

BRB No. 08-0221 BLA

W.H.)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 11/26/2008
)	
KEYSTONE COAL MINING)	
CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

W.H., Butler, Pennsylvania, *pro se*.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for
employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY
and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order -
Denying Benefits (2006-BLA-6126) of Administrative Law Judge Daniel L. Leland
rendered 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 The

¹ Claimant filed an initial claim for benefits on April 17, 1996, which was denied
by the district director on September 18, 1996 for failure to establish any of the requisite
elements of entitlement. Director's Exhibit 1. Claimant filed a subsequent claim on
August 2, 2005. Director's Exhibit 3. The district director issued a proposed decision
and order awarding benefits on May 30, 2006. Director's Exhibit 41. Employer
requested a hearing, which was held on August 26, 2006. The administrative law judge

administrative law judge credited claimant with thirty-one years and seven months of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant was totally disabled by a respiratory or pulmonary impairment, he found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge, however, found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to issue a substantive response unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

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 "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); *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). In this case, the administrative law judge determined that claimant established a change in an applicable condition of entitlement at Section

issued his Decision and Order – Denying Benefits on November 5, 2007, which is the subject of this appeal.

² This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

725.309(d).³ Thus, the administrative law judge was required to weigh all of the record evidence relevant to claimant's entitlement to benefits. *White*, 23 BLR at 1-3.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis. 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 one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In this case, after summarizing the medical evidence, the administrative law judge concluded:

Although a slight preponderance of the x-ray interpretations is positive for pneumoconiosis, the CT scans do not demonstrate pneumoconiosis. CT scans are a more sophisticated method of determining the existence of pneumoconiosis and the May 2, 2006 CT scan failed to show it.

Decision and Order at 7. The administrative law judge also found the opinions of Drs. Fino and Renn, that claimant does not have clinical or legal pneumoconiosis, to be more credible than the contrary but "unsupported" opinions of Drs. Cohen, Celko, and Fiorina, that claimant suffers from pneumoconiosis. *Id.* Thus, the administrative law judge found that claimant failed to satisfy his burden of proving the existence of pneumoconiosis. Decision and Order at 8.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we are compelled to vacate the denial of benefits as the administrative law judge failed to adequately explain how he resolved the conflict in the evidence as to the existence of pneumoconiosis. The Administrative Procedure Act (APA) provides that every adjudicatory decision must 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. . . ." See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). In this case, the administrative law judge did not comply with the APA as he failed to render specific findings under each of the subsections of Section 718.202(a)(1)-(4), explaining in detail

³ We affirm the administrative law judge's findings that claimant established thirty-one years and seven months of coal mine employment, and that the new evidence established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as these findings are neither prejudicial to claimant nor challenged by employer on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

what weight he accorded the positive and negative evidence for pneumoconiosis, and the basis for his credibility determinations. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge credited the “negative CT scan evidence” over the positive x-ray interpretations in concluding that claimant does not have clinical pneumoconiosis. Decision and Order at 7. The administrative law judge, however, did not cite to evidentiary support in the record for his conclusion that CT scans are more reliable than x-rays for diagnosing the presence or absence of pneumoconiosis. The regulations provide for the consideration of CT scans as “other medical evidence” under 20 C.F.R. §718.107. Section 718.107(b) requires that the party submitting other medical evidence, such as a CT scan, must demonstrate that “the test or procedure is medically acceptable and relevant to establishing or refuting a claimant’s entitlement to benefits.” 20 C.F.R. §718.107(b). Thus, when a party seeks to admit a CT scan, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has established the medical acceptability of that test for establishing the presence or absence of pneumoconiosis. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff’d on recon.*, 24 BLR 1-1 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *aff’d on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Because the administrative law judge did not render any findings as to the medical acceptability of the CT scan evidence, as required by Section 718.107(b), we vacate the administrative law judge’s finding that claimant failed to establish the existence of clinical pneumoconiosis pursuant to Sections 718.202(a)(1), (4).⁴

Furthermore, we conclude that the administrative law judge erred in failing to properly consider whether claimant established the existence of legal pneumoconiosis. In this case, Dr. Celko performed an examination of claimant at the request of the Department of Labor and diagnosed pneumoconiosis due to coal dust exposure, sleep disturbance due to obesity, a mixed pulmonary function abnormality due to obesity and coal dust exposure, and chronic asthmatic bronchitis, which he attributed to coal dust exposure. Director’s Exhibit 9. Dr. Celko opined that the miner was totally disabled

⁴ As noted by the administrative law judge, there are two readings of a CT scan dated May 2, 2006. Decision and Order at 3. Dr. Gohel, a Board-certified radiologist and B reader, opined that the scan may show pneumoconiosis, while Dr. Hayes, a Board-certified radiologist and B reader, opined that the CT scan was negative for pneumoconiosis. Claimant’s Exhibit 6; Employer’s Exhibit 2. On remand, if the CT scan evidence is found to be medically acceptable pursuant to 20 C.F.R. §718.107(b), the administrative law judge must explain how he resolved the conflict in the CT scan evidence.

based on the results of his pulmonary function testing, and testified that the cause of claimant's respiratory disability was "multifactoral" and included his obesity and coal dust exposure. Director's Exhibit 19.

In weighing Dr. Celko's opinion, the administrative law judge acknowledged that Dr. Celko attributed the miner's chronic asthmatic bronchitis to coal dust exposure, but found that Dr. Celko "did not provide a well-reasoned opinion for his findings." Decision and Order at 7. The administrative law judge further stated

[Dr. Celko] concluded that the restrictive defect shown on the pulmonary function studies is unquestionably caused by the miner's obesity and he acknowledged that the miner's obesity, in and of itself, could prevent claimant from returning to his last coal mine job. I therefore give little weight to his diagnosis of either clinical or legal pneumoconiosis.

Id.

We are unable to discern from the administrative law judge's discussion of Dr. Celko's opinion, the basis for the administrative law judge's finding that Dr. Celko's diagnosis of legal pneumoconiosis is not well-reasoned. Furthermore, we note that while Dr. Celko testified that claimant's restriction was "totally related to his obesity," when asked whether all of claimant's pulmonary function abnormalities were caused by his obesity, Dr. Celko stated that they were not, and further opined that pneumoconiosis significantly contributed to claimant's respiratory condition. Director's Exhibit 19 at 37-38. The administrative law judge's discussion of Dr. Celko's opinion suggests that because the doctor believed claimant's obesity accounted for his reduced pulmonary function studies and rendered him totally disabled, it was unnecessary to discuss further the doctor's diagnosis of legal pneumoconiosis. That is not true. A "respiratory or pulmonary impairment [which is] . . . substantially aggravated by [] dust exposure in coal mine employment" is legal pneumoconiosis. 20 C.F.R. §718.201(b).⁵ Because the administrative law judge has not fully addressed whether Dr. Celko's opinion is sufficient to establish the existence of legal pneumoconiosis, we vacate the administrative law judge's credibility finding, and remand this case for further consideration of Dr. Celko's opinion at Section 718.202(a)(4). *See* C.F.R. §718.201; *Wojtowicz*, 12 BLR at 1-165; Director's Exhibit 19 at 30-31, 38, 40-41.

Similarly, we hold that the administrative law judge erred in rejecting Dr. Cohen's diagnosis of legal pneumoconiosis on the ground that Dr. Cohen "was dismissive of the

⁵ The regulations make plain that a miner who has a totally disabling respiratory impairment unrelated to coal mine employment is entitled to Black Lung benefits if his pneumoconiosis materially worsens his respiratory impairment. *See* 20 C.F.R. §718.204(c)(i), (ii).

effect of [claimant's] morbid obesity on his pulmonary condition.” Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Contrary to the administrative law judge's finding, Dr. Cohen specifically diagnosed that claimant was morbidly obese and agreed that obesity was responsible for at least half of the restrictive impairment demonstrated on the pulmonary function testing. Employer's Exhibit 13 at 54-57. However, Dr. Cohen also specifically opined that coal dust exposure was a significant contributing factor to claimant's restrictive respiratory condition. *Id.* at 55, 67. Because the administrative law judge has not adequately explained the basis for his conclusion that Dr. Cohen's opinion is not well-reasoned, we vacate the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis.⁶ *Wojtowicz*, 12 BLR at 1-165. Thus, we vacate the administrative law judge's denial of benefits and remand this case for further consideration at Section 718.202(a)(4)⁷

Because the administrative law judge found that claimant did not have pneumoconiosis, he also determined that claimant was unable to establish that he is totally disabled by pneumoconiosis, as required by Section 718.204(c). Decision and Order at 8. In light of our decision to vacate the administrative law judge's findings at Section 718.202(a), we also vacate his findings pursuant to Section 718.204(c) and remand this case for further consideration on the issue of disability causation as necessary.

⁶ The administrative law judge permissibly assigned less weight to the opinion of claimant's treating physician, Dr. Fiorina, as to whether claimant has clinical or legal pneumoconiosis, since the administrative law judge found that Dr. Fiorina treated claimant for non-respiratory conditions and the doctor admitted that he “knows very little if anything about pneumoconiosis or pulmonary disease.” Decision and Order at 7; *see* 20 C.F.R. §718.104(d); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

⁷ We note that while the evidence suggests that claimant may have a respiratory condition that is partially responsive to a bronchodilator, the administrative law judge has failed to properly consider whether claimant has any fixed respiratory condition due to coal dust exposure, which could meet the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2). *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.).

To summarize, the administrative law judge on remand must weigh all of the record evidence relevant to claimant's entitlement to benefits.⁸ He should first weigh the x-ray evidence of record and determine whether it supports a finding of pneumoconiosis under Section 718.202(a)(1). The administrative law judge should then conduct the same inquiry with respect to the medical opinion evidence pursuant to Section 718.202(a)(4).⁹ In assessing the weight to accord the conflicting opinions as to the existence of clinical and legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the rationale for their conclusions, and the documentation underlying their medical judgments. See *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). The administrative law judge must consider whether the CT scan readings are admissible under Section 718.107(b), and if so, he must render a finding to resolve the conflict in the interpretations. If the administrative law judge determines that the existence of clinical or legal pneumoconiosis, or both, has been demonstrated under either Section 718.202(a)(1)

⁸ The administrative law judge did not discuss the evidence developed in conjunction with claimant's prior claim, which is contained at Director's Exhibit 1, and is instructed to do so on remand. See 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

⁹ The administrative law judge should examine the underlying rationale provided by Drs. Fino and Renn for their opinions that claimant's respiratory condition is unrelated to coal dust exposure. Dr. Fino diagnosed that claimant has no respiratory condition due to coal dust exposure, but he also conceded that if claimant's more recent x-ray evidence was positive for pneumoconiosis, he would agree that claimant's FVC and FEV-1 values were consistent with coal dust exposure. Employer's Exhibit 14 at 16. Because 20 C.F.R. §718.202(a)(4) provides for a diagnosis of legal pneumoconiosis "notwithstanding a negative x-ray," the administrative law judge must determine whether Dr. Fino has provided a reasoned opinion as to whether claimant suffers from legal pneumoconiosis as defined at Section 718.201(a)(2). See 20 C.F.R. §§718.201(a)(2); 718.202(a)(4); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002). Furthermore, to the extent that Dr. Renn opined that claimant does not have industrial bronchitis due to coal dust exposure, on the grounds that claimant's respiratory symptoms worsened after he left coal mine employment, the administrative law judge should consider whether Dr. Renn's opinion is consistent with Section 718.201(c), which states that pneumoconiosis "is recognized as latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); Employer's Exhibit 15 at 28-29.

or (4), he must then determine whether the evidence, when considered as a whole, is sufficient to establish the existence of the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Furthermore, if the administrative law judge concludes that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), the administrative law judge must then consider whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and whether claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In addressing each of the issues of entitlement, the administrative law judge is required to weigh all of the relevant evidence of record and explain the basis for his findings in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge