BRB No. 09-0763 BLA

CURTIS M. KISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/31/2010
	)	
L & J EQUIPMENT COMPANY	)	
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

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

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05837) of Administrative Law Judge Linda S. Chapman, with respect to a subsequent claim[1] filed on May 21, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for a second time.[3] In *Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006), the Board affirmed, as unchallenged on appeal, Administrative Law Judge Pamela Lakes Wood's finding of twenty-six years of coal mine employment and her determination that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). In addition, the Board held that Judge Wood erred in her weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) and 718.204(c), and vacated the award of benefits. The Board remanded the case to Judge Wood for reconsideration.

[1] Claimant filed his initial claim on October 29, 1979, which was denied by the district director on October 7, 1980. Director's Exhibit 1. In Administrative Law Judge Pamela Lakes Wood's 2005 Decision and Order Granting Benefits, she indicated that the prior claim in this case could not be located, so she was unable to determine the basis for the prior denial of benefits. Director's Exhibit 75. Therefore, she proceeded to consider the merits of the claim, finding that claimant would have to establish each element of entitlement. *Id*. The prior claim is now part of the record and a review of the district director's denial indicates that claimant did not establish that he had a totally disabling respiratory impairment that was due to pneumoconiosis. *See* Director's Exhibit 1.

[2] On May 10, 2010, the Board issued an order, granting the parties the opportunity to submit briefs regarding the potential effects of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010. The Director, Office of Workers' Compensation Programs (the Director), filed a supplemental brief in which he asserted that, based on the filing date of the instant claim, the amendments do not apply. Employer also filed a supplemental brief, arguing that the claim is not affected by the amendments. Upon consideration of this issue, we agree with the Director and employer that the recent amendments do not apply to the present claim, as it was filed prior to January 1, 2005. Director's Exhibit 3.

[3] The district director initially awarded benefits in this claim on March 18, 2003. Director's Exhibit 35. Employer requested a hearing, which was held on March 2, 2004, before Judge Wood. Director's Exhibits 40, 54. On June 8, 2005, Judge Wood issued a Decision and Order Granting Benefits. Director's Exhibit 75. Employer then appealed to the Board. Director's Exhibit 78.

On remand, Judge Wood determined that the record was insufficient to permit her to comply with the Board's instructions, so she remanded the case to the district director for a reopening of the record and for the development of additional evidence. Director's Exhibit 100. The district director complied with the order and, subsequently, proposed an award of benefits. Director's Exhibit 112. Employer requested a hearing, which was held before Judge Chapman (the administrative law judge) on January 14, 2009. Director's Exhibit 114.

The administrative law judge determined that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), based upon a weighing of the evidence relevant to 20 C.F.R. §718.202(a), and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge did not properly weigh the medical opinion evidence regarding legal pneumoconiosis and erred in finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). In addition, employer asserts that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

[4] In its previous Decision and Order, the Board affirmed, as unchallenged on appeal, Judge Wood's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2)-(3), but that claimant established total disability at 20 C.F.R. §718.204(b)(2). *Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-250 n.4 (2006); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibits 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. 20 C.F.R. §718.202(a)

A. The Administrative Law Judge's Findings

In considering the evidence as a whole at 20 C.F.R. §718.202(a), the administrative law judge concurred with Judge Wood that the x-ray evidence did not establish the existence of either simple or complicated pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 15. In addition, the administrative law judge determined that the CT scan evidence did not establish the existence of pneumoconiosis and was of limited use because, as Dr. Scatarige noted, "large areas of both lungs, particularly the apices and lung bases, were not imaged on the scan." *Id*.

In considering the medical opinion evidence, the administrative law judge found Dr. Rasmussen's 2001 and 2003 opinions diagnosing clinical and legal pneumoconiosis to be well-reasoned and well-documented, so she accorded them significant weight. Decision and Order at 13; Director's Exhibits 10, 11, 50. The administrative law judge agreed with Judge Wood that there was no "inconsistency" in Dr. Rasmussen's report regarding the cause of claimant's impairment because he listed pneumonia and sand dust as part of claimant's medical and occupational history and nothing in his report suggested that Dr. Rasmussen considered them as risk factors for the development of claimant's impairment. *Id*. at 11. Instead, the administrative law judge determined that Dr. Rasmussen based his conclusions on the pattern of impairment, which he found was consistent with coal dust exposure. *Id*. The administrative law judge also agreed with Judge Wood that, when looking at Dr. Rasmussen's report as a whole, the progressive nature of claimant's impairment was something he relied on in determining whether the impairment was due to coal dust exposure. *Id*. at 12. However, the administrative law judge stated that, even if she did not consider Dr. Rasmussen's finding of a progressive impairment, she still found that Dr. Rasmussen provided a thorough and detailed discussion of his conclusions and the reasons supporting his determination that claimant's pulmonary impairment was due to coal dust exposure.[6] *Id*.

