BRB No. 99-0211 BLA

DENNIS C. MEADOWS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
SEA "B" MINING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Dennis C. Meadows, Honaker, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (97-BLA-1492) of Administrative Law Judge Daniel A. Sarno, Jr. denying benefits on

[1] Claimant is Dennis C. Meadows, the miner. Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). Claimant's first two applications for benefits were finally denied by the district director on July 24, 1981 and January 9, 1984. Director's Exhibits 46, 47. On June 24, 1996, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d). The district director denied the claim and claimant requested a hearing. Director's Exhibits 22, 23.

Prior to the scheduled hearing, claimant's lay representative informed the administrative law judge that claimant requested a decision on the record because he was recuperating from recent surgery. Decision and Order at 1-2. Subsequently, employer indicated that it had no objection to a decision on the record, and the hearing was canceled. Employer's Letter, January 16, 1998; Employer's Brief at 1.

Considering the claim on the record only, the administrative law judge credited claimant with seven years of coal mine employment and accepted employer's concession that claimant is now totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Because the total disability element had previously been decided against claimant but was now found established, the administrative law judge additionally found that a material change in conditions was established as required by Section 725.309(d). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Consequently, the administrative law judge considered whether all of the evidence established entitlement to benefits. *Rutter, supra*. The administrative law judge considered the evidence from all three claims, found that it failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and concluded that entitlement was therefore precluded. Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). 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 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).

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).

Pursuant to Section 718.202(a)(1), the administrative law judge weighed all of the x-ray readings based upon the readers' radiological qualifications and found that "the vast weight of the x-ray evidence militates strongly against the presence of pneumoconiosis." Decision and Order at 7; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. The record contains forty-five readings of seventeen x-rays. There are two positive readings, thirty-eight negative readings, four readings not classified for the presence or absence of pneumoconiosis, and one report classifying a chest x-ray film as unreadable. The administrative law judge permissibly questioned Dr. Eryilmaz's "1/1" reading of the April 8, 1974 x-ray when Dr. Eryilmaz subsequently and inconsistently read the July 12, 1977 x-ray as "normal." Director's Exhibits 40, 46; *see Usery v. Turner-Elkhorn Mining Co*., 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976)(once contracted, pneumoconiosis is irreversible). Additionally, the administrative law judge reasonably discounted B-reader Dr. Gaziano's "1/0" reading of the July 2, 1996 x-ray because the same x-ray was read as negative by four Board-certified radiologists and B-readers and by another physician certified as a B-reader. *See Adkins, supra*; *Edmiston, supra*. Because the administrative law judge properly weighed the x-ray readings and substantial evidence supports his finding, we affirm his finding that pneumoconiosis was not established pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge found that the only credible medical opinion of record established that claimant does not have pneumoconiosis but rather suffers from lung disease due to cigarette smoking. Decision and Order at 7-8. Dr. Sweckler examined claimant on behalf of the

Department of Labor (DOL) in his two prior claims. In 1978 Dr. Sweckler declared claimant's cardiopulmonary system normal, but after his 1983 examination, Sweckler diagnosed emphysema and chronic bronchitis related to dust exposure in coal mine employment. Director's Exhibits 46, 47. In the present claim, Dr. Forehand examined claimant on behalf of DOL and diagnosed totally disabling chronic bronchitis due to cigarette smoking. Director's Exhibit 17. Additionally, a 1994 hospital report completed by Dr. Ahmed of the Russell County Medical Center listed pneumoconiosis among several other diagnoses. Director's Exhibit 36. The administrative law judge found within his discretion that although Drs. Sweckler and Ahmed diagnosed pneumoconiosis, they failed to discuss the significance, if any, of claimant's smoking when they related his lung disease to coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge similarly concluded that Dr. Forehand's opinion was not well reasoned because he failed to address claimant's coal mine dust exposure when he attributed claimant's lung disease solely to cigarette smoking. *Id*. Substantial evidence supports the administrative law judge's analysis of these medical opinions.

The administrative law judge further found that, by contrast, Dr. Sargent, who examined claimant on behalf of employer, "squarely addressed" both claimant's coal dust exposure and his smoking in attributing claimant's lung disease solely to smoking. Decision and Order at 8; Director's Exhibit 37; Employer's Exhibit 3. The administrative law judge found Dr. Sargent's opinion well-reasoned and explained in relation to the objective medical evidence obtained by Dr. Sargent, and permissibly concluded that Dr. Sargent's report was therefore "entitled to compelling weight in light of the other poorly reasoned medical opinions." Decision and Order at 8; *see Hicks, supra*; *Akers, supra*.

Although the administrative law judge properly found that the medical opinion evidence in the record does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the Board's analysis does not stop there. "[T]he Director is statutorily mandated to provide claimant with . . . a complete pulmonary evaluation in order to substantiate his claim." *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-89-90 (1994), citing 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b). The Director's duty to provide a complete pulmonary evaluation extends to duplicate claims. *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990). The Director fails to provide claimant with a complete and credible pulmonary evaluation where the administrative law judge finds a medical opinion incomplete, or finds that the opinion, although complete, lacks credibility. *Hodges*, 18 BLR at 1-88 n.3; *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984)(Director's duty is not

fulfilled where opinion is not of sufficient quality to warrant credence).

Here, the administrative law judge discredited the two most recent reports by DOL physicians Swecker and Forehand as "poorly reasoned" regarding the etiology of claimant's emphysema and chronic bronchitis. Decision and Order at 8; Director's Exhibits 17, 47. Dr. Swecker's initial examination report from 1978 does not diagnose a respiratory impairment. Director's Exhibit 46. Thus, the record as weighed by the administrative law judge contains no credible DOL examination report addressing the etiology of claimant's now concededly disabling respiratory impairment. The critical issue at Section 718.202(a)(4) is whether claimant suffers from pneumoconiosis as defined at Section 718.201, that is, whether his "respiratory or pulmonary impairment [is] significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201. Because the administrative law judge found no DOL examination report sufficient to warrant credence on this issue, the Director has failed to meet its obligation to provide claimant with a complete and credible pulmonary evaluation.[2] *See Hodges, supra*; *Newman, supra*. Consequently, we must vacate the administrative law judge's Decision and Order denying benefits and remand this case to the district director so that claimant may be provided with a complete and credible pulmonary evaluation. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hodges, supra*; *Hall, supra*.

[2] The presence in the record of Dr. Sargent's opinion, submitted by employer, does not fulfill the Director's statutory duty of providing claimant with an opportunity to substantiate his claim. *Hodges*, 18 BLR at 1-91-92.

To clarify the proceedings on remand when the case is again before the administrative law judge, we address two additional aspects of the administrative law judge's evaluation of the record. First, the administrative law judge misapplied the doctrine of collateral estoppel to bar claimant from relitigating the length of coal mine employment issue. The administrative law judge reasoned that because the district director found in the prior claim that the record established only seven years of coal mine employment and claimant did not appeal that determination, claimant is now bound by the district director's finding of seven years. Decision and Order at 2-3. Assuming *arguendo* that collateral estoppel is applicable here,[3] we note that for a prior finding to have preclusive effect in subsequent litigation, the issue determined must have been a critical and necessary part of the judgment in the prior proceeding. *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999), citing *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992). In the prior claim, the district director determined that the evidence then in the file did not establish pneumoconiosis arising out of coal mine employment or that claimant was totally disabled by pneumoconiosis. Director's Exhibit 47. The district director's additional determination that claimant had only seven years of coal mine employment was not essential to support the district director's decision denying benefits for failure to establish any element of entitlement. *See Hughes, supra*. Therefore, we reverse the administrative law judge's finding that claimant is collaterally estopped from relitigating the issue of length of coal mine employment.[4]

Second, when evaluating the medical opinions pursuant to Section 718.202(a)(4), the administrative law judge should bear in mind the legal definition of pneumoconiosis and make it an express part of his ultimate finding. *See* 20 C.F.R.

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[3] Collateral estoppel is not a good fit where, as here, all previous decisions have been informal denials by the district director. Where a formal hearing is requested after a district director's decision, the administrative law judge proceeds *de novo* and is not bound by the district director's findings. *See* 20 C.F.R. §725.455(a). Additionally, in the context of this duplicate claim, employer conceded and the administrative law judge found a material change in conditions, thus requiring the administrative law judge to consider *de novo* whether the entire record supported a finding of entitlement. *See Rutter, supra*.

[4] While expressing no view on the credibility of the evidence, we note that the record contains documentary evidence which, if fully credited, may establish approximately thirteen years of coal mine employment. Director's Exhibits 1, 2, 4-6, 46, 47 (coal mine employment history forms, Social Security earnings records, co-worker affidavits).

§718.201; *see Roberts v. Director, OWCP*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995). This will be particularly critical if the complete pulmonary evaluation to be provided on remand results in a new, well-reasoned diagnosis affirmatively linking claimant's chronic bronchitis and emphysema to coal mine dust exposure. In weighing such a diagnosis against Dr. Sargent's opinion that claimant's respiratory impairment is due solely to smoking, the administrative law judge must carefully analyze each physician's reasoning, *see Hicks, supra*; *Akers, supra*, and make a specific finding indicating that the physician whose opinion is credited has addressed the presence or absence of pneumoconiosis as it is broadly defined under the Act and regulations and not merely as it is clinically defined by the medical profession. *See Roberts, supra*; *Barber, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, reversed in part, and vacated in part, and the case is remanded to the district director 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