BRB No. 05-0606 BLA

RICHARD A. KELLY		
Claimant-Petitioner	)	
v.	)	
PBS COALS, INCORPORATED	)	
and	)	DATE ISSUED_____
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
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.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein and Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (04-BLA-5057) of Administrative Law Judge Daniel L. Leland rendered on a duplicate 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). Employer stipulated to eighteen years of coal mine employment at the hearing. Tr. at 6. The administrative law judge found that the evidence was insufficient to establish the existence of clinical (medical) or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability due to pneumoconiosis pursuant to 20 C.F.R §718.204(c).[2] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability due to pneumoconiosis pursuant to Section 718.204(c). Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant argues that the administrative law judge erred by according little weight to the opinions of Drs. Schaaf and Begley because they did not take into consideration claimant's histories of smoking and surface mining ending in 1996, while Dr. Fino did. Dr.

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[1] Claimant's first claim was filed on February 26, 1996, and denied by the district director on June 12, 1996, because claimant did not establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1.

[2] The administrative law judge was not required to determine whether a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d) because employer conceded at the hearing that claimant has a respiratory disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 5 n. 3; Tr. at 5-6; Emp. Post-hearing Br. at 1-2.

[3] Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5 n. 3, 6; Director's Exhibits 1, 18, 19; Claimant's Exhibits 1, 2, 4, 6; Employer's Exhibits 2, 3, 5.

Schaaf opined that claimant has chronic bronchitis related to his smoking and coal mine employment, and that claimant's smoking and coal mine employment histories are "substantial and significant" contributory causes to claimant's pulmonary disability and chronic bronchitis. Claimant's Exhibits 4 at 3; 9 at 21-23. Dr. Begley opined that claimant has chronic bronchitis and chronic obstructive pulmonary disease related to his coal dust exposure and tobacco use, which play a "substantial" role in claimant's quite severe pulmonary impairment. Claimant's Exhibit 10 at 8-11, 13-14. Dr. Fino diagnosed severe chronic obstructive pulmonary disease with chronic obstructive bronchitis and emphysema solely due to cigarette smoking, and opined that claimant has a cigarette smoking-induced respiratory impairment and disability. Exhibit 2 at 5, 6 of Employer's Exhibit 5; Employer's Exhibit 5 at 25-26.

The administrative law judge provided three reasons for according little weight to the opinions of Drs. Schaaf and Begley. First, the administrative law judge found that they did not take into consideration that claimant was an extremely heavy cigarette smoker since age 15, and that claimant only recently reduced the number of cigarettes he smokes per day. Decision and Order at 6. Secondly, the administrative law judge found that Drs. Schaaf and Begley did not take into consideration that claimant's coal mine employment was exclusively in surface mines, where his exposure to coal dust was significantly less than in underground mines. *Id*. Lastly, the administrative law judge found that these doctors did not take into consideration the fact that claimant's coal mine employment ended in 1996, making it unlikely that his pulmonary symptoms are related to his coal dust inhalation. *Id*. The administrative law judge accorded no additional weight to Dr. Begley's opinion as the treating physician, after finding it not well reasoned or documented, based upon the three reasons stated above.[4] Decision and Order at 6 n. 6.

On the other hand, the administrative law judge credited Dr. Fino's opinion that claimant's pulmonary disability is due exclusively to cigarette smoking because Dr. Fino took into consideration that claimant started smoking at age 15 and only recently reduced his cigarette usage. Decision and Order at 6. The administrative law judge also credited Dr. Fino's opinion because he took into consideration that claimant's surface mining ended in 1996 and exposed him to significantly less coal dust than in underground mines, making it unlikely that his pulmonary symptoms are related to coal dust inhalation. *Id*. The

[4] The record also contains the report of Dr. Khan, who opined that claimant has chronic obstructive pulmonary disease due to tobacco inhalation and "coal exposure," and that the latter contributes at least 50 percent to his totally disabling pulmonary disease. Director's Exhibit 14 at 4. The administrative law judge accorded Dr. Khan's opinion little weight for the same reasons he accorded little weight to the opinions of Drs. Schaaf and Begley. Decision and Order at 6. However, the administrative law judge's treatment of Dr. Khan's opinion is affirmed as unchallenged on appeal. *Skrack*, 6 BLR 1-710; Decision and Order at 6; Director's Exhibit 14.

administrative law judge further credited Dr. Fino's opinion because Dr. Fino took into consideration the presence of hypercarbia (an elevated PCO2 or carbon dioxide level), shown in claimant's blood gas studies. *Id*. The administrative law judge credited Dr. Fino's opinion as very well reasoned, and found that Dr. Fino's opinion was supported by Dr. Kaplan's opinion.[5] *Id.*

We agree with claimant that the administrative law judge erred in according little weight to the opinions of Drs. Schaaf and Begley on the bases he set forth. Contrary to the administrative law judge's finding, Drs. Schaaf and Begley took into consideration claimant's smoking history, as they documented it in their written reports or deposition testimony, and identified it as one cause of claimant's pulmonary disability and chronic bronchitis or chronic obstructive pulmonary disease. Moreover, the administrative law judge has not explained how the smoking histories documented by Drs. Schaaf and Begley differ materially from that of Dr. Fino, or from that set forth in claimant's hearing testimony. Specifically, Dr. Schaaf documented claimant's smoking history as one pack or less per day since age 15, and stated that claimant quit smoking approximately three months prior to January 12, 2004. Moreover, Dr. Schaaf characterized claimant's forty year cigarette smoking history as "significant." Claimant's Exhibits 4 at 1; 9 at 12, 42. Dr. Begley identified claimant's smoking history as forty pack years, acknowledged that claimant was currently smoking about six cigarettes a day, and characterized claimant's smoking history as significant. Claimant's Exhibit 10 at 22-23. Dr. Fino documented claimant's smoking history as one pack per day for forty years from 1961-2001, and stated that claimant still smokes six cigarettes or mini-cigars per day for the last two years. Exhibit 2 at 2, 5 of Employer's Exhibit 5; Employer's Exhibit 5 at 8. Claimant testified at the hearing that he started smoking at age fifteen, and that he currently smokes occasionally. Tr. at 15, 21. Claimant testified that he temporarily quits smoking, for periods as long as a year and as short as a week, but then resumes smoking. Tr. at 15-16. Claimant stated that the day before the hearing he smoked four or five cigarettes. Tr. at 16. Claimant admitted to a forty-three pack year smoking history. Tr. at 21.

Thus, we vacate the administrative law judge's decision to accord little weight to the opinions of Drs. Schaaf and Begley, for the reason that they did not take into consideration claimant's smoking history, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must first make a finding as to claimant's smoking history, based on claimant's hearing testimony and the smoking histories

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[5] Dr. Kaplan reviewed certain medical records in this case and concluded that claimant has a totally disabling chronic obstructive pulmonary disease attributable only to cigarette consumption. Employer's Exhibit 1 at 2. As with the administrative law judge's treatment of Dr. Khan, the administrative law judge's treatment of Dr. Kaplan is affirmed as unchallenged on appeal. *Skrack*, 6 BLR 1-710; Decision and Order at 6; Employer's Exhibit 1.

recorded by the physicians of record. The administrative law judge must then evaluate the credibility of the medical opinions of Drs. Schaaf, Begley, and Fino based, in part, on the accuracy of the smoking histories on which their opinions were premised. Before evaluating the medical opinions of record pursuant to Section 718.202(a)(4) or Section 718.204(c) based on claimant's smoking history, the administrative law judge must resolve any inconsistencies between claimant's smoking history, as reflected in the medical opinions and in claimant's hearing testimony.[6] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

The administrative law judge also erred in according little weight to the opinions of Drs. Schaaf and Begley because they did not take into consideration that claimant's coal mine employment was that of a surface miner, and that it ended in 1996. Contrary to the administrative law judge's findings, Drs. Schaaf and Begley appear to have taken into consideration claimant's coal mine employment history, as they documented it in their written reports or deposition testimony, and identified it as a cause of claimant's pulmonary disability, chronic bronchitis, or chronic obstructive pulmonary disease.[7] Moreover, while the administrative law judge indicated that he credited Dr. Fino's opinion because he found Dr. Fino took into account that claimant's surface mining exposed him to significantly less coal dust than an underground miner, Dr. Fino's opinion does not appear to support the administrative law judge's finding. Specifically, Dr. Fino opined that, *generally*, surface coal miners have less dust exposure than underground coal miners, but that, *in the instant case, he was assuming that claimant had the necessary coal dust exposure to cause a coal mine dust-related condition*. Employer's Exhibit 5 at 14-15, 20. Therefore, the administrative law judge erred in relying on Dr. Fino's opinion to find that claimant's surface coal mining exposed claimant to significantly less coal dust than in underground mines.[8]

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[6] The administrative law judge characterized claimant's smoking history as "extremely heavy." Decision and Order at 6. However, each of the doctors recorded a forty pack year history. Claimant's Exhibits 9 at 42; 10 at 22; Employer's Exhibit 5 at 8. Thus, contrary to claimant's contention, any error in the administrative law judge's characterization of claimant's smoking history as "extremely heavy" is harmless, in view of the fact that each of the medical opinions the administrative law judge considered quantified claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6.

