BRB No. 07-0321 BLA

R.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 12/20/2007
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ranae Reed Patrick (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-5531) of Administrative Law Judge Daniel F. Solomon awarding benefits 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). This case involves a claim filed on January 7, 2002. After crediting claimant with sixteen years of coal mine employment, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total

disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 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 finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[1]

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Employer argues that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis. After finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3), the administrative law judge considered whether the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4). After finding that the x-ray evidence was "in equipoise as to the presence of pneumoconiosis," Decision and Order at 18, the administrative law judge considered whether the medical opinion evidence established the existence of pneumoconiosis. In his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Rasmussen and Bellam, that claimant suffered from pneumoconiosis, over the contrary

[1] Because no party challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983).

opinions of Drs. Hippensteel and Zaldivar. *Id.* at 16-19. Considering all of the evidence together, the administrative law judge found that it established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[2] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In this case, we initially note that the administrative law judge did not specifically address whether the medical opinion evidence established clinical pneumoconiosis or legal pneumoconiosis.[3] Because, as discussed below, we must remand this case for further consideration, on remand, the administrative law judge should address whether the medical opinion evidence establishes the existence of clinical and/or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Hippensteel and Zaldivar as hostile to the Act. We agree. The administrative law judge accorded less weight to the opinions of Drs. Hippensteel and Zaldivar because they "foreclosed the possibility that a miner could ever establish legal pneumoconiosis when diagnosed with asthma." Decision and Order at 18. The administrative law judge found that "[t]heir generalized statement that coal mine dust cannot worsen asthma [was] hostile to the Act." *Id.*

An administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act, *e.g.*, that pneumoconiosis does not progress after cessation of a miner's coal mine employment, or that obstructive disorders cannot be caused by coal mine employment, because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203,

[2]"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).

[3] The medical opinion evidence conflicted regarding the existence of both clinical pneumoconiosis and legal pneumoconiosis. For example, Dr. Rasmussen diagnosed clinical pneumoconiosis (coal workers' pneumoconiosis) and legal pneumoconiosis (chronic obstructive pulmonary disease attributable to cigarette smoking and coal dust exposure). Director's Exhibit 11. Conversely, Dr. Zaldivar opined that there was no evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs, thereby finding that claimant did not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 1.

22 BLR 2-467 (3d Cir. 2002); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). However, in this case, neither Dr. Hippensteel nor Dr. Zaldivar assumed that coal dust exposure can never cause chronic obstructive pulmonary disease.[4] *See Stiltner*, 86 F.3d at 341, 20 BLR at 2-254; Employer's Exhibits 10, 11. Drs. Hippensteel and Zaldivar merely indicated that there is no known connection between asthma and coal dust exposure.[5] Employer's Exhibits 10 at 38-39; 11 at 25-26. Thus, Drs. Hippensteel and Zaldivar did not render conclusions based on a premise that is fundamentally at odds with the statutory and regulatory scheme.[6]

Employer also argues that the administrative law judge did not subject the opinions of Drs. Rasmussen and Bellam to the same scrutiny that he gave to the opinions of Drs. Hippensteel and Zaldivar. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibits 11, 30. Dr. Rasmussen attributed claimant's chronic obstructive pulmonary disease to coal mine

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[4] Drs. Hippensteel and Zaldivar each acknowledged that chronic obstructive pulmonary disease can be caused by coal dust exposure. Employer's Exhibits 10 at 80, 11 at 56.

[5] The administrative law judge failed to address the fact that Dr. Rasmussen similarly opined that there is no evidence that asthma is caused by coal dust exposure. Director's Exhibit 30 at 23. Dr. Cohen is the only physician of record who opined that asthma could be related to coal dust exposure. Claimant's Exhibit 1.

[6] Dr. Hippensteel also noted that claimant did not have findings suggestive of "industrial bronchitis." Employer's Exhibit 19. Dr. Hippensteel explained that while coal miners can develop industrial bronchitis, the disease usually subsides within a period of several months after the miner leaves the coal mines. *Id.* In this case, Dr. Hippensteel noted that claimant had "left coal mining a long time ago." *Id.* The administrative law judge found that Dr. Hippensteel's opinion regarding industrial bronchitis was "contrary to the regulations and at odds with the statutory presumptions." Decision and Order at 17. However, the administrative law judge did not first address whether there was any evidence in the record supportive of a finding of chronic or industrial bronchitis. For example, Dr. Rasmussen opined that there was no reasonable basis to diagnose either chronic bronchitis or industrial bronchitis in this case. Director's Exhibit 30 at 16. Thus, to the extent that the evidence does not support a finding of chronic or industrial bronchitis, the administrative law judge has failed to explain how Dr. Hippensteel's failure to diagnose the condition detracts from his opinion.

dust exposure and cigarette smoking. *Id.* The administrative law judge noted that Dr. Rasmussen's diagnosis of pneumoconiosis was based on the fact that claimant was susceptible to toxins, and that claimant's exposure to coal dust relative to smoking "was far greater and thus accounted for a significant contribution to the disease." Decision and Order at 19. The administrative law judge found, without further comment, that Dr. Rasmussen's opinion was "persuasive and well-reasoned." *Id.*

Dr. Bellam, claimant's treating physician, opined that claimant suffered from coal workers' pneumoconiosis. Claimant's Exhibit 2. Dr. Bellam also opined that claimant suffered from a severe breathing impairment due to his coal dust exposure. *Id.* Although the administrative law judge found that Dr. Bellam's opinion was not entitled to additional weight based upon his status as claimant's treating physician, 20 C.F.R. §718.104(d), he accorded Dr. Bellam's opinion "some weight" based upon "the medical history, the observation of symptoms consistent with pneumoconiosis, and the fact that [claimant] was in treatment for pneumoconiosis." Decision and Order at 19.

The administrative law judge's uncritical acceptance of the opinions of Drs. Rasmussen and Bellam, in contrast with his treatment of the contrary opinions submitted by employer, was tantamount to requiring employer to rule out coal dust exposure as a cause of claimant's obstructive lung disease, rather than requiring claimant to establish entitlement through credible medical evidence.[7] *See Hughes v. Clinchfield Coal Co.*, 21

[7] The Department of Labor (the Department) included comments regarding the definition of pneumoconiosis contained in revised Section 718.201. *See* 65 Fed. Reg. 79937-79945 (Dec. 20, 2000). The Department found that there was "overwhelming scientific and medical evidence demonstrating that coal mine dust exposure *can* cause obstructive lung disease." 65 Fed. Reg. 79944 (emphasis added). However, the Department did not anticipate that all obstructive lung disorders would be compensable. in the preamble to the revised regulations, the Department stated that:

> The Department attempts to clarify that not all obstructive lung disease is pneumoconiosis. It remains the claimant's burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis. The Department has concluded, however, that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes "legal" pneumoconiosis.

BLR 1-135, 1-139 (1999)(*en banc*); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the medical opinion evidence establishes the existence of clinical and/or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, should the administrative law judge find that the evidence establishes the existence of clinical and/or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together at 20 C.F.R. §718.202(a) pursuant to *Compton*.

Because the administrative law judge must reevaluate whether the medical opinion evidence establishes the existence of clinical and/or legal pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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65 Fed. Reg. 79923 (Dec. 20, 2000).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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