

BRB No. 07-0246 BLA

E.E.C.)
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 Claimant-Respondent)
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 v.)
)
 ISLAND CREEK COAL COMPANY) DATE ISSUED: 11/30/2007
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 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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-5526) of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent 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). Claimant filed his subsequent claim on September 16, 2003.¹ Director's Exhibit 5. Based on the parties' stipulation, the

¹ Claimant filed an initial claim for benefits on March 1, 1982, which was denied by the district director on May 13, 1982 for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on September 27, 1983, which was denied by Administrative Law Judge Leonard N.

administrative law judge credited claimant with twenty-seven years of coal mine employment. The administrative law judge determined that the newly submitted evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, based on his consideration of the new evidence, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge then awarded benefits.

On appeal, employer challenges the administrative law judge's findings at Sections 718.202(a)(1), (4), and 718.204(c), asserting that the administrative law judge's Decision and Order fails to comply with the Administrative Procedure Act (APA), 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 30 U.S.C. §932(a). Employer specifically contends that the administrative law judge failed to explain how he resolved the conflict in the medical opinion evidence on the issue of whether claimant suffers from chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.²

Lawrence on May 25, 1988. Director's Exhibit 2. Judge Lawrence found the evidence insufficient to establish the existence of pneumoconiosis and total disability. *Id.* Claimant appealed to the Board, but the case was later remanded to the district director for consideration of claimant's petition for modification, [*E.C.*] v. *Island Creek Coal Co.*, BRB No 88-1276 BLA (Order) (Feb. 28, 1990) (unpub.). *Id.* Administrative Law Judge George A. Fath issued a Decision and Order – Denying Benefits on September 29, 1993, finding that claimant failed to establish either a change in conditions or a mistake in a determination of fact with respect to the denial of his claim pursuant to 20 C.F.R. §725.310 (2000). *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Fath's denial of benefits, [*E.C.*] v. *Island Creek Coal Co.*, BRB Nos. 94-0310 BLA and 94-0310 BLA-A (May 30, 1996) (unpub.). *Id.* Claimant filed his third claim on July 9, 1998, which was administratively closed by reason of abandonment. Director's Exhibit 3. Claimant took no further action with regard to his 1998 claim until he filed this subsequent claim on September 16, 2003. Director's Exhibit 5.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment and, thus that claimant established a change in an applicable condition of entitlement

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.³ 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).

After reviewing the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we agree with employer that the administrative law judge's award of benefits must be vacated because he failed to adequately explain his findings under 20 C.F.R. §718.202(a). The APA 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 on the record." 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), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In this case, the administrative law judge did not make separate findings under each subsection of 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant established the existence of pneumoconiosis. Instead, the administrative law judge "reviewed all of the evidence relating to pneumoconiosis together" and found that claimant suffered from legal pneumoconiosis. In addressing whether claimant suffered from legal pneumoconiosis, the administrative law judge considered the conflicting medical opinions of Drs. Mullins, Cohen, Rasmussen, Zaldivar and Renn as to the etiology of claimant's COPD. As noted by employer, there is a controversy in this case among these physicians as to whether the effects of coal mine dust exposure and the effects of cigarette smoking are progressive. Employer's Brief at 10. Aside from general conclusions, the administrative law judge did not provide a basis for accepting Dr. Rasmussen's statement that "you wouldn't expect progressive impairment in lung function as a consequence of [claimant's] previous cigarette smoking." Employer's Exhibit 1 at 21. In rejecting the opinions of Drs. Zaldivar and Renn, that claimant's COPD was not due to coal dust exposure, the administrative law judge noted claimant's work history and Dr. Rasmussen's testimony that smoking-induced lung disease is not progressive. The administrative law judge, however, offered

pursuant to 20 C.F.R. §725.309(d). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

no explanation as to why he considered Dr. Rasmussen's opinion to be more credible. After summarizing Dr. Rasmussen's findings, the administrative law judge summarily stated:

I credit Dr. Mullins, Dr. Cohen and Dr. Rasmussen and accept that based on current medical knowledge, Dr. Rasmussen explained in his deposition that "you wouldn't expect progressive impairment in lung function as a consequence of [Claimant's] previous cigarette smoking." EX 1 at 21. "On the other hand, the effect of coal mine dust exposure can persist indefinitely even after termination ceases, so the fact that he did not become symptomatic until after he'd left the coal mines is quite consistent with coal mine-induced lung disease." *Id.* "That [i]s one clear reason [why] I believe [coal mine dust had an effect] because [Claimant] stopped both smoking and mining at the same time and yet he's progressed, and that's more characteristic of coal mine dust than cigarette smoke." *Id.* at 36.

Decision and Order at 11-12.

We consider the administrative law judge's analysis to be too cursory to satisfy the requirements of APA. *See Wojtowicz*, 12 BLR at 1-165. We agree with employer that in crediting Dr. Rasmussen's opinion, that coal dust-induced lung diseases are progressive, while smoking-induced lung diseases are not, the administrative law judge ignored Dr. Renn's testimony that, once there is permanent damage to the lungs caused by cigarette smoking (COPD and emphysema), a cigarette-induced lung disorder may be progressive even after cessation of smoking.⁴ Furthermore, as noted by employer, even Dr. Cohen's opinion, that claimant has COPD due in part to coal dust exposure, fails to support Dr. Rasmussen's position, that a smoking-induced lung disease may not be progressive, insofar as Dr. Cohen stated that the effects of coal mine dust and tobacco smoke are indistinguishable. Employer's Brief at 15, citing Claimant's Exhibit 1-A. Moreover, in rejecting the opinions of Drs. Renn and Zaldivar, the administrative law judge has failed

⁴ Dr. Rasmussen stated that the primary reason he attributes claimant's chronic obstructive lung disease to coal mine dust exposure is that claimant's pulmonary condition progressed after he stopped working in the mines and stopped smoking. Employer's Exhibit 1 at 35-36. Dr. Rasmussen, however, also stated: "Now, you would usually expect the effects of cigarette smoking to subside except for whatever permanent damage has been caused. I have expressed my opinion that may not be actually 100 [percent] true, but that's basically the status of people's knowledge now, so that you wouldn't expect progressive impairment in lung function as a consequence of his previous cigarette smoking." Employer's Exhibit 1 at 20-21.

to consider that these doctors specifically explain, with references to the objective medical evidence, why they attributed claimant's COPD to smoking and other risk factors, but not to coal dust exposure. In reaching a determination as to the presence or absence of pneumoconiosis, the administrative law judge must evaluate the credibility of the medical experts based on their interpretation of the record evidence particular to this claimant. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Because the administrative law judge did not adequately explain the basis for his credibility determinations at Section 718.202(a)(4), we vacate his finding that claimant established the existence of legal pneumoconiosis, and remand the case for further consideration.

In addition, the administrative law judge has not undertaken a proper analysis of all of the medical evidence in the record relevant to claimant's entitlement to benefits. This case involves a subsequent claim. Claimant's prior claim was denied because he failed to establish any of the requisite elements of entitlement. 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).

Because claimant's initial claim for benefits was denied for failure to establish any of the requisite elements of entitlement, claimant was required to prove, based on the newly submitted evidence, either that he has pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment. The administrative law judge found that the newly submitted evidence was sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. He therefore found that claimant demonstrated a change in an applicable condition of entitlement. However, after reaching his Section 725.309 determination, the administrative law judge was also required to review all of the evidence, including the evidence developed in conjunction with the prior claims, in determining whether claimant was entitled to benefits. *See White*, , 23 BLR 1-3. He did not perform that requisite analysis.

Thus, on remand, we instruct the administrative law judge to weigh all of the record evidence on the issue of whether claimant established the existence of pneumoconiosis. He should make separate findings under Section 718.202(a)(1)-(4), and then weigh all of the evidence together at Section 718.202(a) to determine whether claimant has satisfied his burden of proof. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 164 (4th Cir. 2000). Thereafter, if necessary, the administrative law judge must weigh all of the record evidence to determine whether claimant is able to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002);

Toler v. Eastern Associated Coal Co., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). In considering on remand whether claimant is entitled to benefits, we specifically instruct the administrative law judge to explain the bases for his findings, and provide a rationale for all of his credibility determinations in accordance with the APA. See *Wojtowicz*, 12 BLR at 1-165. The administrative law judge must also specifically address whether each physician's opinion is reasoned and documented,⁵ and sufficient to satisfy claimant's burden of establishing his entitlement to benefits.⁶ *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).

⁵ A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Id.*

⁶ To be entitled to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is 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