[7] Dr. Schaaf identified claimant as a surface mine equipment operator whose employment, ending in 1996, provided him with sufficient exposure to coal dust to produce "problems" where claimant did not "close the cab." Claimant's Exhibits 4 at 1; 9 at 11-12. While Dr. Begley did not explicitly address claimant's coal dust exposure level, he was aware that claimant's coal mine employment ended in 1996. Claimant's Exhibit 10 at 22-23.

[8] The administrative law judge also credited Dr. Fino's opinion because it took into account that claimant stopped working as a miner in 1996, and that this fact made it unlikely that his pulmonary symptoms are related to his coal dust inhalation. The administrative law

We therefore vacate the administrative law judge's decision to accord little weight to the opinions of Drs. Schaaf and Begley, for the reason that they did not take into consideration claimant's coal mine employment history, and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must first determine what claimant's level of coal dust exposure was as a surface miner ending in 1996, based on claimant's hearing testimony[9] and all the other relevant evidence of record. Before finding the medical opinions of record sufficient or insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) or total disability due to pneumoconiosis pursuant to Section 718.204(c), based on claimant's coal mine employment history, the administrative law judge must resolve any inconsistencies between claimant's coal mine employment history, as reflected in the medical opinions and in claimant's hearing testimony. *See Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).[10] Then the

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judge did not explain the basis for his finding that claimant's cessation of mining activities in 1996 made it unlikely that his pulmonary symptoms are related to his coal dust inhalation, and Dr. Fino's opinion does not support the administrative law judge's finding. Dr. Fino's opinion was that, generally, nineteen years of working above ground in the mines, presumably after dust regulations, would not cause this degree of abnormality, but that he assumed in this particular case that claimant had all of the coal dust exposure necessary to cause a coal mine dust-related condition. Employer's Exhibit 5 at 14-15, 20. Therefore, the administrative law judge erred in relying on Dr. Fino's opinion to support the administrative law judge's finding that claimant's cessation of mining activities in 1996 made it unlikely that his pulmonary symptoms are related to his coal dust inhalation. Moreover, the administrative law judge's finding that claimant's cessation of mining activities in 1996 made it unlikely that his pulmonary symptoms are related to his coal dust inhalation is not supported by the opinion of Dr. Begley, who did not necessarily agree that the cause of claimant's bronchitis was cigarette smoking, "because that is what is currently happening, and the coal dust exposure isn't." Claimant's Exhibit 10 at 30. On remand, the administrative law judge must explain the basis for his finding that claimant's cessation of mining activities in 1996 made it unlikely that his pulmonary symptoms are related to his coal dust inhalation.

[9] Claimant testified that he worked in the surface mines as a heavy equipment operator for eighteen years, and that the employment ended in 1996, because he had difficulty climbing on the heavy equipment he used. Tr. at 11-12, 18-20.

[10] The administrative law judge also erred in according little weight to the opinions of Drs. Schaaf and Begley because, unlike Dr. Fino, they did not take into consideration the presence of hypercarbia in claimant's blood gas studies. On remand, the administrative law judge should consider that Drs. Schaaf and Begley took into consideration the presence of hypercarbia in claimant's blood gas studies, but disagreed with Dr. Fino that it indicated a

administrative law judge must consider the weight to be accorded the medical opinions of Drs. Schaaf, Begley, and Fino, based, in part, on whether they had an accurate understanding of claimant's coal dust exposure levels.[11]

In summary, we vacate the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c), and remand this case to the administrative law judge for further consideration of these issues. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); 20 C.F.R. §§718.202(a), 718.204(c). If, on remand, the administrative law judge determines that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c), he must also determine whether the evidence is sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).

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.

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pulmonary impairment solely due to smoking. *See* Claimant's Exhibits 9 at 28, 40-41; 10 at 10, 25, 32; Exhibit 2 at 6 of Employer's Exhibit 5; Employer's Exhibit 5 at 16.

The administrative law judge accorded no additional weight to Dr. Begley's opinion on the basis that he was claimant's treating physician, because he found it not well reasoned or well documented. Inasmuch as we herein vacate the administrative law judge's weighing of Dr. Begley's opinion, on remand the administrative law judge must reconsider the weight to be accorded Dr. Begley's opinion as the miner's treating physician. *See* 20 C.F.R. §718.104(d). *See also Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 157, 160 (3d Cir. 1978); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); 20 C.F.R. §718.104(d).

[11] We reject claimant's contention that Dr. Fino's opinion should not be credited, as he would have an extremely difficult time attributing a portion of claimant's disabling bronchitis to coal dust exposure, because the physician testified that it made no contribution to claimant's disability, because he smoked. Dr. Fino acknowledged in his deposition that coal mine dust exposure can cause chronic bronchitis. Employer's Exhibit 5 at 19.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge