BRB No. 99-0659 BLA

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| ULIS G. McCLAIN | ) | |
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| Claimant-Respondent | ) | |
| | ) | DATE ISSUED: |
| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | |
| | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | DECISION AND ORDER |
| Party-in-Interest | | |

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Michael W. Zimecki (Strassburger, McKenna, Gutnick & Potter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-BLA-0612) of Administrative Law Judge Michael P. Lesniak with respect to 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] In the

[1]The relevant procedural history of this case is as follows: Claimant filed an application for benefits on August 8, 1989. Director's Exhibit 36. The district director denied the claim on the grounds that claimant did not establish any of the elements of entitlement. *Id*. Claimant filed a second claim on June 30, 1989.

Decision and Order with respect to this claim, the administrative law judge credited claimant with at least twenty years of coal mine employment and noted that the first issue before him was whether the newly submitted evidence supported a finding of a material change in conditions pursuant to 20 C.F.R. §725.309(d). The administrative law judge determined that inasmuch as the evidence submitted subsequent to the denial of the prior claim was sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(c), claimant demonstrated a material change in conditions. The administrative law judge further found that the evidence of record, as a whole, supported a finding of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability due to pneumoconiosis under 20 C.F.R. §§718.204(b) and (c). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (a)(4), 718.204(b), 718.204(c)(4), and 725.309.[2] Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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Director's Exhibit 35. This claim was eventually withdrawn at claimant's request on September 27, 1991. *Id*. Claimant subsequently filed a third application for benefits on May 26, 1995. Director's Exhibit 34. The district director found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but did not prove that he was totally disabled due to pneumoconiosis. Benefits were, therefore, denied. *Id*. Claimant filed the claim for benefits that is the subject of the present appeal on January 13, 1997. Director's Exhibit 1.

[2]The administrative law judge's findings under 20 C.F.R. §718.204(c)(1)-(3) are affirmed, as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer argues initially that the administrative law judge erred in determining that claimant could establish a material change in conditions merely by demonstrating that he is now totally disabled under the terms of Section 718.204(c). We reject this argument. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that in order to determine whether a material change in conditions has been established pursuant to Section 725.309, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change sufficient to entitle him to consideration of his claim on the merits. *Id*. In the present case, the prior denial was based upon claimant's failure to establish total disability due to pneumoconiosis under Section 718.204. Director's Exhibit 34. This prerequisite of entitlement actually encompasses two distinct elements: Proof of total respiratory or pulmonary disability, which is made under Section 718.204(c); and proof that pneumoconiosis is the cause of the total disability pursuant to Section 718.204(b). If the newly submitted evidence supports a finding of total disability under Section 718.204(c), therefore, claimant has established an element of entitlement previously adjudicated against him and a material change in conditions pursuant to Section 725.309.

With respect to the administrative law judge's consideration of the newly submitted evidence under Section 718.204(c), employer argues that the administrative law judge erred in finding that the medical opinions of Drs. Fino, Cho, and Levine are sufficient to establish total disability under Section 718.204(c)(4). This contention is without merit. Contrary to employer's assertion, the administrative law judge did not misconstrue Dr. Fino's opinion in determining that Dr. Fino diagnosed a totally disabling respiratory impairment. In a report based upon his examination of claimant in December of 1997, Dr. Fino stated that, in contrast to his earlier finding based upon an examination of claimant in January of 1991, claimant has a respiratory impairment that prevents him from performing his usual coal mine job. Employer's Exhibits A1, K. In

addition, the administrative law judge acted within his discretion in crediting, "in particular," Dr. Fino's opinion regarding this issue based upon Dr. Fino's qualifications as a Board-certified pulmonologist and internist and upon the thoroughness of his report.[3] Decision and Order at 15; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, even assuming that the administrative law judge erred in crediting the opinions of Drs. Cho and Levine, substantial evidence supports the administrative law judge's determination that claimant established total disability under Section 718.204(c)(4) and a material change in conditions. *See Swarrow*, *supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986).

Turning to the administrative law judge's findings on the merits of entitlement, the administrative law judge determined that claimant established the existence of pneumoconiosis under Section 718.202(a)(1), (a)(2), and (a)(4).[4] Decision and Order at 17-18. The administrative law judge also found that upon weighing all of the evidence relating to pneumoconiosis in accordance with the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), claimant established the existence of pneumoconiosis.[5] *Id*.

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[3]The qualifications of Drs. Cho and Levine are not of record.

[4]20 C.F.R. §718.202(a)(3) is not applicable in the present case, as there is no evidence of complicated pneumoconiosis in the record and the relevant claim was filed by a living miner after January 1, 1982. 20 C.F.R. §§718.202(a)(2), 718.304-306.

[5]In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d

With respect to Section 718.202(a)(1), employer argues that the administrative law judge did not provide a sufficient rationale for relying upon two readings of a single film to determine that claimant established the existence of pneumoconiosis under Section 718.202(a)(1). The administrative law judge weighed all of the x-ray readings of record and stated that he would accord greater weight to the interpretations of films obtained between February of 1996 and August of 1997, inasmuch as the record contained readings of films dating from as early as 1984. Decision and Order at 17. The administrative law judge further indicated that he would give more weight to readings performed by physicians who are B readers or Board-certified radiologists *and* B readers. *Id*. The administrative law judge concluded that the two positive interpretations of the film dated April 1, 1997, which were performed by dually qualified physicians, outweighed Dr. Fino's negative readings of the other films obtained during the relevant period. *Id*. We affirm the administrative law judge's finding, as the administrative law judge acted within his discretion in treating the recent films as more probative of claimant's condition and in according greater weight to the readings performed by dually qualified physicians. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark*, *supra*; *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983).

Regarding Section 718.202(a)(2), employer asserts that the administrative law judge erred in determining that the biopsy evidence of record establishes the existence of pneumoconiosis. Employer's contention has merit. The record contains a pathology report describing tissue samples taken from claimant's right lung. In this report, Dr. Kotwal noted the presence of anthracotic pigment and fibrosis, but did not diagnose pneumoconiosis. Director's Exhibit 33. No other physician of record commented on the significance of Dr. Kotwal's findings. Under Section 718.202(a)(2), biopsy evidence of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). In light of the administrative law judge's reliance solely upon Dr.

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Cir. 1997), the Third Circuit held that the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) must be weighed together to determine whether a claimant has established the existence of pneumoconiosis by a preponderance of the evidence.

Kotwal's reference to anthracotic pigment in stating that the biopsy evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), *see* Decision and Order at 17, we must vacate the administrative law judge's finding. We must also vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis under Section 718.202(a)(1)-(4) in accordance with *Williams*, inasmuch as on remand, upon applying the appropriate analysis under Section 718.202(a)(2), the administrative law judge may rationally determine that the biopsy report is the most probative evidence regarding the existence of pneumoconiosis, which may alter his ultimate finding regarding this issue. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

With respect to Section 718.202(a)(4), employer asserts that the administrative law judge erred in treating the opinions of Drs. Cho and Levine as adequately documented and reasoned. Employer also asserts that the administrative law judge erred in discrediting Dr. Fino's opinion. These allegations of error have merit, in part. Contrary to employer's suggestion, the administrative law judge rationally determined that the opinions of Drs. Cho and Levine were reasoned and documented, inasmuch as each physician based his opinion upon a chest x-ray, a physical examination, objective studies, and claimant's work and medical histories. *See Clark*, *supra*; *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). In addition, the administrative law judge was not required to accord less weight to these opinions merely because Drs. Cho and Levine are not Board-certified pulmonologists. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

In resolving the conflict between the opinions of Drs. Cho and Levine and the opinion of Dr. Fino, however, the administrative law judge treated the biopsy evidence as supportive of the diagnoses of pneumoconiosis offered by Drs. Cho and Levine and contrary to Dr. Fino's determination that claimant does not have pneumoconiosis. Decision and Order at 17-18. Because the administrative law judge's determination that the biopsy evidence includes a diagnosis of pneumoconiosis is not accurate, we vacate the administrative law judge's weighing of the medical opinions of record under Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of his findings under Section 718.202(a)(2) and (a)(4) and his determination that the evidence of record, as a whole, is sufficient to establish the existence of pneumoconiosis.[6]

[6]Inasmuch as we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a), we also vacate his finding under 20 C.F.R. §718.203(b).

Regarding the administrative law judge's finding under Section 718.204(b), employer asserts that the administrative law judge erred in determining that the opinions of Drs. Cho and Levine satisfy the standard adopted by the United States Court of Appeals for the Third Circuit in *Bonessa v. United States Steel Corp.*, 884 F.2d 756, 13 BLR 2-23 (3d Cir. 1989), which requires claimant to prove that pneumoconiosis is a substantial contributor to his total disability under Section 718.204(b). Employer also maintains that the administrative law judge erred in relying upon the decision of the United States Court of Appeals for the Fourth Circuit in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), to discredit Dr. Fino's opinion.[7]

Employer's contentions have merit, in part. The administrative law judge rationally determined that Dr. Levine's opinion satisfied the *Bonessa* standard, as Dr. Levine stated in his report that "exposure to coal dust represent[s] a substantial factor in producing [claimant's] symptoms and the disability." Decision and Order at 18; Director's Exhibit 28; *see Bonessa*, *supra*. Concerning Dr. Cho's opinion, however, the administrative law judge did not address whether Dr. Cho's acknowledgment that claimant's 1997 chest surgery for a collapsed lung "may contribute, in some degree" to claimant's disability, undermined Dr. Cho's apparent attribution of claimant's impairment to pneumoconiosis. Director's Exhibit 13; *see McMath*, *supra*; *Turner v. Director, OWCP*, 7 BLR 1-419 (1984). In addition, as employer notes, the administrative law judge cited *Toler* and indicated that Dr. Fino's opinion, that claimant's disability was unrelated to coal dust exposure, was entitled to little weight on the ground that Dr. Fino relied upon the premise, contradicted by the x-ray and biopsy evidence, that claimant does not have pneumoconiosis. Decision and Order at 18; Employer's Exhibits A1, K. In light of the fact that we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis, we

[7]In *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the Fourth Circuit held that an opinion regarding causation must be discredited if the physician rests his conclusion upon a disagreement with the administrative law judge as to either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment.

also vacate the administrative law judge's findings with respect to Dr. Fino's opinion under Section 718.204(b). On remand, however, if the administrative law judge determines that the existence of pneumoconiosis has been established, he may rationally accord less weight to Dr. Fino's opinion regarding the source of claimant's disability based upon Dr. Fino's failure to diagnose pneumoconiosis. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

In summary, we affirm the administrative law judge's finding of a material change in condition pursuant to Section 725.309(d) and his finding that the x-ray evidence is positive for pneumoconiosis under Section 718.202(a)(1), but vacate the administrative law judge's findings under Sections 718.202(a)(2), (a)(4), and 718.204(b) and remand this case to the administrative law judge for reconsideration.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge