BRB No. 00-0862 BLA

JERRY D. WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:_____
	)	
CLINCHFIELD 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 of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vineyard and Moise), Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1060) of Administrative Law Judge Daniel A. Sarno 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).[1] The administrative law judge found that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 (2000) as the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 (a)(2)(2000).[2] The administrative law judge further found that claimant established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(2000). Accordingly, the administrative law judge granted claimant's request for modification and awarded benefits commencing March 1, 1998.

On appeal, employer contends that the administrative law judge erred in his consideration of the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2) (2000), and

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed the instant claim on March 26, 1998. Director's Exhibit 1. The claim was denied by the district director on July 27, 1998 for failure to establish any element of entitlement. Director's Exhibit 15. Claimant then requested a hearing on October 13, 1998, which was treated as a request for modification. Director's Exhibits 17, 20. The district director denied modification. Director's Exhibits 22, 43. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges on June 25, 1999. Director's Exhibits 44, 46.

erred by failing to consider all of the relevant evidence together pursuant to the holding in *Island Creek Coal Co. v. Compton [Compton]*, 211 F.3d 203, BLR (4th Cir. 2000). Employer further challenges the administrative law judge's determination that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Claimant responds, urging affirmance of the decision and order. The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that employer is incorrect in contending that the administrative law judge failed to weigh all the evidence of the existence of pneumoconiosis together as required by *Compton*, but has declined to respond to the other issues raised by employer.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all Black Lung claims pending on appeal before the Board, except for those cases where the Board determines after briefing by the parties, that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant, employer and the Director have responded.[3] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 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).

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[3]The Director's brief, dated March 26, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant's brief, dated April 2, 2001, asserted that the changes contained in the new regulations will not affect the outcome of this case and therefore a decision on the merits should not be stayed. In a brief dated April 2, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 4 - 9. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c) and 718.204(a) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erred in relying upon a 1968 opinion by Dr. Harrison to find that claimant established the existence of pneumoconiosis, without discussing the contrary opinions in the record. Director's Exhibit 38. On May 13, 1968, claimant underwent a lobectomy of the lower lobe of his right lung; Dr. Harrison performed a biopsy which consisted of gross and microscopic examinations of the right lower lobe. *Id*. Dr. Harrison diagnosed chronic bronchiectasis, organizing pneumonitis and anthracosis. *Id*. The administrative law judge found that Dr. Harrison's opinion is extremely descriptive of the presence of extensive and heavy anthracotic pigment on the lung and lymph nodes and additionally found that "Dr. Harrison's diagnosis of anthracosis is not merely another way of saying that anthracotic pigmentation was present in the lungs, but rather, that the diagnosis is specific enough to be encompassed in the board legal definition of pneumoconiosis as explained by the Fourth Circuit." Decision and Order at 4 - 5.

With respect to the remaining opinions of record regarding the biopsy evidence, the administrative law judge initially accorded negligible weight to the opinion by Dr. Caffrey[4] that concluded that Dr. Harrison's diagnoses of anthracosis is not the same as coal workers' pneumoconiosis. The administrative law judge found that Dr. Caffrey only looked at biopsy slides while Dr. Harrison actually performed a gross and microscopic biopsy examination of the lung lobe. Decision and Order at 5. The administrative law judge additionally found that Dr. Caffrey's narrow definition of anthracosis "flies in the

[4]Dr. Caffrey, a pathologist, reviewed slides from the May 13, 1968 biopsy. He opined that the slides revealed bronchiectasis, diffuse, focal pneumonitis, and chronic bronchitis, mild to moderate amount of anthracotic pigment within the lung tissue and a mild amount within the hilar lymph node tissue. Director's Exhibit 37. Dr. Caffrey also reviewed slides from a 1997 lung biopsy, which did not contain any anthracotic pigment according to the physician. Director's Exhibits 39. Additionally, Dr. Caffrey was deposed on October 28, 1999, at which time he stated that Dr. Harrison's diagnosis of anthracosis was not the same as a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 24.

face of the plain language of the Act which clearly specifies that legal pneumoconiosis can encompass a diagnosis of anthracosis such as the one made by Dr. Harrison." *Id*. The administrative law judge also discussed Dr. McSharry's opinion[5], but found that it, too, was entitled to negligible weight because of the physician's use of a narrow medical definition of anthracosis and because Dr. McSharry is not a pathologist. The administrative law judge then found that Dr. Castle's[6] opinion that claimant did not suffer from pneumoconiosis was "virtually worthless" because the physician did not see any of the 1968 biopsy slides.

Lastly, the administrative law judge found that Dr. Colquitt, a pathologist, examined slides of brushings from claimant's left lung and a very small amount of tissue from claimant's right lung following an endobronchial biopsy conducted on December 4, 1997. Decision and Order at 7. Dr. Colquitt found no evidence of malignancy or atypical cells in any of the slides, but diagnosed acute inflammation of the bronchial cells. Director's Exhibit 38. The administrative law judge further found that Dr. Caffrey also examined these slides, but detected no anthracotic pigment or malignancy. Director's Exhibit 39; Employer's Exhibit 24.

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[5]Dr. McSharry, a pulmonary specialist, examined claimant on June 10, 1999 and was deposed on October 18, 1999. Employer's Exhibits 5, 22. Dr. McSharry's June 1999 opinion indicates that claimant does not suffer from coal workers' pneumoconiosis, based on a lack of supporting evidence by chest x-ray and pulmonary function testing despite claimant's long history of exposure to coal dust and his marked pulmonary symptoms. Employer's Exhibit 5. Dr. McSharry further opined that claimant has a moderate to severe respiratory impairment unrelated to coal mining and more likely due to tobacco use, which would prevent claimant from performing the heaviest aspects of claimant's coal mine employment as a supply clerk. *Id*. Regarding Dr. Harrison's diagnosis of anthracosis, Dr. McSharry stated that it was not synonymous with coal workers' pneumoconiosis. Employer's Exhibit 22. He conceded however that claimant's other conditions diagnosed by Dr. Harrison could have been aggravated by coal dust exposure. *Id*.

[6]On the basis of a review of all of the medical data, on October 15, 1999, Dr. Castle opined that claimant does not suffer from coal workers' pneumoconiosis as it was unsubstantiated by physical, radiographic, physiologic, arterial blood gas or pathologic findings. Dr. Castle further opined that claimant suffers from a very significant respiratory impairment related to both tobacco smoke induced chronic obstructive pulmonary disease and bronchiectasis, which would prevent him from doing anything other than sedentary work. Employer's Exhibit 20.

The administrative law judge found that the 1968 biopsy was entitled to greater weight than the more recent 1997 biopsy because the 1968 biopsy was derived from tissue from the entire lower lobe of the right lung, which was studied both grossly and microscopically, whereas the 1997 biopsy involved extremely little tissue, which neither Dr. Colquitt nor Dr. Caffrey indicated was representative of claimant's lung tissue in general. Decision and Order at 7. Having accorded little weight to the contrary opinions in the record, the administrative law judge determined that Dr. Harrison's report is the most probative and entitled to determinative weight, and thus, found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2)(2000), and therefore, a mistake in a determination of fact pursuant to Section 725.310 (2000).

We agree with employer that the administrative law judge erred in his consideration of the evidence pursuant to Section 718.202(a)(2)(2000). Dr. Harrison, in describing his pathologic findings, both gross and microscopic, identified only anthracotic pigmentation, but then, in the concluding sentence of his report, listed anthracosis as one of his final diagnoses. Director's Exhibit 38. While a diagnosis of anthracosis may be sufficient to establish pneumoconiosis pursuant to Section 718.201, *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999), a finding in a biopsy of anthracotic pigmentation is not sufficient by itself to establish the existence of pneumoconiosis. 5 Fed. Reg. 80,048 (2000)(to be codified at 20 C.F.R.§718.202(a)(2)). The administrative law judge's finding that Dr. Harrison's diagnosis of anthracosis was specific enough to be encompassed in the broad legal definition of pneumoconiosis is not supported by the record in light of Dr. Harrison's description of only anthracotic pigmentation on his gross and microscopic discussions. Inasmuch as his pathological report provides no other basis for his diagnosis of "anthracosis,", we reverse the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2)(2000) as Dr. Harrison's report is insufficient as a matter of law to establish the existence of anthracosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As a result, the administrative law judge's finding that claimant established a mistake in a factual determination pursuant to Section 725.310 (2000) is also vacated. *Jessee v. Director, OWCP,* 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

We further agree with employer that the administrative law judge's failure to consider and discuss all of the medical opinion evidence pursuant to Section 718.202(a)(4)(2000) requires remand. *Hicks*, *supra*; *Akers*, *supra*. In his discussion of the medical opinions, as employer contends, the administrative law judge limited his review to the reports or the portions of the reports that discussed the biopsy evidence, but did not review these reports for other findings and a discussion regarding the existence of

pneumoconiosis.[7] The administrative law judge is required to discuss all the evidence of record and provide a rationale for crediting certain evidence, and a failure to do so requires remand. Thus, we remand the case to the administrative law judge to consider the evidence pursuant to Section 718.202(a)(4). Furthermore, we note that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, requires that in determining whether the evidence is sufficient to support a finding of pneumoconiosis, an administrative law judge must weigh all relevant evidence together.[8] *See Compton*, *supra*. Thus, on remand, if the administrative law judge determines that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), he must then address all of the pertinent evidence in conjunction with each other to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a). *Id.*

[7]The administrative law judge also did not discuss the medical opinions by Drs. Smiddy and Rosser.

[8]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last full year of coal mine employment occurred in the state of West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Lastly, regarding the findings pursuant to Section 718.204(b)(2000), the administrative law judge found that the opinions of Drs. Caffrey, Forehand, McSharry and Castle are entitled to little probative value as none of these physicians diagnosed the existence of pneumoconiosis. Decision and Order at 8. The administrative law judge accorded determinative weight to the opinions of the Drs. Smiddy and Rosser, pulmonary specialists, that claimant's totally disabling respiratory impairment was caused, in part, by claimant's coal workers' pneumoconiosis. Inasmuch as we have vacated the administrative law judge's determination that claimant established the existence of pneumoconiosis, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2000) that claimant established total disability due to pneumoconiosis.[9] However, on remand, if the administrative law judge determines that claimant has established the existence of pneumoconiosis, he may not reject the opinions of Drs. Caffrey, Forehand, McSharry and Castle merely on the basis that they did not diagnose coal workers' pneumoconiosis when these physicians opined that claimant suffers from a severe respiratory impairment due to other causes.[10] Therefore, the various opinions on the cause of claimant's respiratory impairment must be reconsidered at Section 718.204. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821, 19 BLR 2-86 (4th Cir. 1995); Director's Exhibit 11; Employer's Exhibit 5, 20, 22, 24.

Accordingly, the administrative law judge's Decision and Order is vacated and the case remanded for further consideration of the evidence .

SO ORDERED.

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[9]The administrative law judge's determination that total disability is established pursuant to Section 718.204(c)(2000) is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[10]Dr. McSharry stated in his deposition that the cause of claimant's respiratory impairment is asthma and suspected hyperinflation of the lungs and obstructive airways related to cigarette smoking. Employer's Exhibit 22. Dr. Caffrey opined that the miner's pulmonary disability was due to bronchiectasis, which was a congenital problem, and chronic bronchitis and bouts of pneumonia due to years of smoking. Director's Exhibit37; Employer's Exhibit 24. Dr. Castle stated that the miner suffered from a very significant respiratory impairment due to tobacco smoke induced chronic obstructive pulmonary disease and bronchiectasis. Employer's Exhibit 20. Dr. Forehand opined that claimant suffered from a significant respiratory impairment due to the effects of removing the right lower lobe and the effects of cigarette smoking. Director's Exhibit 11.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge