

BRB No. 08-0714 BLA

J. C.)
)
 Claimant-Respondent)
)
 v.)
)
 PETER CAVE COAL COMPANY) DATE ISSUED: 07/10/2009
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Law Judge, SMITH and HALL, Administrative Law Judges.

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (01-BLA-0387) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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).¹ This

¹ This case involves a duplicate claim for benefits pursuant to 20 C.F.R. §725.309(d) (2000). Claimant filed his first application for benefits on November 13, 1989, which was finally denied by the district director on May 7, 1990, on the grounds that claimant failed to establish any of the elements of entitlement. Director's Exhibit 38.

case is before the Board for the third time.² In the most recent appeal, the Board affirmed the administrative law judge's reliance on the newly submitted x-ray evidence, as the most probative, to find that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and thus, established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). [*J.C.*] v. *Peter Cave Coal Co.*, BRB No. 04-0888 BLA (Sept. 28, 2006)(unpub.). The Board vacated, however, the administrative law judge's finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for the administrative law judge to reconsider Dr. Wright's opinion in light of the discrepancy between the smoking history he relied on and the smoking history reported by claimant at the hearing, which the administrative law judge credited. The Board further instructed the administrative law judge to reconsider Dr. Ranavaya's opinion to determine whether the physician provided sufficient rationale for his conclusion that pneumoconiosis is a contributing cause of claimant's disabling impairment.

On remand, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Claimant filed a second claim on August 6, 1992, which was finally denied in a Decision and Order issued by Administrative Law Judge Jeffrey Turek on September 19, 1995. Judge Turek found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 39. Claimant filed a third application for benefits on August 14, 1997, which was finally denied by the district director on January 13, 1998, as claimant did not prove any elements of entitlement. Director's Exhibit 40. Claimant filed his current claim for benefits, his fourth, on January 26, 1999. Director's Exhibit 1. The revised regulation pertaining to subsequent claims does not apply to this case, as claimant's fourth claim was filed before the effective date of the amended regulations. 20 C.F.R. §725.2(c).

² The complete procedural history of this case as set forth in the Board's two prior decisions is incorporated herein by reference. [*J.C.*] v. *Peter Cave Coal Co.*, 22 BLR 1-294 (2003); [*J.C.*] v. *Peter Cave Coal Co.*, BRB No. 04-0888 (Sep. 28 2006). At this point in the proceedings, the Board has affirmed the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and a material change in conditions under Section 725.309 (2000). [*J.C.*], BRB No. 04-0888, slip op. at 5. The Board has also affirmed the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b). [*J.C.*], 22 BLR at 1-303.

On appeal, employer contends that the administrative law judge erred in determining that the medical opinion evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer urges reversal of the award of benefits, or in the alternative, urges that the award be vacated and the case be remanded to another administrative law judge. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal. Employer reiterates its arguments in a reply brief.³

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.⁴ 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).

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, 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).

³ On August 25, 2008, while this appeal was pending before the Board, employer filed a Motion to Suspend Briefing Order for Lack of a Party in Interest. Employer asserted that it had received a letter from the Department of Labor, identifying claimant as "[J.C.](Estate)," thus implying that claimant was now deceased. Employer requested that briefing be suspended pending a showing by counsel for claimant that there is a real party-in-interest to pursue to the claim, pursuant to 20 C.F.R. §725.360. By Order dated September 30, 2008, the Board denied employer's motion. On appeal, employer renewed its "objection to this proceeding." Employer's Brief at 2. As set forth in our September 30, 2008 Order, the miner's claim does not abate upon his death. If a miner dies before receiving black lung benefits due him on a claim he has already filed, the benefits are payable to certain persons in a descending level of priority. 20 C.F.R. §725.545(c). Moreover, a person proceeding as a successor in interest to the original miner is not required to show dependency pursuant to 20 C.F.R. §725.360(b). Therefore, employer's objection is noted, and the Board will proceed with its consideration of this case.

⁴ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 40. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

We first address employer's assertion that in finding total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(c), the administrative law judge erred in crediting the opinion of Dr. Wright. Specifically, employer contends that the administrative law judge substituted her opinion for that of a medical expert's in determining that Dr. Wright's finding of an inaccurate smoking history did not undermine his credibility. Employer's Brief at 11. We agree.

In our prior decision, we held that the administrative law judge acted within her discretion as fact-finder in crediting claimant's hearing testimony, that he had a smoking history spanning over thirty years, the last five or six years during which he smoked one pack of cigarettes per day, over the smoking histories recorded by the various physicians.⁵ [J.C.], BRB No. 04-0888, slip op at 6; Decision and Order on Remand at 11; Hearing Transcript at 27-28. We further held, however, that in crediting the opinion of Dr. Wright, who recorded that the claimant smoked a half pack to a pack of cigarettes per day for fifteen years, the administrative law judge did not explain her finding that the disparity between the two histories did not detract from the credibility of Dr. Wright's opinion.⁶ [J.C.], BRB No. 04-0888, slip op at 7. Thus, we remanded case to the administrative law judge to reconsider Dr. Wright's opinion in light of the discrepancy between the fifteen year smoking history upon which he relied and the thirty-year smoking history she found established by claimant's credible testimony. [J.C.], BRB No. 04-0888, slip op at 7.

On remand, the administrative law judge again determined that the claimant's hearing testimony about his smoking history was credible and the most reliable smoking history account. Second Decision and Order on Remand at 3. The administrative law judge further found that the difference between the history claimant related to Dr. Wright, and the history he testified to, was about twelve years⁷ between the ages of fourteen or

⁵ In 2001, claimant testified that he started smoking at age eight, started smoking one-half pack around fourteen or fifteen years of age, and, started smoking one pack per day at around the age of forty-two. Hearing Transcript at 27-28.

⁶ In his report dated June 9, 1998, Dr. Wright noted that claimant smoked one-half pack of cigarettes for fifteen years and stopped smoking fifteen years earlier. Director's Exhibit 11. Dr. Wright further found "There is severe pulmonary impairment. This is in large part related to his dust inhalation of working as a coal miner. There is probably a contribution from smoking; however, the patient has not smoked in fifteen years and having a mild smoking history before that time. This would indicate that smoking is not a substantial cause of the patient's airways disease." Director's Exhibit 11.

⁷ The administrative law judge did not explain the discrepancy between this finding, and her acknowledgement that claimant testified to a thirty year smoking history,

fifteen and twenty-seven, at a rate of one-half pack per day. Second Decision and Order on Remand at 3. Considering Dr. Wright's opinion in light of the inaccurate smoking history upon which he relied, the administrative law judge stated that "it is not possible to tell from [Dr. Wright's] report whether, had he been aware that [claimant] smoked up to a half a pack a day for an additional twelve years, [Dr. Wright] would have considered [claimant's] smoking history to be a more prominent factor" in his impairment. Second Decision and Order on Remand at 3. The administrative law judge further found, however, that "there is no indication that, had he been aware that [claimant] smoked up to a half pack a day for an additional twelve years, Dr. Wright would have concluded that [claimant's] smoking history was the SOLE factor in his severe pulmonary impairment." Second Decision and Order on Remand at 3. The administrative law judge explained:

In other words, Dr. Wright considered both [claimant's] history of exposure to coal mine dust, as well as his smoking history to be factors in the development of his disabling airways disease, with coal dust exposure being a more prominent factor. He clearly did not consider these factors to be mutually exclusive. But while Dr. Wright's awareness of an additional twelve years of up to a half pack of smoking on [claimant's] part may have affected his assessment of the degree of contribution of cigarette smoking to the development of [claimant's] respiratory impairment, there is no suggestion in Dr. Wright's report that it would have eliminated [claimant's] seventeen years history of underground coal dust exposure as a concomitant factor in the development of that impairment.

Second Decision and Order on Remand at 4.

Initially, we agree with employer that the administrative law judge's conclusion, that Dr. Wright's opinion would not have changed had he been aware of claimant's thirty year smoking history, is inconsistent with her earlier determination that "it is not possible to tell from [Dr. Wright's] report" whether his opinion would have been different had he considered an accurate smoking history. Employer's Brief at 12. In addition, in concluding that an awareness of claimant's thirty year, rather than fifteen year, smoking history would not have changed the physician's opinion, the administrative law judge has impermissibly substituted her own opinion for that of Dr. Wright. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Moreover, as employer contends, in finding that "there is no indication that, had he been aware that [claimant] smoked up to a half pack a day for an additional twelve years, Dr. Wright would have concluded that [claimant's] smoking

but related only a fifteen year smoking history to Dr. Wright, which equates to a difference of fifteen years.

history was the SOLE factor in his severe pulmonary impairment,” the administrative law judge failed to consider Dr. Wright’s earlier opinion in which he relied on a thirty-five year smoking history and diagnosed chronic smoker’s bronchitis with mild functional lung impairment, and did not indicate any contribution by coal dust. Director’s Exhibit 38-21. Therefore, the administrative law judge’s weighing of Dr. Wright’s opinion is not supported by substantial evidence. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-625, 2-638 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

We must vacate, therefore, the administrative law judge’s findings regarding Dr. Wright’s report and her finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We remand the case to the administrative law judge for reconsideration of Dr. Wright’s opinion in light of his reliance on an inaccurate smoking history, and in conjunction with all of the relevant medical evidence of record.

Employer next contends that the administrative law judge did not comply with the board’s instructions to subject Dr. Ranavaya’s opinion to the same scrutiny that she applied to Dr. Zaldivar’s opinion.⁸ Employer’s contention has merit. In our prior opinion, we held that the administrative law judge acted within her discretion in finding that Dr. Zaldivar’s failure to explain why he would not alter his opinion, that claimant’s total disability was not due to pneumoconiosis, even if he accepted that claimant had pneumoconiosis, detracted from the credibility of his opinion. Decision and Order on Remand at 12; Director’s Exhibit 30. However, we further held that the administrative law judge did not similarly inquire into whether Dr. Ranavaya had offered any explanation for his conclusion that claimant was totally disabled due to pneumoconiosis. Although an administrative law judge is not required to discredit a medical opinion on this ground, if an administrative law judge relies upon this factor in weighing one medical opinion, he or she must subject the other opinions of record to the same analysis. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1988); *Hall v. Director, OWCP*, 12 BLR 1-133 (1989), *modified on recon.*, 14 BLR 1-1 (1989).

⁸ We note that in crediting Dr. Ranavaya’s opinion, the administrative law judge stated that, “Even if I were to discount Dr. Ranavaya’s opinion, I would still conclude based on the report by Dr. Wright, [claimant] has established that his totally disabling respiratory impairment is due to pneumoconiosis.” Second Decision and Order on Remand at 5 n.4. However, in light of our determination to vacate the administrative law judge’s crediting of Dr. Wright, we must address employer’s contentions regarding the administrative law judge’s evaluation of Dr. Ranavaya’s opinion.

On remand, the administrative law judge reiterated the inconsistencies and contradictions for which she had discredited Dr. Zaldivar's opinion, and stated:

There are no such inconsistencies or contradictions in the opinions of Dr. Ranavaya, who found that [claimant] had pneumoconiosis, based on a seventeen-year-long history of occupational exposure to dust in underground mining, and radiological evidence of the disease, which he concluded caused [claimant's] pulmonary impairment. Dr. Ranavaya's conclusions were the result of his examination of [claimant], his consideration of [claimant's] medical and family history, his seventeen years of underground coal mining, and the results of his x-ray examination. His conclusion regarding [claimant's] x-ray findings is consistent with my finding after weighing all of the x-ray evidence of record.

Second Decision and Order on Remand at 5.

As employer asserts, while the administrative law judge evaluated Dr. Ranavaya's opinion in light of its documentation, she did not assess its probative value in light of whether he explained his determination that pneumoconiosis is a contributing cause of claimant's impairment. We vacate, therefore, the administrative law judge's findings with respect to Dr. Ranavaya's opinion under 20 C.F.R. §718.204(c). The administrative law judge must reconsider Dr. Ranavaya's medical report on remand in determining whether claimant has proven that he is totally disabled due to pneumoconiosis.⁹

In light of the foregoing errors by the administrative law judge, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remand this case to the administrative law judge to reconsider the medical opinion evidence and adequately explain her findings. Specifically, the administrative law judge should address the weight to be accorded to the opinions of Drs. Wright and Ranavaya in light of all the relevant evidence and the disability causation standard enunciated in *Peabody*

⁹ On remand, the administrative law judge is also instructed to reconsider Dr. Ranavaya's opinion in light of the results of the pulmonary function studies upon which he relied. The administrative law judge noted that, contrary to employer's assertion, only the post-bronchodilator pulmonary function study was invalidated by Dr. Gaziano, and not the pre-bronchodilator study. Second Decision and Order on Remand at 4 n.2. However, as employer contends, the administrative law judge did not address what impact, if any, the partial invalidation of Dr. Ranavaya's study had upon the credibility of his opinion. Employer's Brief at 15.

Coal Co. v. Smith, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).¹⁰ *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Finally, employer argues that the case should be reassigned to a new administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

¹⁰ We reject, however, employer's contention that the administrative law judge erred in failing to evaluate the opinions of Drs. Wright and Ranavaya in light of the exertional requirements of claimant's last coal mine employment. Employer's Brief at 14-15. This inquiry is relevant to the issue of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv), which has been previously affirmed by the Board. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Accordingly, the administrative law judge's Second Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for further proceedings 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