BRB No. 07-0322 BLA

J.W.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 12/21/2007
	)	
CONSOLIDATION COAL 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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy 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 Judge.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (04-BLA-5913) of Administrative Law Judge Daniel F. Solomon 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). Claimant filed this subsequent claim on February 1, 2002.[1] Director's Exhibit 4. This case is before the Board for the second time. In [*J.W.H.*] *v. Consolidation Coal Co.*, BRB Nos. 05-0448 BLA, 05-0448 BLA-A (Sept. 30, 2005)(unpub.)(Hall, J., concurring), the Board reversed the administrative law judge's finding that claimant's subsequent claim was untimely filed and remanded the case for consideration of the claim.

On remand, the administrative law judge credited claimant with 22.59 years of coal mine employment, as stipulated by the parties. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) by establishing total disability. The administrative law judge then considered the merits of entitlement, and found that claimant established that he is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c). In so finding, the administrative law judge credited the medical opinion of Dr. Rasmussen over those of Drs. Castle, Fino, and Crisalli. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(c).[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief addressing the administrative law judge's decision to discredit Dr. Crisalli's opinion.

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).

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,

[1] Claimant filed his first claim on January 28, 1994, and it was denied on July 12, 1994, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed his second claim on January 22, 1996, and it was denied on November 15, 2000, because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

718.204. Failure to establish any one of these elements precludes 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).

Pursuant to 20 C.F.R. §718.202(a)(4), employer first argues that the administrative law judge erred in according less weight to Dr. Crisalli's medical report merely because the doctor did not examine claimant. This contention has merit. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). However, the Director argues that the administrative law judge's error was harmless because Dr. Crisalli's medical report exceeded the evidentiary limitations of 20 C.F.R. §725.414 and therefore should not have been considered by the administrative law judge.

The Director notes that the applicable provision of 20 C.F.R. §725.414 permitted employer to "submit, in support of its affirmative case . . . no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). A showing of "good cause" was required to exceed this limit. 20 C.F.R. §725.4456(b)(1). Employer submitted and the administrative law judge admitted the reports of Drs. Castle and Fino as employer's two affirmative medical reports. Subsequently, at the hearing, employer proffered a third medical report by Dr. Crisalli, designated as rebuttal to the report of Dr. Mullins, who conducted the complete pulmonary evaluation on behalf of the Director, and to the report of Dr. Rasmussen, claimant's affirmative medical report. August 25, 2004 Transcript (Tr.) at 34-39; Employer's Exhibit 12. The administrative law judge admitted Dr. Crisalli's opinion as employer's rebuttal to claimant's affirmative medical opinion evidence. Tr. at 38. The Director contends that this ruling was improper, as it allowed employer to exceed the evidentiary limitations on medical reports.[3]

Because, as discussed below, we must remand this case for further consideration of the medical opinion evidence, and in light of the Director's argument that Dr. Crisalli's report exceeded the evidentiary limitations, we instruct the administrative law judge on remand to reconsider the admissibility of Dr. Crisalli's report. *See* 20 C.F.R. §§725.414(a), 725.456(b)(1).

Employer next argues that the administrative law judge erred in relying on Dr. Rasmussen's opinion and erred in giving less weight to the opinions of Drs. Castle and Fino at 20 C.F.R. §718.202(a)(4). We first address employer's challenges to the

[3] The rebuttal provision of 20 C.F.R. §725.414 provides that, in rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii),(a)(3)(ii).

sufficiency of Dr. Rasmussen's opinion. Employer initially argues that Dr. Rasmussen's new opinion, that claimant is totally disabled due to legal pneumoconiosis, provided in a 2003 report and a 2004 deposition, cannot support the award where Dr. Rasmussen's old opinion, provided in a 1997 report, was also that claimant is totally disabled due to legal pneumoconiosis, and was found insufficient to support the prior claim.

We reject employer's argument. The revised regulation at 20 C.F.R. §725.309(d)(4) provides that, where, as here, the administrative law judge finds a change in an applicable condition established, no findings made in the prior claim shall be binding in the adjudication of the subsequent claim. 20 C.F.R. §725.309(d)(4). Thus, the administrative law judge was not bound by the prior finding that Dr. Rasmussen's 1997 opinion did not establish that claimant is totally disabled due to legal pneumoconiosis.

Employer next argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4) because it was inconsistent with the x-ray and CT scan evidence. We reject employer's argument, because the administrative law judge relied on Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4) to determine whether the existence of legal pneumoconiosis was established, not the existence of clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-212, 22 BLR 2-162, 2-175 (4th Cir. 2000). Employer also argues that the administrative law judge erred by relying on Dr. Rasmussen's opinion because the doctor did not explain his opinion that coal mine dust exposure contributed to claimant's pulmonary impairment. We reject this argument, as substantial evidence supports the administrative law judge's determination that Dr. Rasmussen explained his opinion in this regard. Decision and Order at 5, 9; Claimant's Exhibit 1; Employer's Exhibit 8.

Additionally, employer argues that the administrative law judge erred by relying on Dr. Rasmussen's opinion because it was equivocal and speculative, and thus insufficient to constitute substantial evidence that claimant's lung disease was "significantly related to, or substantially aggravated by" coal dust exposure, in accordance with 20 C.F.R. §718.201(b). Employer's Brief at 13-14, citing *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389-391, 21 BLR 2-639, 2-649-2-653 (4th Cir. 1999). Specifically, employer notes that Dr. Rasmussen opined that claimant's obstructive respiratory impairment is due to smoking, asthma, and coal mine dust exposure, but did not distinguish between the impairment caused by these factors. The administrative law judge read Dr. Rasmussen's overall opinion as stating that claimant's chronic impairment is due to a combination of smoking, asthma, and coal mine dust exposure, that it was not possible to distinguish between these factors, and that each factor contributed to claimant's impairment. Decision and Order at 9. The record reflects that, although Dr. Rasmussen acknowledged that any one of these three factors could possibly have caused all of claimant's pulmonary impairment, he explained why he believed all three factors played a role in producing claimant's impairment. Employer's

Exhibit 8 at 29-30, 33-34. A physician is not required to specify relative degrees of causal contribution to a lung impairment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-351, 2-372, 2-373 (4th Cir. 2006). Based on the foregoing, we conclude that, contrary to employer's contention, Dr. Rasmussen's opinion is sufficient, if properly credited, to constitute substantial evidence in support of a finding that claimant's pulmonary impairment arose, in part, from coal mine employment. *See* 20 C.F.R. §718.201.

Employer argues that the administrative law judge erred in giving the opinion of Dr. Fino, that claimant does not have pneumoconiosis but has an impairment due to asthma, less weight because Dr. Fino foreclosed the possibility that claimant has more than one cause of his impairment. We agree.

The administrative law judge gave less weight to Dr. Fino's opinion because it foreclosed the possibility of more than one basis for claimant's obstructive impairment. Decision and Order at 8. The administrative law judge mischaracterized Dr. Fino's opinion, as the doctor considered smoking and coal mine employment as additional causes, but concluded that they did not cause or significantly contribute to claimant's pulmonary impairment. Specifically, Dr. Fino considered whether claimant's coal mine employment caused his airway obstruction, but concluded that it did not, based on the results of the 1991 and 1994 pulmonary function studies, which showed a reversible and improved obstruction, unlike that shown by coal mine employment. Employer's Exhibit 6 at 17-18. Reviewing later tests showing persistent obstruction, Dr. Fino stated that, "looking at [claimant's] progression of lung disease over the years, even if coal mine dust contributed 2 to 3 cc per year [loss of FEV1] it pales in comparison to the dramatic loss of FEV1 related to [claimant's] asthma and airway remodeling." Employer's Exhibit 6 at 18. Dr. Fino thus concluded that neither smoking nor coal mine dust exposure played a significant role in claimant's impairment. *Id.* Consequently, substantial evidence does not support the finding that Dr. Fino foreclosed a contribution by more than one causal factor. Because the administrative law judge provided an invalid reason for discounting Dr. Fino's opinion, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case to the administrative law judge for reconsideration of Dr. Fino's opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

The administrative law judge discounted Dr. Castle's opinion that claimant does not have pneumoconiosis because Dr. Castle relied on "the same logic" as Dr. Fino. Decision and Order at 8. In his report dated August 4, 2003, Dr. Castle concluded that claimant has at least moderate, markedly reversible airway obstruction indicative of bronchial asthma and tobacco smoke-induced chronic bronchitis based on the physiologic studies. Director's Exhibit 17. At his deposition, Dr. Castle stated that claimant's pulmonary impairment is not caused by his coal mine employment because a reversible

airway obstruction that claimant has is not caused by coal mine employment and because claimant's changes are not as progressive in a fixed and consistent fashion as one would expect if coal mine dust exposure were contributing. Employer's Exhibit 16 at 23. Dr. Castle's opinion does not foreclose the possibility of more than one cause of claimant's pulmonary impairment. We therefore remand this case to the administrative law judge for reconsideration of Dr. Castle's opinion.

The administrative law judge further found that the opinions of Drs. Castle and Fino were undermined by their reliance on initial pulmonary function studies that the administrative law judge concluded were "out of line" with the later pulmonary function studies. Decision and Order at 8. However, Dr. Fino evaluated all of the pulmonary function studies of record. *See* Employer's Exhibit 15 at 18-20; Employer's Exhibit 6 at 11-13. In any event, the interpretation of medical data is for the medical experts, and thus, the administrative law judge erred in finding that the opinions of Drs. Castle and Fino were undermined because of their reliance, in part, on pulmonary function studies "out of line" with later studies. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Lastly, we agree that the administrative law judge in effect required employer to prove, through the opinions of Drs. Castle and Fino, that coal mine employment played no role in claimant's disabling airways obstruction, when the burden is on claimant to establish that his obstruction arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Compton*, 211 F.3d at 210-211, 22 BLR at 2-173-2-174; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Thus, we remand this case to the administrative law judge for further consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must then weigh together all the relevant evidence pursuant to 20 C.F.R. §718.202(a) to determine whether the existence of pneumoconiosis is established.[4] *See Compton*, 211 F.3d at 210-211, 22 BLR at 2-173-74.

Finally, employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

[4] Employer additionally argues that the administrative law judge erred by giving claimant the benefit of the presumption that his legal pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). We agree that once the administrative law judge found that the existence of legal pneumoconiosis was established based on Dr. Rasmussen's opinion, it was unnecessary for him to apply the Section 718.203(b) presumption of causation. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341, 2-342 (10th Cir. 2006); *Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999).

In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of the evidence thereunder, if reached. In so doing, we reject employer's contention that Dr. Rasmussen's opinion is legally insufficient to support a finding that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c), because Dr. Rasmussen did not apportion claimant's lung impairment between smoking, asthma, and coal mine dust exposure. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372.

Accordingly, the administrative law judge's Decision and Order Award of 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