

BRB No. 03-0347 BLA

HOWARD LEE BOWYER)
)
 Claimant-Respondent)
)
 v.)
)
 CENTRAL APPALACHIAN COAL)
 COMPANY)
) DATE ISSUED: 02/27/2004
 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Jason E. Huber (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (00-BLA-0622) of Administrative Law Judge Richard A. Morgan awarding benefits in a miner's 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).¹ The administrative law judge credited

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

claimant² with at least twenty years of coal mine employment pursuant to the parties' stipulation, Hearing Transcript at 7. Decision and Order at 3. The administrative law judge determined that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 11, 14. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge, after considering all the evidence, found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 11-15. Accordingly, benefits were awarded, commencing April 2002. Decision and Order at 16.

On appeal, employer asserts, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that the administrative law judge failed to weigh all relevant evidence together pursuant to 20 C.F.R. §718.202(a). Employer's Brief at 8-9. Employer additionally asserts that the administrative law judge erred in crediting the opinions of Drs. Cohen, D'Brot, and Rasmussen and in discrediting the opinions of Drs. Altmeyer and Zaldivar pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 9-16. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant is Howard Lee Bowyer, the miner, whose first claim for benefits, filed on July 19, 1985, was denied by the Department of Labor on January 13, 1986. Director's Exhibits 1, 15. Claimant's second and present claim was filed on October 8, 1996. Director's Exhibit 33. In considering the second claim, the district director determined that claimant's first claim was still open; therefore, the second claim was treated as a request for modification. Director's Exhibit 45. On October 7, 1998, Administrative Law Judge Clement J. Kennington denied benefits on claimant's second claim. Director's Exhibit 77. Claimant filed an appeal before the Benefits Review Board, which the Board dismissed as untimely. Director's Exhibits 78, 79. On September 28, 1999, claimant submitted additional evidence that was treated as a request for modification. Director's Exhibits 81, 82. The district director denied claimant's request for modification and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 84, 85.

³We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3), 718.203(b), and his finding of total respiratory disability on the

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).

Pursuant to 20 C.F.R. §725.310(a) (2000),⁴ the administrative law judge initially considered whether claimant could establish modification by demonstrating either a change in conditions or a mistake in a determination of fact. Decision and Order at 10-11. The administrative law judge found that claimant demonstrated a change in conditions by establishing the existence of pneumoconiosis and total respiratory disability. Decision and Order at 11, 14.

In order to establish a change in conditions, an administrative law judge must determine if the new evidence, considered in conjunction with the old evidence, is sufficient to establish at least one of the elements of entitlement that defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1991); see *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Administrative Law Judge Clement J. Kennington previously denied benefits because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 77. While the administrative law judge noted that Judge Kennington did not reach the issue of disability, the administrative law judge granted claimant's request for modification because "the evidence establishes a change in conditions, i.e., that he is at least now totally disabled." Decision and Order at 11. The administrative law judge also determined that claimant established a change in conditions based on his finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 14. Even though employer does not challenge the administrative law judge's finding of a change in conditions based on total respiratory disability, we vacate the administrative law judge's finding that claimant established a change in conditions on this basis because his finding is contrary to the law as total respiratory disability was not an element of entitlement that was adjudicated in the previous decision. *Napier*, 17 BLR at 1-113; *Nataloni*, 17 BLR at 1-84; see *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999). The administrative law judge additionally found a change in conditions based on

merits pursuant to 20 C.F.R. §718.204(b) inasmuch as they are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴The amended regulation regarding modification, see 20 C.F.R. §725.310, applies only to claims filed after January 19, 2001.

the existence of pneumoconiosis. Decision and Order at 14. We cannot affirm the administrative law judge's change in conditions finding based on pneumoconiosis because, as discussed below, the administrative law judge erred in finding the existence of pneumoconiosis. Therefore, we vacate the administrative law judge's finding that claimant established a change in conditions based on pneumoconiosis and we instruct the administrative law judge on remand to reconsider whether claimant established a change in conditions or a mistake in fact before considering the merits of this case. *Napier*, 17 BLR at 1-113; *Nataloni*, 17 BLR at 1-84; see *Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28.

Employer asserts pursuant to 20 C.F.R. §718.202(a)(4) that the administrative law judge erred in crediting the opinions of Drs. Cohen, D'Brot, and Rasmussen, who found the existence of pneumoconiosis, because these physicians' opinions are unreasoned. Employer's Brief at 9-14. Regarding Dr. D'Brot's opinion, it is unclear, as employer asserts, how the administrative law judge found the opinion of Dr. D'Brot to be well-reasoned in light of statements this physician made during his deposition. The administrative law judge stated that Dr. D'Brot found "[i]n his reasonable medical judgment, [that] the x-ray findings of pulmonary fibrosis are coal workers' pneumoconiosis."⁵ Decision and Order at 13. The administrative law judge also credited Dr. D'Brot's opinion because this physician had been claimant's "treating physician for at least ten years." *Id.* Dr. D'Brot initially testified that he based his diagnosis of pneumoconiosis on the x-rays and claimant's coal dust exposure. Director's Exhibit 75 at 15-17. Dr. D'Brot testified later in his deposition that he would not rule out the possibility that there is pneumoconiosis in the lungs even given the fact that the x-ray and the physical examination do not show the disease exists. Director's Exhibit 75 at 24-25. However, Dr. D'Brot did not offer any objective evidence to support his diagnosis, other than citing claimant's coal mine employment history. *Id.* Because the administrative law judge failed to consider how the statements Dr. D'Brot made during his deposition affect the credibility of his opinion, we instruct the administrative law judge to reconsider Dr. D'Brot's opinion on remand. See *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). In reconsidering Dr. D'Brot's opinion, we instruct the administrative law judge to consider this physician's findings in conjunction with his deposition testimony and determine whether his opinion is reasoned. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

⁵In fact, however, Dr. D'Brot testified that the fibrosis could be, but was not necessarily, pneumoconiosis. Director's Exhibit 75 at 20.

Additionally, the administrative law judge found Dr. Rasmussen's opinion to be documented, but stated that this physician primarily relied on Dr. Patel's positive x-ray reading "which was contradicted by four better qualified readers"⁶ to diagnose pneumoconiosis. Decision and Order at 13. While it is proper for an administrative law judge to discredit a physician's opinion which is based on an x-ray reading that was subsequently reread as negative by physicians with superior qualifications, *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983), the administrative law judge, in this case, chose to credit Dr. Rasmussen's opinion. Because it is unclear why the administrative law judge credited Dr. Rasmussen's opinion even though he also found it to be based on Dr. Patel's November 25, 1996 x-ray reading "which was later contradicted by four qualified readers," it is difficult to determine whether the administrative law judge's reason for crediting this opinion is rational. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Accordingly, we instruct the administrative law judge to reconsider Dr. Rasmussen's opinion on remand and to clarify his reasoning for finding the opinion to be documented. See *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

The administrative law judge next found Dr. Cohen's opinion to be well reasoned and to accurately follow the definition of pneumoconiosis found in the regulations. Decision and Order at 13. The administrative law judge stated that Dr. Cohen "clearly set forth his reasoning for diagnosing clinical and legal pneumoconiosis" and that "Dr. Cohen's understanding of the medical literature echoes that of the Department." Decision and Order at 13. Employer asserts that Dr. Cohen could not base his finding of pneumoconiosis, in part, on the pulmonary function and blood gas studies because he testified at his deposition that there is no pattern on a pulmonary function study or blood gas test that is specific to pneumoconiosis alone. Employer's Brief at 9. However, at his deposition, Dr. Cohen thoroughly explained why he found that claimant has pneumoconiosis based on the CT scan, pulmonary function, and blood gas study evidence.⁷ Employer's Exhibit 9 at 20-26. Therefore, we reject employer's assertion that

⁶Dr. Patel, a Board-certified radiologist, interpreted the November 25, 1996 x-ray as positive for pneumoconiosis. Director's Exhibit 43. Drs. Francke, Wiot, Shipley, and Spitz, all B-readers and Board-certified radiologists, reread the November 25, 1996 x-ray as negative for pneumoconiosis. Director's Exhibits 44, 64.

⁷Specifically, Dr. Cohen testified:

[I]n a particular patient you have to look at the extent of the emphysema and compare that to the extent of the gas exchange abnormalities, and when you look at the extent of emphysema described in the CT Scan by Dr. Wyatt, it was only mild, whereas, he

the administrative law judge erred in finding Dr. Cohen's opinion to be reasoned because this physician properly relied on the pulmonary function and blood gas studies in conjunction with the CT scan evidence to support his diagnosis of pneumoconiosis.⁸ *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; see *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)(interpretation of the medical evidence is for the experts).

Additionally, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Altmeyer and Zaldivar. Employer's Brief at 14-16. Specifically, employer asserts that the administrative law judge held Dr. Altmeyer "to a different standard than the other physicians." Employer's Brief at 14. Dr. Altmeyer stated in his report that:

Chronic bronchitis (industrial bronchitis) from exposure to coke dust in the coal mine almost always clears up significantly or completely in 6 months to 1 year after cessation of exposure to dust in coal mines. However, chronic bronchitis from cigarette smoking may persist for many years.

Director's Exhibit 29 at 33. Therefore, Dr. Altmeyer found that claimant's chronic bronchitis is related to his smoking history. *Id.* In discrediting the report of Dr.

had quite substantial gas exchange abnormalities with exercise. So it's possible that a component of that gas exchange abnormality is from the emphysema, and I believe that to be the case, but that the degree of exercise induced hypoxemia, or drop in oxygen, seemed out of proportion to what you would expect for only mild emphysema which made me consider that he had, in addition to that, interstitial lung disease due to his pneumoconiosis.

Employer's Exhibit 9 at 25-26.

⁸Employer additionally asserts that the administrative law judge erred in crediting Dr. Cohen's opinion that claimant has pneumoconiosis because it is based on the presumption that "all miners with pulmonary impairment have some degree of pneumoconiosis," which is contrary to the Act. Employer's Brief at 9-12. Contrary to employer's assertion, Dr. Cohen's finding of legal pneumoconiosis was not based on such a presumption. Employer's Exhibit 9 at 14-18. Rather, as discussed above, Dr. Cohen thoroughly explained why he found that claimant has pneumoconiosis based on the CT scan, pulmonary function and blood gas study evidence. See discussion, *supra*.

Altmeyer, the administrative law judge stated that this physician's "opinion that chronic bronchitis from coal dust exposure . . . lasts no longer than six months to one year following the cessation of exposure to coal dust, is hostile-to-the-Act." Decision and Order at 14. We are not persuaded that Dr. Altmeyer's statement regarding chronic bronchitis rises to the level of hostility to the Act. See *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Therefore, we vacate the administrative law judge's discrediting of Dr. Altmeyer's opinion and instruct the administrative law judge to reconsider this report on remand.

Finally, employer asserts that the administrative law judge's discrediting of Dr. Zaldivar's opinion "represents a crucial misunderstanding of Dr. Zaldivar's position." Employer's Brief at 14-15. Employer's assertion has merit. The administrative law judge discredited Dr. Zaldivar's opinion⁹ for two reasons. First, the administrative law judge stated, "even though [this physician] testified that his opinion was not based on the absence of x-ray evidence of pneumoconiosis, in the end that is what his opinion clearly was." Decision and Order at 14. Second, the administrative law judge stated "while Dr. Zaldivar "testified that pneumoconiosis can cause obstruction, his opinion overall shows a disregard for the medical literature and the legal definition [of pneumoconiosis]." *Id.* Because it is unclear how the administrative law judge found Dr. Zaldivar's opinion to be based on the absence of x-ray evidence of pneumoconiosis and a disregard for the legal definition of pneumoconiosis when this physician specifically stated otherwise, we instruct the administrative law judge to reconsider Dr. Zaldivar's opinion on remand and to clarify his rationale for discrediting this physician's opinion. *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand this case for further consideration.

Employer additionally asserts that the administrative law judge failed to weigh all types of relevant evidence together when considering whether claimant has established the existence of pneumoconiosis in accordance with *Compton*. Employer's Brief at 8-9. The administrative law judge cited to *Compton* and stated, "[w]eighing all of the

⁹Dr. Zaldivar found no coal workers' pneumoconiosis and found emphysema due to smoking. Director's Exhibit 64.

evidence, both like and unlike, on the issue of pneumoconiosis, I find that pneumoconiosis is established.” Decision and Order at 14. Section 718.202(a) provides that a finding of the existence of pneumoconiosis may be made by a chest x-ray, a biopsy or autopsy report, the presumptions described in 20 C.F.R. §§718.304, 718.305, 718.306, and a reasoned medical opinion based on objective evidence. 20 C.F.R. §718.202(a). The United States Court of Appeals for the Fourth Circuit held in *Compton* that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *Compton*, 211 F.3d at 211, 22 BLR at 2-174; see *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). While the administrative law judge stated that he weighed the different types of relevant evidence together pursuant to Section 718.202(a), he did not provide any discussion as to why he chose to accord more weight to one type of evidence over another type of evidence. Consequently, on remand, the administrative law judge must weigh together all types of evidence, including the x-ray and biopsy evidence pursuant to Section 718.202(a)(1) and (a)(2) and the CT scan and medical opinion evidence pursuant to Section 718.202(a)(4), to determine whether claimant has established the existence of pneumoconiosis by a preponderance of all of the evidence in the record. *Compton*, 211 F.3d at 211, 22 BLR at 2-174. In doing so, we also instruct the administrative law judge to provide a detailed analysis for his findings, as required by the Administrative Procedure Act. See 5 U.S.C. §557(c)(3)(A), 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); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Because the administrative law judge must reevaluate whether the medical evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we vacate the administrative law judge’s 20 C.F.R. §718.204(c) finding. If the issue of disability causation is again reached on remand, we also instruct the administrative law judge to consider all the relevant evidence regarding whether claimant’s total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c), and to explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge