

BRB No. 05-0933 BLA

CECIL PARSONS)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 07/18/2006
)	
WOLF CREEK COLLIERIES)	
)	
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 on Remand - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Thomas A. Moak (Stumbo, Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (01-BLA-0248) of Administrative Law Judge Daniel J. Roketenetz rendered 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 is before the Board for the second time. Claimant was awarded benefits on a duplicate claim filed on March 29, 2000. The administrative law judge credited claimant with twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical opinion evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and therefore demonstrated a material change in conditions pursuant to Section 725.309(d) (2000).¹ The administrative law judge further found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board upheld the administrative law judge's determination that the law of the United States Court of Appeals for the Fourth Circuit was applicable, and affirmed his findings that the weight of the new evidence submitted in support of this duplicate claim established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board also affirmed the administrative law judge's finding that the weight of the evidence of record, old and new, 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 disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge's award of benefits was affirmed. *Parsons v. Wolf Creek Collieries*, BRB No. 02-0188 BLA (Dec. 13, 2002)(Dolder, J., concurring and dissenting)(unpub.).

Pursuant to employer's request for reconsideration *en banc*, and after Oral Argument, the Board affirmed in part, and vacated, the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis and a material change in conditions, and remanded the case for him to reassess the medical opinion evidence and explain his findings with respect thereto. *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*)(McGranery, J., concurring and dissenting). Specifically, the Board instructed the administrative law judge to reconsider his determination to accord greater weight to the opinion of Dr. Lafferty based on his status as claimant's treating physician and less weight to Dr. Tuteur's opinion because he was a non-examining physician. *Parsons*, 23 BLR at 1-35-36. On remand the administrative law judge was instructed to reevaluate his conclusion that Dr. Zaldivar's earlier and later opinions were inconsistent. *Id.* In addition, on remand the administrative law judge was

¹ Although 20 C.F.R. §725.309(d) has been revised, those revisions apply only to claims filed after January 19, 2001. 20 C.F.R. §725.2(c).

instructed to reassess the weight accorded to Dr. Kim's CT scan report, since Dr. Kim's radiological qualifications were not in the record, yet the administrative law judge had credited Dr. Kim's opinion based on his qualifications, without following proper procedures for taking judicial notice of such qualifications. *Id.* The administrative law judge's finding that the existence of pneumoconiosis was established at Section 718.202(a)(4) was vacated and the finding that claimant's total disability was due to pneumoconiosis was vacated and the case was remanded. *Id.*

On remand, the administrative law judge again found that the newly submitted medical evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and a material change in conditions pursuant to Section 725.309(d) (2000). Decision and Order on Remand at 3-4. The administrative law judge further found that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). *Id.* Accordingly, benefits were awarded. The present appeal followed. Employer argues that the administrative law judge erred in crediting the medical opinions of Drs. Kim, Lafferty, and Younes and that he did not weigh all of the relevant evidence together in finding the existence of pneumoconiosis established. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's arguments on the merits, but urges rejection of employer's contentions concerning the issues of the applicable law, the latency and progressivity of pneumoconiosis, and pre-existing conditions.²

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director*,

² The Director is correct. The Board rejected these arguments previously and because employer demonstrates no exception to the law of the case doctrine, we decline to reconsider our prior holdings on these issue. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

OWCP, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.*

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in his weighing of the medical opinion evidence. Initially, we reject employer's allegation that the administrative law judge erred in considering the reports of Drs. Lafferty and Younes, diagnosing claimant with pneumoconiosis, to be documented and reasoned medical opinions. Substantial evidence supports the administrative law judge's finding that these opinions were based on physical examinations, medical testing and consideration of relevant medical histories. Director's Exhibits 9, 12; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213, 22 BLR 2-162, 175-176 (4th Cir. 2000)(requiring that "the totality" of a medical report indicate a reasoned medical judgment). Additionally, the administrative law judge reasonably credited Dr. Kim's opinion since the physician's diagnosis was based upon a review and comparison of CT scans taken on August 25, 2000 and December 22, 2000. Claimant's Exhibit 1.

However, employer's argument is valid that the administrative law judge did not adequately explain his reasons for finding the opinions of Drs. Kim, Lafferty, and Younes more persuasive than the contrary opinion of Dr. Zaldivar that claimant does not have pneumoconiosis, but instead has sarcoidosis. Employer's Exhibit 9. Specifically, the administrative law judge stated that Drs. Kim, Lafferty, Younes, and Zaldivar gave well-reasoned and well-documented opinions. Decision and Order on Remand at 4. In so finding, however, the administrative law judge "grant[ed] less weight to Dr. Tuteur's medical report," and "rel[ied] upon the well-reasoned and well-documented opinions of Drs. Kim, Lafferty, and Younes over the well-reasoned and well-documented opinion of Dr. Zaldivar" to find that claimant established the existence of pneumoconiosis by a preponderance of the evidence. *Id.* Review of the record, however, reflects that Dr. Zaldivar considered the same examinations, tests, and medical histories as Drs. Kim, Lafferty, and Younes, and that he provided a written opinion and deposition testimony explaining in detail why he concluded that claimant's impairment is unrelated to coal

mine dust exposure. Employer's Exhibits 1, 9. A review of the administrative law judge's decision reveals no discussion or explanation of why he relied upon the opinions of Drs. Kim, Lafferty, and Younes over Dr. Zaldivar's opinion in finding the existence of pneumoconiosis established "by a preponderance of the evidence." The administrative law judge should have explained his reasoning at some point in his Decision and Order in order to satisfy the Administrative Procedure Act (APA), 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). The APA requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefore on all material issues of fact, law, or discretion presented in the record. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, on this record, the administrative law judge has not adequately explained his basis for crediting the opinions of Drs. Kim, Lafferty, and Younes as more persuasive than the contrary opinion of Dr. Zaldivar. *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). Consequently, since the administrative law judge did not explain his rationale for crediting the opinions of Drs. Kim, Lafferty, and Younes over Dr. Zaldivar's opinion in finding the existence of pneumoconiosis established, we must vacate the administrative law judge's finding pursuant to Sections 718.202(a)(4) and 725.309(d) (2000) and remand this case to him for further consideration. *Wojtowicz*, 12 BLR at 1-165.

Therefore, we again remand this case to the administrative law judge for a reevaluation and weighing of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to Section 718.202(a)(4). On remand, the administrative law judge should then weigh together all relevant evidence to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) under *Compton*. Additionally, in light of our remand instructions, we decline to address employer's allegations of error regarding the administrative law judge's other findings on the merits of entitlement.

In light of our remand of this case for further findings on the merits of the claim at Sections 718.202(a)(4), we need not address claimant's counsel's fee request at this juncture.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is vacated, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge