

BRB No. 07-0498 BLA

P.L. (On Behalf of V.L., Deceased))
)
 Claimant-Respondent)
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 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED: 02/29/2008
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 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, 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 Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (06-BLA-5174) of Administrative Law Judge Jeffrey Tureck, on a subsequent claim for benefits 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). The administrative law judge credited claimant with twenty-five years of coal mine employment pursuant to the parties' stipulation, and adjudicated this

subsequent claim, filed on May 21, 2004,¹ pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the miner's previous claim had been denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge found that the new evidence submitted in support of this subsequent claim was again insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and therefore, claimant had failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, the Director challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4), and contends that the administrative law judge erred in failing to distinguish between legal and clinical pneumoconiosis, and thereby failed to consider all relevant evidence. Employer responds in support of the administrative law judge's denial of benefits. Claimant has not filed a brief in this case.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibits 48, 53. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of the miner's claim. 20 C.F.R. §725.309(d)(2), (3).

¹ The miner died on March 10, 2005, and this claim is brought by his widow on his behalf. Director's Exhibit 9. The miner filed his first claim on June 29, 1994, which was abandoned. Director's Exhibit 70-9. His second claim was filed on October 16, 1995 and denied on July 30, 1997 because the miner failed to establish the existence of pneumoconiosis. Director's Exhibit 48. A request for modification was subsequently denied on May 23, 2002.

The Director challenges the administrative law judge's finding at 20 C.F.R. §718.202(a)(4),² and contends that the administrative law judge erred in completely discrediting the opinion of Dr. Rasmussen as to the existence of pneumoconiosis. Director's Brief at 5; Decision and Order at 6. The Director asserts that the administrative law judge's failure to consider Dr. Rasmussen's diagnosis of legal pneumoconiosis requires remand of this case. Director's Brief at 7. We agree.

Dr. Rasmussen performed an examination on February 23, 2005, and diagnosed coal workers' pneumoconiosis based on twenty-five years of coal mine employment and x-ray evidence; COPD/Emphysema based on chronic productive cough, airflow obstruction and reduced single breath diffusing capacity for carbon monoxide; and carcinoma of lung based on history and biopsy. Director's Exhibit 11. Dr. Rasmussen further opined that the miner's coal workers' pneumoconiosis was due to coal mine dust exposure; his COPD/Emphysema was due to coal mine dust exposure and cigarette smoking; and his carcinoma was due to a non-occupational factor. *Id.* Dr. Rasmussen stated, in part, that [the miner] suffers from clinical coal workers' pneumoconiosis and legal pneumoconiosis, which contribute significantly to his disabling chronic lung disease. *Id.*

Pursuant to Section 718.202(a)(4), the administrative law judge relied on the opinions of Drs. Oesterling and Hippensteel as being well-documented and well-reasoned, and consistent with the pathological diagnoses of Drs. Sides and Crouch. Decision and Order at 6. In determining that Dr. Rasmussen's opinion was of no probative value, the administrative law judge found that the physician based his diagnosis of pneumoconiosis on his own interpretation of the February 23, 2005 x-ray, and that this reliance was misplaced because it was contradicted not only by the more probative negative x-ray interpretations, but also by the highly probative pathology evidence. Decision and Order at 6.

The Director correctly notes that the administrative law judge failed to discuss the issue of legal pneumoconiosis. Director's Brief at 5-6. Evidence that does not establish medical pneumoconiosis should not necessarily be treated as evidence against a finding of legal pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 173 (4th Cir. 2000). Additionally, a negative biopsy is not conclusive evidence of the absence of pneumoconiosis. 20 C.F.R. §718.106(c). Because the administrative law judge did not consider that legal pneumoconiosis represents a broader spectrum of lung diseases associated with coal mine employment than does clinical pneumoconiosis, he

² We affirm, as unchallenged on appeal, the administrative law judge's finding that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), and his finding with regard to the length of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

has not considered all the relevant evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Accordingly, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the issue of legal pneumoconiosis.

On remand, the administrative law judge should consider whether Drs. Hippensteel, Oesterling, and Crouch had an accurate understanding of the miner's coal mine employment,³ and to what extent the doctors considered evidence not properly before the administrative law judge.⁴ Additionally, the administrative law judge should discuss Dr. Hippensteel's basis for ruling out legal pneumoconiosis.⁵

Because the administrative law judge must reevaluate whether the medical opinion evidence establishes the existence of legal pneumoconiosis, an analysis that could affect his finding regarding whether claimant has demonstrated a change in an applicable condition of entitlement, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.309(d) for further analysis on remand.

³ Dr. Oesterling assumed minimal exposure to coal dust and stated, "[t]his does not sound to me like he was working at the face." Employer's Exhibit 8 at 21-22. Dr. Rasmussen, however, examined claimant and took the following work history: "Much of his time was at the face...He drilled holes in the roof with considerable dust exposure." Director's Exhibit 11.

⁴ Dr. Hippensteel, at deposition, referred to a pulmonary evaluation he conducted in 2000. Employer's Exhibit 7 at 9.

⁵ Dr. Hippensteel stated at deposition that, "I think that legal pneumoconiosis is excluded by pathologic negativity in such a case as this, where we have the autopsy of the complete lung." Employer's Exhibit 7 at 16.

Accordingly, the administrative law judge's Decision and Order Denying 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

BETTY JEAN HALL
Administrative Appeals Judge