BRB No. 00-0332 BLA

JOHN J. TRENT	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
PBS COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Hilary S. Daininhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-1116) of Administrative Law Judge Michael P. Lesniak 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.* (the Act). Claimant initially filed an application for benefits on July 23, 1986. Director's Exhibit 35. In a Decision and Order dated September 22, 1988, Administrative Law Judge Henry W. Sayrs determined that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied. *Id*. Claimant took no further action until filing a second application for benefits on January 21, 1998. Director's Exhibit 1.

In the Decision and Order that is the subject of the present appeal, Administrative Law Judge Michael P. Lesniak (the administrative law judge) credited claimant with nineteen and one-half years of coal mine employment and determined that inasmuch as the newly submitted evidence of record was sufficient to prove that claimant is now totally disabled, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). The administrative law judge considered the 1998 claim on the merits, therefore, and found that the evidence of record established the existence of pneumoconiosis under Section 718.202(a)(4) and that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found that claimant demonstrated that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c)(4). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical evidence and did not adequately address the evidence submitted with claimant's first application for benefits. Employer also asserts that the administrative law judge did not make an appropriate determination regarding the dependency of claimant's son. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

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[1]We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(c)(1) and (c)(2), as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence, is rational, and is in accordance with applicable 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).

Initially, we reject employer's allegations of error with respect to the administrative law judge's weighing of the opinions of Drs. Goodman and Pickerill, both of whom concluded that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis. Director's Exhibit 30; Claimant's Exhibit 7; Employer's Exhibits 4, 5, 7. Dr. Goodman stated unequivocally at his deposition that a person with simple pneumoconiosis does not manifest an obstructive impairment and that simple pneumoconiosis cannot be totally disabling. Claimant's Exhibit 7 at 25, 29. Inasmuch as the latter premise is hostile to the Act and the administrative law judge is permitted to discredit an opinion in which a physician indicates that pneumoconiosis cannot cause an obstructive impairment, the administrative law judge acted within his discretion in according diminished weight to Dr. Goodman's conclusions regarding the existence of pneumoconiosis and the source of claimant's putative total disability on these grounds. Decision and Order at 7; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

The administrative law judge also rationally determined that Dr. Pickerill's opinion attributing claimant's obstructive impairment to sleep apnea rather than pneumoconiosis or coal dust exposure was entitled to little weight under Sections 718.202(a)(4) and 718.204(b). Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although Dr. Pickerill stated that his diagnosis was supported by claimant's symptoms and objective test results, he also admitted that in order to make a conclusive diagnosis of the disease, claimant must undergo a sleep study. Employer's Exhibit 7 at 30-46.

Turning to the remainder of the administrative law judge's findings, the administrative law judge based his determination that claimant established a material change in conditions and entitlement to benefits upon the newly submitted opinions of Drs. Schaaf and Ignacio and found that the newly submitted opinions of Drs. Pickerill and Goodman were entitled to little weight. Decision and Order at 4-7. Employer argues that the administrative law judge erred in crediting the opinions of Drs. Schaaf and Ignacio as reasoned and documented without setting forth his rationale.

The administrative law judge considered the opinions of Drs. Ignacio and Schaaf in conjunction with Section 725.309(d) and merely noted that both physicians concluded that claimant is totally disabled from a respiratory or pulmonary standpoint. Decision and Order at 4. Upon considering Dr. Ignacio's and Dr. Schaaf's opinions under Section 718.202(a)(4), the administrative law judge stated that:

> Dr. Schaaf diagnoses pneumoconiosis. It is also Dr. Ignacio's opinion that claimant has pneumoconiosis. I find that Dr. Schaaf's opinion together with Dr. Ignacio's tips the balance in claimant's favor. I find that the preponderance of the physician opinion evidence establishes the existence of pneumoconiosis at §718.202(a)(4).

Decision and Order at 7; Director's Exhibits 14, 16, 18; Employer's Exhibit 7. The administrative law judge relied upon his weighing of these newly submitted opinions under Section 718.202(a)(4) to find that claimant proved that he is totally disabled due to pneumoconiosis under Sections 718.204(b) and (c). The administrative law judge did not, however, set forth the basis for his implicit finding that Dr. Ignacio's and Dr. Schaaf's conclusions are reasoned and documented as is required by the Administrative Procedure Act (APA), 5 U.S.C. §554, *et seq*., as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

The administrative law judge's omission is not harmless for two reasons. First, the rationale underlying Dr. Ignacio's diagnosis of pneumoconiosis and total disability due to pneumoconiosis is not apparent on the face of his opinion and there is no indication that Dr. Ignacio was familiar with the exertional requirements of claimant's coal mine employment. In addition, as employer suggests, whether Dr. Schaaf identified pneumoconiosis as a substantial contributor to claimant's alleged totally disabling impairment as is required under the holding of the United States Court of Appeals for the Third Circuit in *Bonessa v. United States Steel Corp.*, 884 F.2d 756, 13 BLR 2-23 (3d Cir. 1989), is unclear. Dr. Schaaf characterized the degree of the contribution that pneumoconiosis has made to claimant's impairment in various ways in his written report and during his deposition. Director's Exhibit 14; Employer's Exhibit 7 at 15, 24, 41. In light of these factors, we vacate the administrative law judge's

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

findings under Sections 725.309(d), 718.202(a)(4), 718.204(c)(4), and 718.204(b) and remand the case to the administrative law judge for reconsideration of the medical reports of Drs. Ignacio and Schaaf. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see also Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

The administrative law judge should initially reconsider his determination that claimant established a material change in conditions under Section 725.309(d). If he determines that a material change in conditions has been established, the administrative law judge must consider the 1998 claim on the merits, based upon a weighing of all of the newly submitted evidence in conjunction with the evidence submitted with the prior claim. *See Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Nevertheless, contrary to employer's suggestion, it is within the administrative law judge's discretion to accord greater weight to the more recent evidence in light of the fact that the previously submitted evidence is at least ten years old. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). With respect to his weighing of the relevant medical reports, the administrative law judge must also determine whether the opinions regarding whether pneumoconiosis or coal dust exposure is a source of claimant's impairment are reasoned and documented and set forth the basis for his findings, including the significance of the physician's understanding of claimant's smoking history. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). In reconsidering the evidence relevant to the existence of pneumoconiosis, the administrative law judge must apply the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In *Williams*, the Third Circuit ruled that the evidence relevant to Section 718.202(a)(1)-(4) must be weighed together to determine whether a claimant has established the existence of pneumoconiosis.

Finally, employer is correct in asserting that the administrative law judge's finding regarding the dependent status of claimant's son cannot be affirmed. The administrative law judge stated that the award of benefits for which employer is liable is to be augmented by claimant's "dependent wife Mary and son James." Decision and Order at 8. Although there are references in the record indicating

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[3]Contrary to employer's allegation, however, the administrative law judge is not required to treat the hospital records and clinical progress notes detailing treatment of nonrespiratory and nonpulmonary conditions as negative probative evidence concerning either the existence of pneumoconiosis or the source of claimant's alleged totally disabling impairment.

that James, who was born on June 26, 1944, became totally disabled as a result of injuries suffered in a car accident that occurred in 1962, the administrative law judge did not determine whether there is evidence sufficient to establish that James became disabled before the age of eighteen nor did he determine the relevant period of dependency in light of the Social Security Administration document indicating that James began receiving Supplemental Security Income benefits in 1974. 20 C.F.R. §§725.209, 725.221; Director's Exhibits 1, 11, 12; Hearing Transcript at 18-22. Thus, we vacate this portion of the administrative law judge's Decision and Order. The administrative law judge must make the necessary findings regarding James's dependency if benefits are awarded on remand.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge