

BRB No. 06-0914 BLA

H.H.)
)
 Claimant-Respondent)
)
 v.)
) DATE ISSUED: 06/22/2007
 LEATHERWOOD ENERGY)
 CORPORATION, INCORPORATED)
)
 and)
)
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 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 – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

John Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand – Awarding Benefits (03-BLA-6099) of Administrative Law Judge Rudolf L. Jansen rendered on a subsequent

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 Claimant filed this claim on September 6, 2001.² Director's Exhibit 2. It is now before the Board for the second time.

In [*H.H.*] *v. Leatherwood Energy Corp.*, BRB No. 05-0342 BLA (Dec. 16, 2005)(unpub.), the Board reviewed employer's appeal of an award of benefits and vacated Administrative Law Judge Daniel J. Roketenetz's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), 718.204(c), and 725.309(d). The Board held that Judge Roketenetz failed to explain why the opinions of Drs. Baker and Chaney were better reasoned and documented than that of Dr. Broudy, and failed to address the inconsistencies in Dr. Baker's two opinions regarding the extent of claimant's disability. Thus, the case was remanded for the administrative law judge to explain why the opinions of Drs. Baker and Chaney should be credited over those of Dr. Broudy. Moreover, the Board instructed the administrative law judge to admit Dr. Dahhan's medical report into the record, and to weigh it with the other medical opinions of record. If claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), consideration of the claim on the merits was to be undertaken.

On remand, Judge Roketenetz was unavailable and the case was reassigned, without objection, to Administrative Law Judge Rudolf L. Jansen (the administrative law judge), who found that claimant established a "material change in his condition" pursuant to 20 C.F.R. §725.309(d)(2000) by establishing that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).³ Considering the claim on the merits, the administrative law

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed his first claim for benefits on May 24, 1994. Director's Exhibit 1. The first claim was denied on November 4, 1994 because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. *Id.* Because claimant did not pursue this claim any further, the denial became final.

³ As the Board previously noted with Administrative Law Judge Daniel J. Roketenetz, Administrative Law Judge Rudolf L. Jansen should have considered whether the new evidence established a "change in an applicable condition of entitlement"

judge found that claimant established that he has pneumoconiosis pursuant to Section 718.202(a)(4), that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in according controlling weight to the opinion of claimant's treating physician, Dr. Chaney, without considering that Dr. Chaney is the least qualified physician of record. Employer also argues that the administrative law judge erred in rejecting the opinions of Drs. Broudy and Dahhan, because they are well-reasoned and well-documented. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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).

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. 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 are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because the evidence did not show that claimant had pneumoconiosis, that the disease was caused at least in part by coal mine work, and that claimant was totally disabled by the disease. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing any one of these three elements to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge found that claimant established a "material change in his condition" since the denial of the prior claim pursuant to Section 725.309(d) after weighing the new medical opinions of Drs. Baker, Broudy, Chaney, and Dahhan, and

pursuant to 20 C.F.R. §725.309(d), because claimant's subsequent claim was filed after the date of the regulations that took effect on January 19, 2001. [*H.H.*] v. *Leatherwood Energy Corp.*, BRB No. 05-0342 BLA (Dec. 16, 2005)(unpub.), slip op. at 2 n.3.

finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Initially, the administrative law judge found that Dr. Baker's opinion, that claimant has clinical and legal pneumoconiosis, rendered in reports dated October 31, 2001, and November 4, 2002, was well-documented and entitled to "significant probative weight" because of Dr. Baker's credentials as a Board-certified pulmonary specialist, and because Dr. Baker provided the bases for his findings. Decision and Order on Remand at 5. Next, the administrative law judge considered that Dr. Broudy is a pulmonary specialist, but assigned less probative weight to Dr. Broudy's opinion, that claimant does not have clinical or legal pneumoconiosis, rendered in a report dated December 12, 2001, finding that it was less documented and reasoned because Dr. Broudy "did not rule out legal pneumoconiosis in that he essentially ignored the patient's lengthy coal mining history in his final impression." *Id.* The administrative law judge acknowledged that Dr. Broudy diagnosed chronic bronchitis with mild airways obstruction unrelated to coal mine employment, but the administrative law judge found that Dr. Broudy did not explain "how he arrived at his conclusion that [claimant's] 22 years exposure to coal dust played no part in his current pulmonary problem." *Id.* The administrative law judge then considered Dr. Dahhan's opinion, that claimant does not have clinical or legal pneumoconiosis, rendered in a report dated February 13, 2004, but assigned it less probative weight, because Dr. Dahhan failed to explain why claimant's coal dust exposure did not contribute to or aggravate claimant's pulmonary defect. Decision and Order on Remand at 6.

The administrative law judge assigned greatest probative and "controlling weight" to Dr. Chaney's opinion, that claimant has clinical pneumoconiosis, rendered in an undated report, treatment records, and a deposition dated March 8, 2004, because Dr. Chaney is claimant's treating physician and because his opinion was well-reasoned and well-documented. Decision and Order on Remand at 6-7. The administrative law judge noted that Dr. Chaney was most familiar with claimant's condition, that Dr. Chaney's opinion was supported by Dr. Baker's reasoned opinion, and that Dr. Chaney explained his disagreement with Dr. Dahhan's opinion. *Id.* The administrative law judge acknowledged that the regulations permit him to assign greater weight to a treating physician's opinion based on the criteria at 20 C.F.R. §718.104(d)(1)-(4).⁴ Evaluating

⁴ 20 C.F.R. §718.104(d) provides that the administrative law judge must take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1)*Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

the criteria, the administrative law judge found that Dr. Chaney's opinion met the criteria at Section 718.104(d)(1)(nature of relationship factor) because Dr. Chaney treated claimant for respiratory conditions, in addition to "unrelated medical conditions." Decision and Order on Remand at 7. The administrative law judge also found that Dr. Chaney's opinion met the criteria at Section 718.104(d)(2) and (3)(duration of relationship and frequency of treatment factors) because Dr. Chaney had treated claimant since 1996 and sees claimant on a consistent basis, giving Dr. Chaney an opportunity to obtain a superior understanding of claimant's condition. *Id.* Moreover, the administrative law judge found that Dr. Chaney's opinion met the criteria at Section 718.104(d)(4) (extent of treatment factor), because Dr. Chaney performed pulmonary function studies and blood gas studies on claimant at least three times. *Id.*

In considering Section 718.202(a)(4) on the merits, the administrative law judge weighed the new medical opinion evidence as above, and also considered Dr. Wicker's June 20, 1994 report, which was submitted with claimant's prior claim. The administrative law judge assigned less weight to Dr. Wicker's opinion, that claimant does not have pneumoconiosis, because it was based on an examination conducted seven years prior to the next most recent examination of record, and in view of the progressive nature of pneumoconiosis.⁵ Decision and Order on Remand at 8.

Employer contends the administrative law judge erred in assigning controlling weight to Dr. Chaney's opinion without discussing his qualifications. Employer's contention has merit. Dr. Chaney is a family practitioner and a Board-certified forensic

(2)*Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3)*Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4)*Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

20 C.F.R. §718.104(d)(1)-(4).

⁵ The administrative law judge's treatment of Dr. Wicker's opinion is consistent with the Board's prior holding in [*H.H.*], BRB No. 05-0342 BLA, slip op. at 4, and we affirm it as it is unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

examiner, Claimant's Exhibit 2 at 3, but is not a pulmonary specialist or Board-certified in pulmonary medicine. Claimant's Exhibit 2 at 9. In black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003). In *Williams*, the court held that the administrative law judge erred in ignoring the credentials of the claimant's treating physician and erred in accepting his opinion without considering his qualifications in relation to the qualifications of the physicians rendering opposite conclusions. *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Thus, because the administrative law judge did not consider Dr. Chaney's qualifications, we vacate the administrative law judge's assignment of controlling weight to Dr. Chaney's opinion. On remand, the administrative law judge must consider Dr. Chaney's qualifications, and compare them to those of Drs. Baker, Broudy, and Dahhan, in determining whether claimant has established a change in an applicable condition of entitlement pursuant to Section 725.309(d) by establishing pneumoconiosis pursuant to Section 718.202(a)(4). The record reflects that Drs. Broudy and Dahhan are both Board-certified in internal medicine and pulmonary disease. Director's Exhibit 19; Employer's Exhibit 1. Dr. Baker's qualifications are not in the record, but the administrative law judge noted that he was a pulmonary specialist, Board-certified in pulmonary disease.⁶ Decision and Order on Remand at 5, 11.

Additionally, we hold that the administrative law judge erred in assigning less probative weight to the opinions of Drs. Broudy and Dahhan because the physicians failed to explain why they believed that claimant's coal dust exposure did not contribute to or aggravate claimant's pulmonary defect. In *Williams*, the court held that the administrative law judge's criticism of Dr. Dahhan's opinion for the same reason made "no sense" because it assumed that claimant's work as a miner must have caused his lung impairment. *Williams*, 338 F.3d at 515-516, 22 BLR at 2-651.

Because the administrative law judge relied on his findings pursuant to Sections 725.309(d)(2000) and 718.202(a)(4) in considering this subsequent claim on the merits at Section 718.202(a)(4), we vacate and remand this case on the merits at Section 718.202(a)(4) as well.

Pursuant to Section 718.204(b)(2)(iv),(c) the administrative law judge again accorded greatest weight to Dr. Chaney's opinion that claimant is totally disabled and that his total disability is due to pneumoconiosis, without considering Dr. Chaney's

⁶ Employer acknowledges on appeal, that Dr. Baker is Board-certified in internal medicine and pulmonary medicine. Employer's Brief at 15.

comparative credentials. We therefore vacate the administrative law judge's findings thereunder.

On remand, the administrative law judge must determine whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement since the date of the denial of the prior claim pursuant to Section 725.309(d). If the administrative law judge finds that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), the administrative law judge must consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits on the merits under 20 C.F.R. Part 718. In weighing the evidence, the administrative law judge must consider the qualifications of Dr. Chaney in relation to the qualifications of the physicians rendering opposite conclusions.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate and remand the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), 718.204(c), and 725.309(d). I believe that the administrative law judge carefully and properly explained why he assigned greatest probative and controlling weight to Dr. Chaney's opinion, that claimant has pneumoconiosis, as that of the treating physician. At 20 C.F.R. §§718.202(a)(4) and 725.309(d), the administrative

law judge found that Dr. Chaney's opinion met the criteria at 20 C.F.R. §718.104(d), was well-reasoned and well-documented, and was supported by Dr. Baker's opinion, that claimant has pneumoconiosis. Employer does not challenge these findings, and thus I would affirm them as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, at Sections 718.202(a)(4) and 725.309(d), the administrative law judge permissibly assigned less probative weight to the opinions of employer's doctors, Drs. Broudy and Dahhan, that claimant does not have pneumoconiosis, based on their inadequate reasoning, because the physicians failed to explain why claimant's coal dust exposure played no part in his pulmonary impairment.⁷ *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 BLR 2-192, 2-199, 2-200 (6th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 5-6.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge permissibly assigned little weight to the opinions of Drs. Broudy and Dahhan, that claimant is not totally disabled, because the physicians were unaware of the exertional requirements of claimant's usual coal mine employment as a roof bolter. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Decision and Order on Remand at 9. The administrative law judge assigned less probative weight to Dr. Baker's opinion of total disability because Dr. Baker showed no familiarity with claimant's job duties. Additionally, the administrative law judge assigned greatest probative weight to Dr. Chaney's opinion, that claimant is totally disabled because Dr. Chaney was aware of the exertional requirements of claimant's usual coal mine employment as a roof bolter and because Dr. Chaney was the most familiar with claimant's physical condition. Employer does not challenge the administrative law judge's treatment of the opinions of Drs. Baker and Chaney at Section 718.204(b)(2)(iv), and thus, I would affirm them as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

⁷ As the administrative law judge pointed out, Dr. Dahhan explained why he did not find clinical pneumoconiosis, but did not explain why claimant's "mild obstructive ventilatory defect" was not "caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." Decision and Order on Remand at 6; Employer's Exhibit 1 at 2. Similarly, Dr. Broudy merely opined that:

I do not believe that [claimant] has coal workers' pneumoconiosis nor does he have a chronic lung disease caused by the inhalation of coal mine dust. I believe the chronic bronchitis with mild chronic airways obstruction is the result of cigarette smoking I do not believe that there has been any significant pulmonary disease or respiratory impairment that has arisen from this man's occupation as a coal worker.

Director's Exhibit 19 at 5-6.

Based on the administrative law judge's proper weighing of the evidence at Sections 718.202(a)(4) and 718.204(b)(2)(iv), I would affirm his assignment of significant probative weight to Dr. Chaney's opinion, that claimant is totally disabled due, at least in part, to pneumoconiosis at Section 718.204(c). Moreover, I would affirm the administrative law judge's assignment of significant weight to Dr. Baker's opinion that claimant is totally disabled from a respiratory standpoint due to both smoking and coal dust exposure because it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711. Lastly, I would affirm the administrative law judge's assignment of very little probative weight to the opinions of Drs. Broudy and Dahhan, that claimant's pulmonary problems are due to smoking. These physicians did not diagnose pneumoconiosis and, thus, contradict the administrative law judge's finding that claimant has pneumoconiosis, which I would affirm. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Remand at 11. Based on the above reasoning, I would affirm the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.204(b)(2)(iv), 718.204(c), and 725.309(d), and thus, I would affirm the award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge