determination to accord greater weight to the opinion of Dr. Houser based on his status as claimant's treating physician. *Buchanan*, slip op. at 7-8. The Board also instructed the administrative law judge to explain the weight he accorded to the opinions of Drs. Cohen and Hinkamp. *Buchanan*, slip op. at 9. In addition, the Board instructed the administrative law judge to reassess the opinions of Drs. Fino, Renn, and Tuteur, because he did not explain the basis for his finding that their opinions were not in accord with prevailing medical or scientific literature. *Buchanan*, slip op. at 10. Because the Board vacated the administrative law judge's finding that the existence of pneumoconiosis was established at Section 718.202(a)(4), the Board also vacated the finding that claimant's total disability was due to pneumoconiosis. *Buchanan*, slip op. at 11. Lastly, the Board instructed the administrative law judge to address employer's contention that claimant's entitlement to benefits was precluded by a preexisting, non-respiratory condition pursuant to *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). *Buchanan*, slip op. at 12.

On remand, the administrative law judge again found that the newly submitted medical evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Remand at 7-10. Specifically, the administrative law judge credited the opinions of Drs. Houser, Hinkamp, Cohen, and Carandang, that claimant is suffering from pneumoconiosis, over the contrary opinions of Drs. Fino, Tuteur, and Renn. Decision and Order on Remand at 11. Thus, the administrative law judge found that the newly submitted medical opinion evidence established a material change in conditions pursuant to Section 725.309(d) (2000). *Id*. The administrative law judge further found that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order on Remand at 13. Additionally, the administrative law judge found that the award of benefits was not precluded under *Vigna*, because the record did not contain evidence that claimant was totally disabled by a non-pulmonary or non-respiratory condition or disease before he contracted pneumoconiosis. Decision and Order on Remand at 4-5. Accordingly, the administrative law judge awarded benefits.

On reconsideration, the administrative law judge rejected employer's contention that an award of benefits is precluded pursuant to *Vigna*, agreeing with claimant that the applicability of the holding in *Vigna* was limited to 20 C.F.R. Part 727, and was no longer applicable in cases arising under Part 718, in light of the Seventh Circuit's holding in *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Decision on Motion for Reconsideration at 2. Alternatively, the administrative law judge reaffirmed his analysis and findings on this issue. *Id*. Furthermore, the administrative law judge rejected employer's other arguments with respect to his evaluation of the evidence. Decision on Motion for Reconsideration at 2-6. Thus, the administrative law judge denied employer's request for reconsideration.

On appeal, employer contends that the administrative law judge applied an erroneous material change in conditions standard pursuant to Section 725.309(d) (2000). Employer further asserts that the administrative law judge erred in assuming that pneumoconiosis is a latent and progressive disease. Furthermore, employer alleges that the administrative law judge erred in finding that the newly submitted medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer also contends that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). In addition, employer argues that benefits were precluded because claimant was totally disabled by a pre-existing, non-respiratory condition. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to reject employer's arguments that the administrative law judge applied an improper material change standard and that legal pneumoconiosis can never be latent. The Director also urges the Board to reject employer's argument that claimant's back injury precludes an award of benefits under *Vigna*.

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).

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

Where 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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), a miner "must show that something capable of making a difference has changed since the record closed on the first application." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09, 21 BLR 2-113, 2-127 (7th Cir. 1997)(*en banc*). Specifically, "a material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at

the time of the first application." *Sahara Coal Co. v. OWCP, [McNew],* 946 F.2d 554, 556, 15 BLR 2-227, 2-229 (7th Cir. 1991).

Claimant's first claim was denied because he did not establish the existence of pneumoconiosis. Therefore, the administrative law judge properly considered whether the evidence developed since the prior denial establishes that claimant has pneumoconiosis. Employer, in again challenging the administrative law judge's application of this standard, has not raised any new arguments. Because employer demonstrates no exception to the law of the case doctrine, the Board will not reconsider its decision on this issue. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

Additionally, employer again alleges that "legal" pneumoconiosis is not typically latent and progressive and that the administrative law judge therefore erred in failing to require claimant to prove that his chronic obstructive pulmonary disease (COPD) is a latent and progressive form of pneumoconiosis. The Board rejected this argument previously. *Buchanan*, slip op. at 5. Intervening case law supports the Board's holding. *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*). Because employer has not demonstrated any exception to the law of the case doctrine, we decline to reconsider our previous holding on this issue. *Brinkley*, 14 BLR at 1-150-51.

Pursuant to Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Houser, Cohen, Hinkamp, and Carandang that claimant suffers from COPD due to both coal dust exposure and cigarette smoking, over the contrary opinions of Drs. Fino, Renn, and Tuteur that claimant's COPD is due solely to smoking. The administrative law judge found that the opinions of Drs. Houser, Cohen, Hinkamp, and Carandang were well reasoned and documented and entitled to full weight, whereas the opinions of Drs. Fino, Renn, and Tuteur, were not well reasoned and, thus, entitled to little weight. Decision and Order on Remand at 11.

Employer contends that the administrative law judge erred in crediting Dr. Houser's opinion based on his status as claimant's treating physician, in violation of *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). In his Decision and Order on Remand, the administrative law judge found that Dr. Houser's opinion was "deserving of substantial weight," because Dr. Houser "is a pulmonary specialist, his opinion is well documented, reasoned and persuasive, and his report reflects his treatment of Claimant's pulmonary condition from 1992 to 2000." Decision and Order on Remand at 8. On reconsideration, however, the administrative law judge rejected employer's contention that he relied on Dr. Houser's status as treating physicians, and he clarified his findings regarding his weighing of Dr. Houser's opinion.

The administrative law judge stated that he did not accord greater weight to this opinion based on Dr. Houser's status as treating physician. Rather, he accorded greater weight to the opinion because it was well reasoned and documented, as well as based on Dr. Houser's specialty credentials, not only as a Board-certified pulmonologist, but also because of his position as the Medical Director of a Black Lung Clinic. Decision on Motion for Reconsideration at 4. These were reasonable and permissible credibility determinations. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We therefore reject employer's allegation that the administrative law judge erred in according full weight to Dr. Houser's opinion.

Furthermore, we affirm the administrative law judge's finding that the opinions of Drs. Cohen, Hinkamp, and Carandang were entitled to full weight. Decision and Order on Remand at 8-9; Director's Exhibits 9, 20; Claimant's Exhibits 1-2. Specifically, the administrative law judge found that the physicians based their diagnoses and conclusions on detailed work, smoking, and medical histories, claimant's symptoms, and a review of objective medical data, *i.e.*, pulmonary function studies and arterial blood gas studies, and that they cited to pertinent medical literature in support of their opinions. *Id*. Therefore, contrary to employer's contention, the administrative law judge did not err in relying on the opinions of Drs. Cohen, Hinkamp, and Carandang, as he reasonably found that these opinions were well reasoned and documented and, thus, entitled to full weight. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Moreover, the administrative law judge reasonably accorded additional weight to Dr. Cohen's opinion based on his expertise in pulmonary medicine and on his additional credentials as a specialist in the treatment of pneumoconiosis. Decision and Order on Remand at 9; *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-380 (7th Cir. 2001); *Dillon*, 11 BLR at 1-114.

There is merit, however, in employer's argument that the administrative law judge did not adequately explain his reasons for discounting the opinions of Drs. Fino and Tuteur.

The administrative law judge found Dr. Fino's opinion that claimant's COPD is due solely to smoking not to be well reasoned and accorded it less weight. Decision and Order on Remand at 9. In particular, the administrative law judge found that while Dr. Fino did not rule out that coal dust exposure can cause an obstructive impairment, he criticized the studies relied upon by the Department of Labor (DOL) in formulating the new regulations based on his conclusion that the studies suffered from "selection bias." Decision and Order on Remand at 9; Employer's Exhibit 4 at 31. Finding that the foundations of Dr. Fino's opinion diverged from what DOL found acceptable, the administrative law judge determined that Dr. Fino's entire opinion was not well reasoned and accorded it less weight. *Id.*

As employer correctly contends, the administrative law judge discredited Dr. Fino's entire opinion based on his views of the medical literature, but did not attempt to determine whether Dr. Fino based his specific conclusions on those views or whether his conclusions about this specific claimant were based on the evidence available in this case. As a result, the administrative law judge did not address Dr. Fino's specific discussion of why he concluded that the evidence in this case was that claimant's respiratory impairment was due solely to cigarette smoking. Employer's Exhibit 4 at 27-30. Therefore, we vacate the administrative law judge's finding with regard to Dr. Fino's opinion and remand the case for the administrative law judge to discuss fully the specifics of Dr. Fino's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Likewise, the administrative law judge discredited Dr. Tuteur's opinion based on similar reasoning, noting that Dr. Tuteur "suggests that a coal dust induced obstructive impairment cannot progress after the cessation of coal dust exposure." Decision and Order on Remand at 10; Employer's Exhibits 6, 13. We agree with employer that the administrative law judge did not adequately explain his finding that Dr. Tuteur's opinion, as a whole, is not credible. While the administrative law judge may discredit the opinion as based on the assumption that pneumoconiosis is not progressive after cessation of coal mine employment, he did not discuss whether Dr. Tuteur's opinion regarding claimant is based on this assumption. Specifically, the administrative law judge did not discuss the specifics of Dr. Tuteur's opinion regarding claimant and his bases for determining that claimant's totally disabling respiratory impairment was due solely to smoking. Employer's Exhibit 6 at 4, 7. We therefore vacate the administrative law judge's finding regarding Dr. Tuteur's opinion and remand the case for the administrative law judge to discuss fully the specifics of Dr. Tuteur's opinion. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

However, we affirm the administrative law judge's finding that Dr. Renn's opinion that claimant's chronic bronchitis and emphysema were due solely to smoking, is entitled to no weight because Dr. Renn did not explain his conclusions. Decision and Order on Remand at 9-10; Employer's Exhibit 8. The administrative law judge permissibly found that although Dr. Renn set forth the medical evidence and objective studies he relied upon, and discussed some of the medical literature, he did not adequately explain how this evidence supported his conclusion that claimant's respiratory impairment was due solely to smoking. Decision and Order on Remand at 9-10; Employer's Exhibit 8; *see Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR 1-46; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Substantial evidence supports the administrative law judge's finding. Employer's Exhibit 8.

Consequently, we vacate the administrative law judge's Section 718.202(a)(4) findings and remand the case for the administrative law judge to reassess the medical

opinions of Drs. Fino and Tuteur to determine whether the opinions are reasoned and documented. In particular, the administrative law judge must provide a basis for finding that any particular physician's views are not in accord with the medical and scientific literature and then discuss how that impacted the physician's opinion with regard to this specific claimant. If, on remand, the administrative law judge finds the opinions of Drs. Fino and Tuteur credible, he must then weigh these opinions with the opinions of Drs. Houser, Cohen, Hinkamp, and Carandang, to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). 20 C.F.R. §§718.201, 718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). In light of our decision to vacate the administrative law judge's finding pursuant to Section 718.202(a)(4), we also vacate the finding that the evidence establishes that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c).

Lastly, employer contends that the administrative law judge erred in finding that benefits are not precluded under *Vigna*. Employer asserts that this finding conflicts with the administrative law judge's recitation of the evidence wherein he notes that Dr. Rupert stated that claimant was capable of performing "medium" work as a result of his back injury. Employer's Brief at 35-36. In addition, employer contends that Judge O'Neill's prior finding has already established that claimant was totally disabled by the back injury and, therefore, precludes claimant's entitlement in this duplicate claim. *See* n.1, *supra*. These contentions lack merit.

On remand, the administrative law judge found that there was no evidence that claimant had a pre-existing, totally disabling back condition. Decision and Order on Remand at 5. On reconsideration, the administrative law judge also agreed with claimant that *Vigna* did not apply in this case as the holding was overruled by the recent Seventh Circuit decision in *Shores*, 358 F.3d 486, 23 BLR 2-18. Decision on Motion for Reconsideration at 2. In the alternative, he reaffirmed his finding that even if *Vigna* is applicable, the record contained no evidence that clamant was totally disabled by a pre-existing back condition.

Initially, we note that subsequent to the administrative law judge's decisions, the Seventh Circuit court held that *Vigna* is applicable to claims such as this one, filed prior to January 19, 2001. *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005). Thus, we do not affirm the administrative law judge's finding that *Vigna* was inapplicable as a matter of law. However, contrary to employer's contention, the administrative law judge rationally found that the record contains no evidence that claimant had a pre-existing disability that would preclude entitlement.

A review of the record indicates that while claimant was treated for various back ailments, there is no medical opinion stating that he was totally disabled by a back ailment prior to becoming totally disabled by his respiratory impairment. Dr. Rupert, an orthopedist who treated claimant for back troubles in 1991-92, opined that after rehabilitation claimant was able to perform medium work. Director's Exhibit 34. However, as the administrative law judge found, Dr. Rupert also stated that these restrictions did not take into consideration any respiratory impairment. Decision and Order on Remand at 5; Director's Exhibit 34. Concurrently, Dr. Houser stated that claimant was precluded from doing medium or heavy work due to his COPD, with additional limitations attributable to his back ailments. Director's Exhibit 34. None of the recent medical opinions concludes that claimant is totally disabled solely from a back ailment, but attribute his disability to a respiratory impairment with contribution from his back problems. Thus, the administrative law judge reasonably found that the evidence does not establish a pre-existing, totally disabling back ailment.

In addition, contrary to employer's contention, Judge O'Neill's prior finding that claimant was disabled both by a respiratory impairment and chronic back pain does not preclude entitlement in this claim. First, as the Director notes, if claimant establishes a material change in conditions, the findings from his prior denied claim have no preclusive effect in this claim. *See Spese*, 117 F.3d at 1008-09, 21 BLR at 2-127. Second, Judge O'Neill and the current administrative law judge found that claimant is totally disabled by both a respiratory impairment and by a back condition. The Seventh Circuit court has explained that concurrent, independent disabilities do not preclude entitlement. *Shores*, 358 F.3d at 496, 23 BLR at 2-36. Therefore, in this case, benefits are not precluded under *Vigna*.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge