BRB No. 07-0969 BLA

D.M.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WAMPLER BROTHERS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 08/28/2008
	)	
and	)	
	)	
OLD REPUBLIC 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

D.M.C., Whitesburg, Kentucky, *pro se*.

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

Rita Roppolo (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (04-BLA-6164) of Administrative Law Judge Janice K. Bullard rendered on a 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*. Claimant's prior application for benefits, filed on March 1, 1991, was finally denied on August 26, 1991, because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action on his prior claim. On November 12, 2002, claimant filed his current application, his third, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order dated July 31, 2007, the administrative law judge initially found that the current claim was timely filed, and that employer is the responsible operator. The administrative law judge then credited claimant with 13.21 years of coal mine employment[1] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the evidence established the existence of legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due in part to coal dust exposure at 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), but failed to establish that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to reverse the denial of benefits. Specifically, the Director contends that the administrative law judge failed to provide valid reasons for discrediting Dr. Baker's uncontradicted opinion that claimant's respiratory impairment, which was found to be totally disabling by the administrative law judge, is due to coal dust exposure pursuant to 20 C.F.R. §718.204(c). The Director further asserts that a remand to the administrative law judge is not required, because claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) based on Dr. Baker's opinion, and thus, has

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. Director's Exhibit 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

established as a matter law, that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Employer responds, urging the Board to deny the Director's request that the denial of benefits be reversed, and to affirm the denial of benefits. In the alternative, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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 a finding of 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 shall 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). The miner's prior claim was denied because the miner failed to establish any element of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing an element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Initially, we address employer's contention that in finding the existence of legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4) based on the two new medical opinions of record, the administrative law judge erred in crediting the opinion of Dr.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Baker, as corroborated by the opinion of Dr. Jarboe.[3] Employer's Brief at 29. Specifically, employer contends that the opinion of Dr. Baker is unreasoned, and that the administrative law judge mischaracterized Dr. Jarboe's opinion as supportive of Dr. Baker's opinion. We disagree.

The administrative law judge noted that Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure, based on an abnormal chest x-ray and a history of coal dust exposure, COPD and chronic bronchitis due to both coal dust exposure and cigarette smoking, and ischemic heart disease, due to arteriosclerotic heart disease. Decision and Order at 11-12; Director's Exhibit 10. Similarly, Dr. Jarboe diagnosed simple coal workers' pneumoconiosis based on a chest x-ray, as well as chronic bronchitis, bronchial asthma, coronary artery disease and hypertension. In addition, Dr. Jarboe opined that claimant had a significant respiratory impairment in the form of mild restriction and mild to moderate obstruction, and added that, in addition to obesity, smoking, and asthma, "coal dust inhalation could have contributed to some extent to the impairment . . . ." Director's Exhibit 12.

The administrative law judge initially found, correctly, that in contrast to Dr. Baker's diagnosis of clinical pneumoconiosis, which was based on an x-ray that was reread as negative by a more highly qualified reader, Dr. Baker's diagnosis of legal pneumoconiosis was uncontradicted. Director's Exhibit 10. In addition, as Dr. Jarboe specifically acknowledged the possibility that coal dust contributed to claimant's respiratory impairment, contrary to employer's contention, the administrative law judge acted within her discretion in crediting Dr. Baker's diagnosis of legal pneumoconiosis as both uncontradicted, and partially supported, by Dr. Jarboe's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 12; Director's Exhibit 12. Moreover, the administrative law judge permissibly concluded that, in light of the fact that Dr. Jarboe also diagnosed clinical pneumoconiosis, and in the absence of contrary evidence, the opinions of Drs. Baker and Jarboe, taken together, were sufficient to meet claimant's burden of proof to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 12.

[3] The Director, Office of Workers' Compensation Programs, does not argue that employer was required to raise this argument in a cross-appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *King v. Tennessee Consol. Coal Co.*, 6 BLR 1-87 (1983).

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. We, therefore, reject employer's assertion that the administrative law judge erred in crediting the opinion of Dr. Baker, as supported by the opinion of Dr. Jarboe, and affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4); 718.203(b), and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

We next address the Director's contention that the administrative law judge erred in her evaluation of Dr. Baker's opinion in finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). As the administrative law judge correctly summarized, a miner is totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288 (6th Cir. 2001). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.[4] 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003); Decision and Order at 16.

In evaluating the evidence relevant to the issue of the cause of claimant's respiratory impairment at 20 C.F.R. §718.204(c), the administrative law judge focused on the more recent reports of Drs. Baker and Jarboe as the most probative of claimant's current condition. The administrative law judge discredited Dr. Baker's opinion, that each of the following four diagnoses "fully" contributed to claimant's moderate respiratory impairment: coal workers' pneumoconiosis due to coal dust exposure, COPD and chronic bronchitis, both due to coal dust and smoking, and ischemic heart disease due to arteriosclerotic heart disease. Director's Exhibit 12; Decision and Order at 16. The administrative law judge explained that because she had found, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that Dr. Baker's diagnosis of a moderate respiratory impairment was "ambiguous" as to whether claimant was disabled from performing his usual coal mine work, she found Dr. Baker's opinion regarding the cause of the impairment to be

[4] The comments to the regulations make clear that the inclusion of the words "material" or "materially" reflects the view that "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. 79946 (Dec. 20, 2000).

"necessarily flawed." Decision and Order at 16. The administrative law judge additionally accorded diminished probative weight to Dr. Baker's opinion on the ground that he failed to address the effects of claimant's smoking history on claimant's pulmonary condition. Finally, the administrative law judge discredited Dr. Jarboe's opinion, that it was "possible" that pneumoconiosis or coal dust exposure "contributed to some extent to the impairment present," as entirely equivocal and ambiguous. Decision and Order at 16.

We agree with the Director that in evaluating the medical opinions, the administrative law judge, having found total disability established, did not adequately explain how Dr. Baker's failure to clarify whether claimant's moderate impairment was totally disabling undermined the physician's separate conclusion that claimant's respiratory impairment is contributed to "fully" by claimant's clinical and legal pneumoconiosis, as well as his ischemic heart disease.[5] *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-75 (2004). Moreover, as further argued by the Director, contrary to the administrative law judge's finding, Dr. Baker addressed the effects of smoking on claimant's respiratory impairment, stating that both smoking and coal dust exposure contributed to claimant's COPD and chronic bronchitis. Director's Exhibit 10. Therefore, the administrative law judge's conclusions that Dr. Baker's opinion as to the cause of claimant's respiratory impairment is "necessarily flawed," and that he failed to consider the effects of claimant's smoking history, are not supported by the evidence of record. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. We must therefore vacate the administrative law judge's finding that claimant failed to meet his burden to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

However, we disagree with the Director's assertion that, because the administrative law judge credited, pursuant to 20 C.F.R. §718.202(a)(4), Dr. Baker's opinion that claimant's COPD and chronic bronchitis were due to coal dust exposure, claimant has established, as a matter of law, that pneumoconiosis is a substantially contributing cause of his disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Because the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and the cause of claimant's disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) are separate elements of entitlement, and since the administrative law judge has the discretion to credit and discredit medical opinions based on the quality of their reasoning and documentation, *Gray v. SLC Coal Co.*, 176 F.3d 382, 398-90, 21

[5] The Sixth Circuit has held that a medical opinion attributing claimant's respiratory impairment to a combination of smoking and coal dust exposure may be sufficient to establish that claimant was totally disabled due to pneumoconiosis. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218, 20 BLR 2-360, 2-373 (6th Cir. 1996).

BLR 2-615, 2-629 (6th Cir. 1999); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, we conclude that this case must be remanded to the administrative law judge for further consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge