BRB No. 07-0886 BLA

T.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 06/26/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Appeals Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (06-BLA-6082) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim[1] 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). The administrative law judge credited claimant with at least twenty-three years of coal mine employment[2] and found the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b), based on the parties' stipulations, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge noted that claimant's prior claim had been finally denied for failure to establish any element of entitlement. Because the parties stipulated to total disability, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of entitlement, the administrative law judge initially found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge further found, however, that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203, and that his total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that claimant is precluded from establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on the findings made in his prior denied claim. Additionally, employer contends that the administrative law judge erred in according determinative weight to the medical opinion of Dr. Rasmussen over the contrary opinions of Drs. Castle and Hippensteel at 20 C.F.R. §§718.202, 718.203, and 718.204. Claimant has not responded in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a

[1] Claimant's initial claim for benefits, filed on February 19, 1992, was finally denied on June 17, 2003 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the instant claim on August 22, 2005. Director's Exhibit 3.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

limited response, urging the Board to reject employer's contention that claimant is precluded from establishing a change in an applicable condition of entitlement.[3]

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 into the Act 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).

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing any element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Initially, employer contends that the administrative law judge misidentified the element of entitlement that was previously adjudicated against claimant for purposes of 20 C.F.R. §725.309(d). Specifically, employer argues that claimant failed to establish a link between pneumoconiosis and a totally disabling respiratory impairment in his prior, finally-denied claim, and it has therefore been irrevocably established that claimant's

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-three years of coal mine employment, but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). We additionally affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

respiratory impairment is unrelated to his coal mine employment. Thus, according to employer, claimant cannot establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer's Brief at 5-6. The Director responds that the issue of total disability was decided against claimant in his prior claim, making total disability an applicable condition of entitlement in the current claim. Director's Brief at 1-2. We agree with the position taken by the Director.

Contrary to employer's characterization, claimant's prior claim was denied for failure to establish any element of entitlement. Director's Exhibit 1. Specifically, claimant previously "fail[ed] to establish the presence of Disease Disability and Causality as defined in the Act." *Id*. Therefore, claimant could demonstrate a change in an applicable condition of entitlement by demonstrating, with new evidence, that he is now totally disabled. See 20 C.F.R. §725.309(d)(2). Because employer now concedes the existence of a totally disabling respiratory impairment, the administrative law judge reasonably found that claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Rutter*, 86 F.3d at 1365, 20 BLR at 2-235. The finding pursuant to 20 C.F.R. §725.309(d) is therefore affirmed.

Turning to the merits of entitlement, pursuant to 20 C.F.R. §718.202(a), the administrative law judge initially found that although the preponderance of the x-ray, computerized tomography (CT) scan and medical opinion evidence did not establish the existence of clinical pneumoconiosis, the more probative medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema due in part to coal dust exposure. Decision and Order at 11. The administrative law judge explained that he was crediting the "better reasoned medical opinions as to legal pneumoconiosis, [because] [x]-ray and CT evidence is not as significant as other clinical evidence in cases involving legal pneumoconiosis." *Id*.

Specifically, in finding the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three medical opinions. Dr. Rasmussen, who performed the Department of Labor complete pulmonary evaluation, diagnosed COPD/emphysema caused by coal dust exposure and cigarette smoking, Director's Exhibit 13, while Drs. Hippensteel and Castle both opined that claimant's respiratory impairment was not related to coal dust exposure.[4] Director's

[4] Dr. Hippensteel examined claimant on March 2, 2006, and diagnosed asthmatic bronchitis as the most likely cause of claimant's impairment. Dr. Hippensteel explained that he did not believe claimant's bronchitis was caused by coal dust exposure, because claimant had a reversible, purely obstructive impairment with a normal diffusion that was "not typical or suggestive of coal workers' pneumoconiosis." DX 8 at 17-18.

Exhibit 19; Employer's Exhibit 4. Finding Dr. Rasmussen's opinion to be "the most rational and cogent opinion as to cause and effect in this case," the administrative law judge credited the opinion of Dr. Rasmussen over the contrary opinions of Drs. Hippensteel and Castle. Decision and Order at 12.

Employer contends that the administrative law judge erred in crediting Dr. Rasmussen's diagnosis of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge failed to adequately explain his determination to credit Dr. Rasmussen's opinion or provide valid reasons for discrediting the opinions of Drs. Hippensteel and Castle. Employer's Brief at 9-12. Based on its allegations of error, employer contends that the administrative law judge's findings at Sections 718.202(a)(4), 718.203 and 718.204(c) must be vacated. We agree.

The administrative law judge failed to adequately explain his determination to credit Dr. Rasmussen's opinion. In support of his decision, the administrative law judge stated that Dr. Rasmussen was a qualified expert in the field of coal workers' pneumoconiosis, that he cited several journal studies to substantiate his conclusions, and that his opinion was supported by "objective medical evidence such as blood gas studies, pulmonary function studies, physical performance tests, physical examination, and medical and work histories." Decision and Order at 12. Although these reasons support a determination that Dr. Rasmussen's opinion is documented and reasoned, the administrative law judge failed to explain why he found Dr. Rasmussen's opinion to be more persuasive than the opinions of Drs. Hippensteel and Castle. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-336-37 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

We further agree that the administrative law judge failed to state a valid reason for discrediting the contrary medical opinions of Drs. Hippensteel and Castle, that claimant does not have legal pneumoconiosis. In discounting their opinions, the administrative

---

Dr. Castle reviewed the evidence of record and submitted a consultative report. Employer's Exhibit 4. Dr. Castle explained in his deposition that claimant was totally disabled due to "bronchial asthma and his obesity hypoventilation syndrome and obstructive sleep apnea syndrome." Employer's Exhibit 7 at 11. Dr. Castle opined that because "[coal dust exposure] has not been found to cause bronchial asthma," it was his opinion that claimant's disabling pulmonary impairment was not caused by coal dust exposure. *Id.* at 11-13.

law judge stated that both Drs. Hippensteel and Castle gave undue emphasis to the miner's negative x-ray readings, and that their respective diagnoses of bronchial asthma and chronic bronchitis were "competent of being legal pneumoconiosis." Decision and Order at 12. The administrative law judge additionally noted that Dr. Castle's opinion was entitled to less weight because he did not examine claimant. *Id.* Employer correctly points out, however, that both Drs. Castle and Hippensteel interpreted claimant's x-rays as negative, and that this is consistent with the administrative law judge's findings at 20 C.F.R. §718.202(a)(1). Decision and Order at 11; Employer's Brief at 12. Further, both physicians explained that their opinions as to the etiology of claimant's respiratory impairment were based on physical examinations, objective studies, and claimant's symptoms. Employer's Brief at 12; Employer's Exhibit 7 at 7-13; Employer's Exhibit 8 at 13-14. Thus, substantial evidence does not support the administrative law judge's finding that the physicians placed "undue emphasis" on claimant's negative x-rays. Moreover, under Part 718, claimant has the burden of proving every element of entitlement by a preponderance of evidence. *See Anderson*, 12 BLR at 1-112. Because no physician of record attributed claimant's asthma, or bronchitis, to coal dust exposure, by presuming that claimant's asthma and bronchitis were legal pneumoconiosis, the administrative law judge impermissibly substituted his opinion for that of a medical professional and shifted the burden of proof to employer. *See Marcum v. Director, OCWP*, 11 BLR 1-23, 1-24 (1987). Finally, because a non-examining physician's opinion may constitute substantial evidence, the fact that Dr. Castle did not examine claimant is not a valid reason, in and of itself, to discredit his opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335, *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

As the administrative law judge has not provided a sufficient explanation for his weighing of the contrary medical opinions of record, we vacate his findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and remand the case for further consideration of the relevant evidence. On remand, the administrative law judge must consider the physicians' respective qualifications,[5] the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative

[5] The record reflects that Drs. Castle and Hippensteel are Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibit 4; Director's Exhibit 19, while Dr. Rasmussen is Board-certified in Internal Medicine. Director's Exhibit 13.

law judge must explain his reasons for both crediting and discrediting the medical opinion evidence.[6] *Hicks*, 138 F.3d at 533-34, 21 BLR at 2-336-37.

If, on remand, the administrative law judge again finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), he must then weigh together all of the evidence relevant to Section 718.202(a) in determining whether claimant suffers from pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred in discrediting the opinions of Drs. Castle and Hippensteel, that claimant's total disability is unrelated to pneumoconiosis, because these doctors did not diagnose pneumoconiosis. Furthermore, employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion that claimant's total disability is due to pneumoconiosis, asserting that it is not sufficient to establish disability causation. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must reconsider disability causation under 20 C.F.R. §718.204(c), if reached, in accordance with the proper legal standard in the Fourth Circuit. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990). If, on remand, the administrative law judge again finds that the existence of pneumoconiosis is established, he may have the discretion to accord less weight to the disability causation opinions of physicians who do not diagnose pneumoconiosis.

[6] If, on remand, the administrative law judge properly finds the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), he will necessarily have determined the etiology of the pneumoconiosis, obviating the need for a separate inquiry under Section 718.203(b). *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

Collins v. Pond Creek Mining Co., 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-373, 2-383-84 (4th Cir. 2002); *Compton*, 211 F.3d at 214, 22 BLR at 2-177; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 115-116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, 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

_____
JUDITH S. BOGGS
Administrative Appeals Judge