

BRB No. 07-0564 BLA

R. D. C.)
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 Claimant-Respondent)
)
 v.)
)
 PETER FORK MINING COMPANY)
)
 and)
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 EMPLOYERS INSURANCE OF WAUSAU) DATE ISSUED: 04/29/2008
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Joseph Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (06-BLA-5133) of Administrative Law Judge Daniel F. Solomon rendered 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).¹ Claimant filed his claim for benefits on September 27, 2004. Director's Exhibit 3. The administrative law judge credited claimant with twenty-five years of coal mine employment² pursuant to the parties' stipulation. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.204(b)(2),³ an element of entitlement previously adjudicated against claimant. *See White v. New White Coal Co*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease and emphysema arising out of coal mine employment, pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), 718.203(b). The administrative law judge further determined that the evidence established that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that the evidence established the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.⁴

¹ Claimant's first claim for benefits, filed on October 17, 1986, was denied on April 7, 1987. Director's Exhibit 1. Claimant's second claim, filed on January 27, 1993, was denied by Administrative Law Judge Edith Barnett in a Decision and Order dated August 11, 1995, based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibits 1, 2.

² The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

³ Employer stipulated that claimant is totally disabled by a respiratory impairment. Decision and Order at 4, 5.

⁴ Because no party challenges the administrative law judge's findings as to the length of claimant's coal mine employment, and that total disability and a change in an

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).

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).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis.⁵ The administrative law judge considered the opinions of Drs. Rasmussen, Rosenberg, and Fino.

In a report dated January 10, 2005, Dr. Rasmussen, who is Board-certified in Internal Medicine, based on physical examination, employment and medical histories, and objective tests, opined that although claimant does not have clinical pneumoconiosis, he has a moderately severe obstructive impairment due in part to coal mine dust exposure:

The patient has a significant history of exposure to coal mine dust. However he has insufficient x-ray changes to justify a diagnosis of coal workers' pneumoconiosis. A clinical diagnosis of coal workers' pneumoconiosis cannot be established in this case.

The two causes of this patient's disabling lung disease are his cigarette smoking and his coal mine dust exposure. Both contribute. Both cause lung tissue damage, which is indistinguishable by physical, radiographic or physiologic means and which are independent of x-ray changes.

applicable condition of entitlement were established pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

Director's Exhibit 9 at 4. Dr. Rasmussen concluded that "[t]he patient's coal mine dust exposure is a significant contributing cause. A diagnosis of clinical pneumoconiosis cannot be established in this case, however, legal pneumoconiosis is established, which contributes significantly to his disabling lung disease." *Id.* at 5. In a report dated November 7, 2005, Dr. Rasmussen reiterated his previous findings and further opined:

The two causes of [claimant's] disabling lung disease are his significant cigarette smoking history of about 54 pack years and his 35 years of coal mine dust exposure. Both cause chronic obstructive lung disease and emphysema, which use identical cellular and biochemical processes by which they cause identical lung tissue damage. There is no way in which chest x-rays, physical or physiologic findings can distinguish between these two toxic substances. These observations have been confirmed by multiple epidemiologic studies and summarized by NIOSH in 1995.

Claimant's Exhibit 1 at 3. Dr. Rasmussen concluded that claimant's coal mine dust exposure "must be considered a significant contributing factor to his disabling chronic lung disease" and thus, claimant has legal pneumoconiosis "which contributes in a significant manner to his totally disabling respiratory insufficiency." *Id.* at 5.

Drs. Fino and Rosenberg, who are Board-certified in Internal Medicine and Pulmonary Disease, based on physical examination, medical and work histories, objective tests, and review of the record, opined that claimant does not have coal workers' pneumoconiosis and that his severe disabling obstructive lung disease is due solely to his smoking. Employer's Exhibits 1, 2. When deposed, Drs. Fino and Rosenberg disagreed with Dr. Rasmussen that obstruction related to smoking and coal mine dust cannot be distinguished. Employer's Exhibit 39 at 25; Employer's Exhibit 40 at 13. They opined that several features of claimant's examination and test results allowed them to conclude that claimant's obstruction was unrelated to coal mine dust exposure. Employer's Exhibit 39 at 21-25; Employer's Exhibit 40 at 14-17.

The administrative law judge accorded greater weight to Dr. Rasmussen's opinion diagnosing legal pneumoconiosis than to the opinions of Drs. Rosenberg and Fino, diagnosing obstructive lung disease due to smoking. The administrative law judge initially noted that although Dr. Rasmussen is not Board-certified in pulmonology, he "is an acknowledged expert in the field of pulmonary impairments of coal miners." Decision and Order at 8 (internal quotes and citation omitted). The administrative law judge also noted that Dr. Rasmussen cited studies to support his opinion that the effects of cigarette smoking and coal mine exposure cannot be distinguished. The administrative law judge found that, although employer pointed to specific record evidence that claimant's smoking history "may well have [been] double" the history that was relied upon by Dr. Rasmussen, this discrepancy was not "fatal to the claim." Decision and Order at 9. The

administrative law judge concluded that Dr. Rasmussen's reports constituted a reasoned medical opinion establishing legal pneumoconiosis. By contrast, the administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Fino, because they placed undue reliance on the x-ray readings, failed to address legal pneumoconiosis, and failed to address whether coal dust exposure aggravated claimant's pulmonary condition. *Id.*

Employer contends that the administrative law judge did not explain why the possible discrepancy between the smoking history relied upon by Dr. Rasmussen and the actual history did not affect the credibility of Dr. Rasmussen's diagnosis. We agree. As noted by the administrative law judge, Dr. Rasmussen recorded a smoking history of approximately fifty-four pack-years. Although Drs. Fino and Rosenberg recorded similar smoking histories provided by claimant, they both noted that review of claimant's medical records reflected smoking histories as high as eighty pack-years. Employer's Exhibit 39 at 21; Employer's Exhibit 40 at 9. The administrative law judge summarized claimant's varying testimony as to the length and intensity of his smoking history, and noted claimant's testimony that he could not recall how long he smoked, and that he thought that some doctors had his smoking history "wrong." Decision and Order at 2-3. The administrative law judge further summarized medical histories in the record reporting that claimant smoked up to two or two-and-one-half packs of cigarettes per day for forty years, until about 1992, and then cut back to approximately one pack per day until quitting in 2006.⁶ Decision and Order at 3.

Without making a finding as to the length of claimant's smoking history, the administrative law judge stated that, although "there may be a discrepancy, I do not accept that this is fatal to the claim." Decision and Order at 9. The administrative law judge failed to adequately resolve this issue, as he did not explain why a discrepancy between the smoking history recorded by Dr. Rasmussen and the actual smoking history did not affect the credibility of Dr. Rasmussen's diagnosis of legal pneumoconiosis. *See* Administrative Procedure Act, 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge did not explain why he accepted Dr. Rasmussen's conclusion that coal dust exposure contributed to claimant's impairment in light of a smoking history that the administrative law judge acknowledged may be double the one that Dr. Rasmussen relied upon in rendering his opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.

⁶ In its brief, employer states that if claimant smoked two to two-and-one-half packs per day for the time period described, the smoking history would range "from 96 to 119 pack years" Employer's Brief at 8.

1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Additionally, there is merit in employer's contention that substantial evidence does not support the administrative law judge's findings that Drs. Rosenberg and Fino did not consider whether claimant's impairment was due to, or aggravated by, coal dust exposure, and placed undue reliance on negative x-rays to conclude that he does not have legal pneumoconiosis. The record reflects that neither Dr. Fino nor Dr. Rosenberg concluded that claimant's obstruction was due to smoking based solely upon a negative chest x-ray. Further, the record reflects that both Drs. Fino and Rosenberg set forth their understanding of the definition of legal pneumoconiosis, and gave specific reasons for concluding that claimant's obstruction was not related to coal mine dust exposure.⁷ Thus, the administrative law judge's reasons for discrediting the opinions of Drs. Fino and Rosenberg are not supported by substantial evidence. *See* 33 U.S.C. §921(b)(3).

⁷ Dr. Rosenberg focused on the pattern of claimant's medical findings to determine whether his obstructive impairment was related to coal mine dust exposure:

This pattern of obstruction, coupled with a bronchodilator response, significant airtrapping (increased RV/TLC), a low diffusing capacity and a diffuse emphysematous pattern on X-ray, are all classic for smoking-related COPD, and not coal mine dust related obstructive disease. In addition, while there is no question CWP can be latent and progressive, for a variety of reasons, [claimant's] progressive obstructive disease after leaving the coal mines is not coal mine dust related.

Employer's Exhibit 2 at 8. Dr. Rosenberg reiterated these findings in his deposition, where he also indicated that he understood legal pneumoconiosis to include chronic respiratory conditions "caused or aggravated by coal dust exposure." Employer's Exhibit 40 at 10, 14-20. Similarly, Dr. Fino focused on the pattern of claimant's findings:

It is possible to distinguish the effects of coal mine dust from those of cigarette smoking when it comes to both chronic obstructive bronchitis and emphysema. I find no indications that [claimant] has an increased amount of coal mine dust within the lungs. That is a clear and important distinction when attributing obstructive lung disease to either chronic obstructive bronchitis or emphysema due to coal mine dust inhalation.

Employer's Exhibit 1 at 15. Dr. Fino set forth these findings in greater detail in his deposition, where he also indicated that he understood legal pneumoconiosis to include lung diseases "caused or contributed to by coal mine dust" Employer's Exhibit 39 at 19, 21-25.

In light of the foregoing, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge to reconsider the medical opinion evidence. Specifically, on remand, the administrative law judge should determine the extent of claimant's smoking history, reassess the medical opinion evidence in light of his determination, and adequately explain his findings. *See* 5 U.S.C. §557(c)(3)(A); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge should consider the documentation and reasoning of the medical opinions and reconsider the weight to be accorded the opinions of Drs. Fino and Rosenberg. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in his analysis of the medical opinions when he found that the evidence established that claimant's total disability is due to pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must reconsider the evidence pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part and vacated in part, and the case 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