[6] The administrative law judge found, contrary to employer's contention, that the smoking history of a half a pack of cigarettes a day for three years, relied on by Dr. Rasmussen, was not in error. Decision and Order at 12. The administrative law judge also indicated that, even if the smoking history was in error, Dr. Rasmussen relied on the

Regarding Dr. Rosenberg's opinion, the administrative law judge determined that his most recent conclusion, that coal dust exposure cannot cause centrilobular emphysema, was at odds with the Act.[7] Decision and Order at 14; *see* Employer's Exhibit 1. The administrative law judge further stated that she disagreed with the Board's previous holding, that Judge Wood unfairly required Dr. Rosenberg to address whether the CT scan provided evidence of legal pneumoconiosis. Decision and Order at 13. Instead, the administrative law judge determined that Judge Wood considered Dr. Rosenberg's opinion as a whole and did not place any "burden" on Dr. Rosenberg concerning his analysis of the CT scan. *Id*. In addition, the administrative law judge found that Judge Wood, contrary to the Board's holdings, discounted Dr. Rosenberg's conclusions, not because he relied on a single piece of evidence but, rather, because the CT scan he relied on was not interpreted by a Board-certified radiologist. *Id*. The administrative law judge also agreed with Judge Wood that she found Dr. Rosenberg's change of opinion, after reviewing the CT scan, to be "troublesome" because he did not provide any analysis or identify the factors that supported his conclusion. *Id*.; *see* Director's Exhibits 32, 53.

The administrative law judge gave little, if any, weight to Dr. Fino's opinion, diagnosing legal pneumoconiosis, because his conclusions were not reasoned or supported. Decision and Order at 15; *see* Director's Exhibit 53. The administrative law judge noted that there was some confusion as to whether Dr. Fino's opinion contained a typographical error in indicating that there was "sufficient" objective evidence to diagnose legal pneumoconiosis.[8] *Id*. at 14. However, the administrative law judge

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pattern of impairment as the key factor in concluding that claimant's impairment was due to coal dust exposure. *Id*.

[7] Dr. Rosenberg explained that the centrilobular emphysema observed on claimant's CT scan was not indicative of coal workers' pneumoconiosis because "[w]hile there is no question coal mine dust exposure can cause emphysema, when it does so, it begins as focal emphysema." Employer's Exhibit 1. Further, Dr. Rosenberg indicated, "there are no animal models . . . which demonstrate that coal mine dust exposure causes the development of either centrilobular or bullous emphysema." *Id*. Therefore, Dr. Rosenberg concluded that "coal mine dust exposure does not cause centrilobular emphysema." *Id*.

[8] Employer previously argued that Dr. Fino's diagnosis of legal pneumoconiosis was a typographical error. In her Order of Remand, Judge Wood specifically indicated that employer was permitted to have Dr. Fino correct any technical errors in his previous report. Director's Exhibit 100. However, employer did not submit a corrected version of Dr. Fino's report.

determined that, regardless of any error, Dr. Fino's conclusions were summary and unsupported by an analysis of the underlying documentation. *Id*.

Based on these findings, the administrative law judge accorded greatest weight to Dr. Rasmussen's opinion, that claimant has a totally disabling respiratory impairment due to his coal dust exposure, because it was well-documented, reasoned, and supported by his objective findings. Decision and Order at 15. The administrative law judge did not give any weight to Dr. Fino's opinion, as he did not provide any rationale for his conclusion regarding the presence or absence of legal pneumoconiosis. *Id*. Further, the administrative law judge found that Dr. Rasmussen's opinion was entitled to more weight than Dr. Rosenberg's opinion because Dr. Rosenberg's conclusions were contrary to the Act and, in his most recent report, he did not address the etiology of claimant's decreased diffusing capacity and significant resting hypoxia. *Id*. Consequently, the administrative law judge determined that claimant met his burden of establishing, at 20 C.F.R. §718.202(a)(4) and at 20 C.F.R. §718.202(a) overall, that he has legal pneumoconiosis. *Id*.

B. Arguments on Appeal

On appeal, employer argues that the administrative law judge, like Judge Wood, erred in finding that claimant established the existence of legal pneumoconiosis, based on Dr. Rasmussen's opinion. In addition, employer asserts that Dr. Rasmussen did not provide sufficient documentation or reasoning to support his diagnosis of chronic bronchitis due to coal dust exposure in his 2001 report and did not repeat the diagnosis in his 2003 report. Employer indicates that Dr. Rasmussen's 2001 report is not sufficiently documented or reasoned because, while Dr. Rasmussen stated that coal mine dust exposure is the only known cause of claimant's impairment, he did not explain his statement that the possibility of a resting right-to-left shunt is not excluded and did not account for the possible effects of claimant's bouts with pneumonia or history of sand dust exposure. Employer raises similar concerns regarding Dr. Rasmussen's 2003 report, as Dr. Rasmussen again relied on the pattern of impairment to support his conclusion, that the miner's impairment is due to coal dust exposure, without explaining why other factors could not play a role. Further, employer asserts that while Dr. Rasmussen, in his 2003 report, cited to two articles he authored, he did not attach the articles or discuss how they supported his conclusions.

Employer also raises allegations of error regarding the administrative law judge's consideration of Dr. Rosenberg's opinion. Employer argues that the administrative law judge erred in disagreeing with the Board, in its 2006 decision, and in agreeing with Judge Wood's reasons for discrediting Dr. Rosenberg's opinion. Employer maintains that the administrative law judge incorrectly required Dr. Rosenberg to address whether a CT scan was pertinent to a diagnosis of legal pneumoconiosis and erred in determining

that Dr. Rosenberg completely changed his opinion, based on a single piece of evidence. In addition, employer argues that the administrative law judge improperly discredited Dr. Rosenberg's opinion, that focal emphysema caused by coal dust is distinguishable from centrilobular and bullous emphysema, which Dr. Rosenberg opined are not related to coal dust exposure. Further, employer states that the administrative law judge impermissibly substituted her own opinion for that of a medical expert, as there was no medical evidence contradicting Dr. Rosenberg's conclusion that claimant's previous pneumonias were infections, which likely caused the centrilobular emphysema.

Finally, employer also notes that, like Judge Wood, the administrative law judge did not distinguish between her findings of clinical or legal pneumoconiosis. Employer maintains that the "overall tenor" of the administrative law judge's decision indicates that claimant did not establish the existence of clinical pneumoconiosis. Employer's Brief at 12 n.1. Employer also argues that Dr. Rasmussen relied on an incorrect cigarette smoking history of a half pack of cigarettes per day for three years, instead of the twenty-eight pack year history found by Dr. Kanwal in 1980. Finally, employer states that the administrative law judge did not comply with the Board's instructions as she committed the same errors as Judge Wood, when evaluating Dr. Rasmussen's opinion.

We hold that employer's contentions have merit, in part. We initially disagree with employer's contention that Dr. Rasmussen relied on an inaccurate smoking history in forming his opinion. The administrative law judge acted within her discretion in finding that claimant had a history of smoking a half pack of cigarettes a day for about three years from 1950 to 1953, based on claimant's consistent statements to Drs. Rasmussen and Rosenberg and his testimony at the hearing before Judge Wood.[9] Decision and Order at 12; *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

We also affirm the administrative law judge's finding that Dr. Rosenberg's conclusions at 20 C.F.R. §718.202(a) were at odds with the comments to the amended

[9] Dr. Rosenberg's reports indicate that claimant smoked a half pack to three-fourths of a pack of cigarettes a day from 1950 until 1953 or 1954. Director's Exhibits 10, 11, 50. Dr. Rosenberg reported that claimant smoked for a short period of time, while he was serving in the Army and noted the smoking history reported in Dr. Rasmussen's reports. Director's Exhibit 32. At the hearing before Judge Wood on March 2, 2004, claimant testified that he smoked while he was in the service and thought he quit when he got out, but his wife told him that he smoked for a bit afterwards, which he estimated to be at most a year after he got out of the service. Director's Exhibit 54 at 28.

definition of legal pneumoconiosis, indicating that coal dust exposure can cause centrilobular emphysema. *See* 65 Fed. Reg. 79,941 (Dec. 20, 2000). Therefore, because the administrative law judge ultimately was not persuaded by Dr. Rosenberg's opinion and she gave at least one valid reason why his opinion was not persuasive, we need not address employer's additional arguments, and we affirm the administrative law judge's discounting of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

However, employer correctly asserts that the administrative law judge erred in not addressing the issues identified by the Board in its 2006 decision. As the Board previously held, because the administrative law judge found legal pneumoconiosis established at 20 C.F.R. §718.202(a), based on Dr. Rasmussen's report, "the pertinent issue is whether the administrative law judge's crediting of Dr. Rasmussen's finding of legal pneumoconiosis is correct." *Kiser*, 23 BLR at 1-252; Decision and Order at 15. As employer contends, and the Board also previously held, the administrative law judge did not adequately discuss the inconsistency in Dr. Rasmussen's reports regarding the cause of claimant's impairment. *Kiser*, 23 BLR at 1-252. Dr. Rasmussen noted in his 2003 report that coal dust exposure was the only risk factor for claimant's pulmonary impairment, but also indicated that claimant had pneumonia twice in 2001 and received significant exposure to sand dust while working at a foundry. Director's Exhibit 50. Therefore, it was error for the administrative law judge to state that she found no inconsistency in Dr. Rasmussen's report because he listed pneumonia and sand dust exposure in claimant's medical and occupational histories and based his conclusions on the pattern of claimant's impairment. *See* Decision and Order at 11. In addition, the administrative law judge did not address the significance of Dr. Rasmussen's statement that "[t]he possibility of a right and left shunt is not excluded." Director's Exhibits 10, 11; *see also* Director's Exhibit 50. Further, employer is correct that the administrative law judge did not address Dr. Rasmussen's failure to explain how claimant's pattern of impairment is "consistent with the effects of coal mine dust exposure." Director's Exhibit 50.

Employer also reiterates its argument from the prior appeal, that the administrative law judge erred in relying on Dr. Rasmussen's finding of progressive worsening of claimant's symptoms as evidence of pneumoconiosis. We agree. The administrative law judge noted that Dr. Rasmussen's reference to the progressive impairment in claimant's pulmonary function was not in "the same precise sentence" as his discussion of the pattern of claimant's impairment, but still found that Dr. Rasmussen relied on the progressive nature of claimant's impairment to determine that it was caused by coal dust exposure. Decision and Order at 12; Director's Exhibit 50. Because the interpretation of the objective medical evidence is for the experts, the administrative law judge, in stating that "the progressive worsening of the pulmonary functions" was an indication of coal workers' pneumoconiosis, impermissibly substituted her opinion for that of Dr.

Rasmussen. *Parulis v. Director, OWCP,* 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Moreover, as employer asserts, while it is proper for an administrative law judge to find that an opinion that pneumoconiosis is never progressive is hostile to the Act, there is "no contrary proposition that pneumoconiosis always has to result in such a progressive worsening of symptoms or that pneumoconiosis is the only cause of such a worsening of respiratory symptoms." Employer's Brief at 16; *see Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Motion for Recon.)(*en banc*); *see also Nat'l Mining Ass'n v. Dep't of Labor,* 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). Consequently, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a), and remand this case for the administrative law judge to reconsider her credibility determinations regarding Dr. Rasmussen's opinion.

On remand, the administrative law judge should first make a determination regarding whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4). *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002)(Gregory, J., dissenting); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). If the administrative law judge finds legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), she should then determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

II. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

At 20 C.F.R. §718.204(c), the administrative law judge essentially reiterated her findings regarding the medical opinion evidence at 20 C.F.R. §718.202(a). The administrative law judge found Dr. Rasmussen's opinion, that claimant's disabling respiratory impairment was due to coal dust exposure, to be entitled to great weight because she found it to be well-documented, well-reasoned, and supported by the objective medical evidence. Decision and Order at 16. The administrative law judge did not give significant weight to Dr. Rosenberg's opinion because, while he originally diagnosed interstitial lung disease consistent with coal workers' pneumoconiosis, in the addendum to his report he did not further discuss the cause of claimant's impairment, but rather determined, based on a November 2002 CT scan, that the cystic changes he previously observed were actually consistent with other forms of interstitial lung disease besides pneumoconiosis. *Id*. In addition, the administrative law judge found that, in his most recent report, Dr. Rosenberg did not address the etiology of claimant's disabling oxygen transfer impairment, but stated that claimant's centrilobular emphysema could not be due to coal dust exposure. *Id*. Because Dr. Fino did not diagnose a disabling pulmonary impairment, the administrative law judge determined that it was of no value

regarding the cause of claimant's impairment. *Id*. Therefore, weighing all of the evidence together, the administrative law judge concluded that claimant established that his totally disabling respiratory impairment is due to coal dust exposure at 20 C.F.R. §718.204(c). *Id*.

B. Arguments on Appeal

Employer argues that the administrative law judge repeated the errors that she made at 20 C.F.R. §718.202(a) in rendering her findings at 20 C.F.R. §718.204(c). Because we have instructed the administrative law judge, on remand, to reevaluate her weighing of the opinions of Drs. Rasmussen and Rosenberg regarding the existence of pneumoconiosis, we vacate the administrative law judge's determination at 20 C.F.R. §718.204(c), as it is based on her consideration of these physicians' opinions at 20 C.F.R. §718.202(a). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis and fully explain the rationale for her conclusions. S*ee Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990) (citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162 (1989).

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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge