BRB No. 08-0507 BLA

A.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHANNOPIN MINING COMPANY	)	
	)	DATE ISSUED: 04/20/2009
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.

A.W., Greensboro, Pennsylvania, *pro se*.[1]

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor of Labor; Rae Ellen Frank James, 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, McGRANERY and HALL, Administrative Appeals Judges.

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[1] Lynda D. Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995) (Order).

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (2007-BLA-5825) of Administrative Law Judge Daniel L. Leland 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).[2] The administrative law judge credited claimant with thirty-eight and one-half years of coal mine employment and determined that claimant was required to establish the existence of pneumoconiosis in order to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge considered the newly submitted evidence and found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge concluded, therefore, that claimant failed to establish a change in an applicable condition of entitlement and denied benefits accordingly.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief in which he asserts that the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) cannot be affirmed, as the administrative law judge did not make a specific finding regarding claimant's smoking history. Employer has responded to the Director's brief and urges the Board to reject Director's arguments. Employer asserts that remand is unnecessary because the administrative law judge acknowledged the conflicting smoking histories in the record and found claimant's smoking history uncertain. Employer also argues that the administrative law judge discredited claimant's favorable evidence on other valid grounds.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by

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[2] Claimant filed an application for benefits on July 14, 1997, which Administrative Law Judge Michael P. Lesniak denied in a Decision and Order issued on November 29, 1999, based upon his finding that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant took no further action until filing a second application for benefits on June 14, 2006. Director's Exhibit 3. On March 15, 2007, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 30. At employer's request, the case was transferred to the Office of Administrative Law Judges and a hearing was held before Administrative Law Judge Daniel L. Leland on November 7, 2007.

substantial evidence, are rational, and are 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).

When 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 prior claim was denied on the ground that he failed to establish the existence of pneumoconiosis, he is required to establish, based on the newly submitted evidence, that he has pneumoconiosis in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Pursuant to Section 718.202(a)(1), the administrative law judge considered five readings of an x-ray dated June 26, 2006 and four readings of an x-ray dated May 14, 2007.[4] Decision and Order at 7-8; Director's Exhibits 13; Claimant's Exhibits 1-3, 6; Employer's Exhibits 1, 3, 4, 8. Drs. Colella and Alexander, who are dually qualified as Board-certified radiologists and B readers, interpreted the June 26, 2006 x-ray as positive for pneumoconiosis. Claimant's Exhibits 1, 2. Drs. Gohel, Wiot, and Meyer, who are also dually qualified radiologists, read this film as negative for pneumoconiosis.[5] Director's Exhibit 13; Employer's Exhibits 3, 8. Dr. Alexander also noted that the June 26, 2006 film contained a Category A large opacity. Claimant's Exhibit 2. The May 14, 2007 x-ray was read as positive for pneumoconiosis by Drs. Colella and Alexander, but as negative by Dr. Wiot and Dr. Fino, a B reader. Claimant's Exhibits 3, 6; Employer's Exhibits 1, 4. Dr. Alexander also diagnosed the presence of a Category A large opacity on this film. Claimant's Exhibit 3.

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[3] This case arises within the jurisdiction of the United States Court of Appeals of 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.

[4] In addition, Dr. Navani, a Board-certified radiologist and B reader, interpreted claimant's June 26, 2006 x-ray for quality purposes only. Director's Exhibit 13.

[5] A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C).

The administrative law judge determined that the June 26, 2006 x-ray was negative for pneumoconiosis based upon the preponderance of negative readings by dually qualified physicians. Decision and Order at 7-8. With respect to the film dated May 14, 2007, the administrative law judge determined that it was positive for pneumoconiosis based upon the preponderance of positive readings by dually qualified physicians. *Id*. at 8. Based upon these findings, the administrative law judge concluded that the newly submitted x-ray evidence was in equipoise and was, therefore, insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). *Id*.

We affirm the administrative law judge's finding, as he considered the quantitative and qualitative nature of the conflicting x-ray readings and rationally accorded greater weight to the interpretations performed by physicians who are both Board-certified radiologists and B readers. 20 C.F.R. 718.202(a)(1); *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 3, 8; Claimant's Exhibits 3, 6; Employer's Exhibits 1, 4. The administrative law judge also acted within his discretion in determining that claimant did not satisfy his burden of proving the existence of pneumoconiosis at Section 718.202(a)(1) by a preponderance of the evidence, as one x-ray is positive for pneumoconiosis and one x-ray is negative for pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U. S. 267, 18 BLR 2A-1 (1994); Decision and Order at 8.

Pursuant to Section 718.202(a)(2), the administrative law judge considered the newly submitted report of Dr. Oesterling, a Board-certified pathologist, who reviewed tissue slides obtained from a needle biopsy of claimant's lung. Decision and Order at 8; Employer's Exhibit 14. Dr. Oesterling indicated that he did not detect the presence of coal workers' pneumoconiosis, as the tissue did not contain a micronodule or significant quantities of silicate and silica crystals. Employer's Exhibit 14. Dr. Oesterling also noted that needle biopsies are inadequate for assessing the presence of interstitial fibrosis. *Id*. The administrative law judge rationally determined that this evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 8.

With respect to Section 718.202(a)(3), the administrative law judge considered whether the newly submitted x-ray, biopsy and CT scan evidence was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304.[6] Section 411(c)(3) of the Act, as

[6] Under 20 C.F.R. §718.202(a)(3), a claimant may also establish the existence of pneumoconiosis by invoking the presumptions set forth in 20 C.F.R. §§718.305, 718.306. 20 C.F.R. §718.202(a)(3). These presumptions are not available to claimant in this case, however, as Section 718.305 does not apply in claims filed after January 1, 1982 and

implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The administrative law judge rationally determined that the newly submitted x-ray evidence did not support a finding of complicated pneumoconiosis under Section 718.304(a), on the ground that the preponderance of x-ray readings did not contain diagnoses of a large opacity. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 8. Regarding Section 718.304(b), the administrative law judge correctly found that the record did not contain a biopsy report noting the presence of massive lesions in claimant's lungs. Decision and Order at 8. Pursuant to Section 718.304(c), the administrative law judge found that Dr. Jaworski's diagnosis of complicated pneumoconiosis/progressive massive fibrosis, which was based upon his reading of a CT scan dated September 12, 2007, was outweighed by Dr. Wiot's negative reading of the same scan, in light of Dr. Wiot's superior qualifications as a Board-certified radiologist and B reader.[7] We affirm this finding as being within the administrative law judge's discretion as fact-finder. *See Melnick*, 16 BLR at 1-33; Decision and Order at 8. We also affirm, therefore, the administrative law judge's finding that the newly submitted evidence was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *Id.*

Under Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Celko, Jaworski, Rasmussen, and Renn. Dr. Celko examined claimant on July 24, 2006, and recorded the results of the examination on Department of Labor Form CM-988. Director's Exhibit 13. Dr. Celko indicated that claimant smoked one-third to one-half of a pack of cigarettes per day for two years and diagnosed chronic obstructive pulmonary disease (COPD)/asthma and arteriosclerotic heart disease. *Id.* Dr. Celko identified the etiology of the diagnosed conditions as "sustained dust exposure; intrinsic asthma with airway remodeling." *Id.*

Section 718.306 applies only to certain claims involving deceased miners. 20 C.F.R. §§718.305(e), 718.306(a).

[7] Dr. Jaworski is a Board certified pulmonologist and B reader. Claimant's Exhibit 7 at 9.

Dr. Jaworski became claimant's treating physician on March 21, 2006. Claimant's Exhibit 5; Employer's Exhibit 10. He indicated in a report dated September 21, 2007, that claimant smoked one pack of cigarettes per week for two years. Claimant's Exhibit 5. Dr. Jaworski diagnosed severe COPD/emphysema caused by coal dust exposure. *Id*. At his deposition, Dr. Jaworski indicated that he based his diagnoses on claimant's CT scans and a pulmonary function study obtained on March 30, 2006. Employer's Exhibit 10 at 30. He further stated that although he could not distinguish between the effects of cigarette smoking and coal dust exposure, he ruled out smoking as a cause of claimant's emphysema because claimant's smoking history involved only one pack per week for two years. *Id*. at 32.

Dr. Rasmussen reviewed claimant's medical records and submitted a report dated October 6, 2007. Claimant's Exhibit 4. Dr. Rasmussen noted that claimant's smoking history was "insignificant" and diagnosed severe COPD caused by coal dust exposure. *Id*. Dr. Rasmussen was deposed and reiterated the conclusions set forth in his written report. Claimant's Exhibit 7 at 8. Dr. Rasmussen also indicated that he could not distinguish between smoking and coal dust exposure as etiological agents and that claimant was not a heavy smoker. *Id*. at 24-26.

Dr. Renn reviewed claimant's medical records and in his summary of claimant's smoking history, Dr. Renn noted that claimant's medical records included differing reports that claimant stopped smoking in 1946, 1948, 1965, 1970, 1980, 1984, and that he smoked one-seventh, one-quarter, or one-third of a pack of cigarettes per day for two to four years. Employer's Exhibit 2. Dr. Renn diagnosed asthma and/or chronic bronchitis with an asthmatic component and emphysema. *Id*. Dr. Renn identified smoking as the cause of claimant's pulmonary conditions. *Id*. At his deposition, Dr. Renn stated:

> Those who quit [smoking] know exactly when they quit. If they can't name the date and time, they can name the year. So for this wide variability to be over a period of thirty-eight years from 1946 to 1984 and not being able to localize it any better than that, one has to suspect that this history is way off and totally invalid. And knowing that people with emphysema – by far and away the vast majority of them who develop emphysema – it is all from tobacco smoke.

Employer's Exhibit 12 at 26-27. Dr. Renn further indicated that the reduction in claimant's FEV1/FVC ratio, which is present in claimant's pulmonary function studies, is inconsistent with a coal dust related disease. *Id*. at 27-28. Dr. Renn stated that impairment caused by coal dust exposure is reflected in a proportionate reduction in volumes and flows, which was not seen on claimant's pulmonary function testing. *Id*. at 28.

In weighing the medical opinions, the administrative law judge initially found that Dr. Celko's opinion could not support a finding of legal pneumoconiosis because he did

not explain how he concluded that coal dust exposure was the cause of claimant's COPD/asthma.[8] Decision and Order at 8. We affirm this determination as being within the administrative law judge's discretion as fact-finder. *See Clark*, 12 BLR at 1-153.

With respect to the opinions of Drs. Jaworski, Rasmussen and Renn, the administrative law judge initially noted that "[t]he record contains a wide variety of cigarette smoking histories, from non[-]existent to twenty[-]seven years." *Id.* The administrative law judge determined:

> Based on these smoking histories, Dr. Renn concluded that [claimant's] emphysema was due to cigarette smoking, but Drs. Jaworski and Rasmussen's attribution of [claimant's] emphysema to coal dust exposure is somewhat questionable as they assumed that he had a very light and remote smoking history, a fact not substantiated by the record.
>
> Dr. Renn also relied on the reduction in the FEV1/FVC, elevated lung volumes, and a reduced diffusing capacity which he identified as hallmarks of cigarette smoking-caused emphysema. Dr. Jaworski and Dr. Rasmussen concluded that as coal dust exposure can cause obstructive lung disease[,] it must have caused [claimant's] obstructive lung disease, but they provided no other rationale [for their opinions] other than [that claimant] had a long coal mine employment history and supposedly a light smoking history. Unlike Dr. Renn, Drs. Jaworski and Rasmussen averred that there is no method to distinguish smoking from coal dust exposure as causes of [claimant's] emphysema. Their assumption that [claimant's] obstructive lung disease was due to coal dust exposure because it can be caused by coal dust exposure is unreasoned and unsupported by any reference to objective studies as Dr. Renn's contrary opinion was. In light of their failure to provide reasons for their findings and their reliance on [claimant's] uncertain smoking history, I find that their opinions are not well reasoned and that Dr. Renn's well reasoned and well documented opinion is entitled to more weight.

[8] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Id. at 8-9. Based upon his findings at Section 718.202(a)(1) and (4), the administrative law judge concluded that the evidence of record was insufficient to establish the existence of either clinical or legal pneumoconiosis. *Id*. at 9.

The Director argues that the administrative law judge erred in discrediting the opinions of Drs. Jaworski and Rasmussen under Section 718.202(a)(4) because they relied upon a minimal smoking history that was unsupported by the evidence of record. The Director asserts that, absent a specific finding as to the length of claimant's smoking history, the administrative law judge's statement that "the record contains a wide variety of cigarette smoking histories," does not constitute a valid rationale for his determination that Drs. Jaworski and Rasmussen relied upon an inaccurate smoking history. Director's Letter Brief at 2, *quoting* Decision and Order at 8. Employer responds, maintaining that the administrative law judge's finding that the length of claimant's smoking history was "uncertain" was adequate. Employer's Response to Director at 2, *quoting* Decision and Order at 9. Employer further argues that the administrative law judge acted within his discretion in finding that the opinions of Drs. Jaworski and Rasmussen were not well reasoned because, unlike Dr. Renn, they stated that they could not distinguish between the effects of smoking and coal dust exposure and did not identify objective evidence specifically supporting their attribution of claimant's pulmonary disease to coal dust exposure.

Upon review of the administrative law judge's weighing of the medical opinions of Drs. Jaworski, Rasmussen and Renn at Section 718.202(a)(4), we hold that the Director's argument has merit. In discrediting the opinions in which Drs. Jaworski and Rasmussen identified coal dust exposure as the cause of claimant's obstructive lung disease, the administrative law judge provided two separate, but interrelated, rationales. As indicated, the administrative law judge determined that Drs. Jaworski and Rasmussen relied upon "a very light and remote smoking history" that was "not substantiated by the record." Decision and Order at 8. The administrative law judge also determined that the opinions of Drs. Jaworski and Rasmussen were unreasoned based upon their statements that they could not distinguish between the effects of smoking and coal dust exposure. *Id*. at 9. The administrative law judge determined that Dr. Renn's contrary view, that smoking was the sole cause of claimant's emphysema, was supported by his reference to claimant's pulmonary function study results and was more persuasive. *Id*. The administrative law judge did not recognize, however, that Dr. Renn also based his opinion on his assumption that it was likely that claimant's smoking history was more extensive than that reported in the medical records. Employer's Exhibit 12 at 26-27. Thus, the Director is correct in asserting that in order to fully resolve the conflict among the medical opinions as to whether claimant's COPD/emphysema is related to coal dust exposure, the administrative law judge was required to render a specific finding as to the length and extent of claimant's use of cigarettes. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Accordingly, we vacate the administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and his finding that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309. The case is remanded to the administrative law judge so that he can consider all of the newly submitted evidence relevant to claimant's smoking history and make the requisite finding. The administrative law judge must then address the effect that his finding has, if any, on the credibility of the newly submitted physicians' opinions. In particular, if the administrative law judge determines that Drs. Jaworski and Rasmussen relied upon accurate smoking histories, he must reconsider whether their statements regarding their inability to separate the effects of smoking from the effects of coal dust exposure still detract from the credibility of their opinions.[9] The administrative law judge must include in his weighing of the newly submitted medical opinion evidence on remand, Dr. Fino's report of his examination of claimant on May 14, 2007.[10] Employer's Exhibit 1.

If the administrative law judge determines that Dr. Jaworski's opinion is reasoned and documented on remand, he must consider whether it is entitled to controlling weight based on his status as the claimant's treating physician pursuant to 20 C.F.R. §718.104(d). In weighing the reports of Drs. Renn and Rasmussen in which these doctors reviewed medical records, the administrative law judge must determine whether they based their respective opinions upon evidence that was admitted into the record. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i); *see 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); Claimant's Exhibit 4; Employer's Exhibit 2. If the administrative law judge determines that either physician relied upon inadmissible evidence, it is within his discretion to exclude that doctor's report from the record, decline to consider those parts affected by a reference to the inadmissible evidence, or accord it diminished weight, depending upon the extent of the doctor's reliance upon the inadmissible evidence. *Id*.

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[9] The Department of Labor and several of the United States Courts of Appeals have indicated that a physician's statement that he cannot distinguish between the effects of smoking and coal dust exposure does not, by itself, render unreasoned a physician's identification of coal dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 65 Fed. Reg. 79946 (Dec. 20, 2000); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 222 BLR 2-265, 2-280 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000).

[10] The administrative law judge summarized Dr. Fino's report, but did not consider it at 20 C.F.R. §718.202(a)(4). Decision and Order at 4, 8-9.

Finally, if the administrative law judge concludes on remand that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), claimant will have established a change in an applicable condition of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3. The administrative law judge must then consider whether the record as a whole supports claimant's entitlement to benefits and render specific findings, as necessary, pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986)(*en banc*).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge 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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge