BRB No. 08-0153 BLA

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| M.F. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BRENDA COAL, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| OLD REPUBLIC INSURANCE COMPANY | ) | DATE ISSUED: 10/30/2008 |
| | ) | |
| 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 of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-BLA-05957) of Chief Administrative Law Judge John M. Vittone 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). The administrative law judge credited claimant with ten years of coal mine employment, based on the parties' stipulation, and adjudicated this claim, filed on April 23, 2003, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of both clinical and legal pneumoconiosis under 20 C.F.R. §718.202(a)(1), (4). The administrative law judge further determined that employer did

not rebut the presumption set forth in 20 C.F.R. §718.203(b), that claimant's clinical pneumoconiosis arose out of coal mine employment. The administrative law judge accepted the parties' stipulation that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and found the evidence sufficient to establish that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), asserting that the administrative law judge erred in his evaluation of the x-rays and medical opinions. Employer also challenges the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

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.[2] 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).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered readings of three x-rays and determined whether each x-ray was positive or negative for the existence of pneumoconiosis by referring to the qualifications of the readers. The administrative law judge found that the May 31, 2003 x-ray was negative, as the negative interpretations by Dr. Baker, a B reader, and Drs. Spitz and Wiot, dually qualified as B readers and Board-certified radiologists, outweighed the positive reading by Dr. Ahmed, a B reader. Decision and Order at 4, 13; Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibits 2, 5. Regarding the February 4, 2004 x-ray, the administrative law judge found it to be positive, as the negative interpretation by Dr. Wiot was outweighed

[1] By letter dated June 17, 2008, counsel for employer advised the Board that claimant died on May 30, 2008, and requested the Board change the caption of the case. The Board, by letter dated August 27, 2008, responded that it was not necessary to change the caption in this case.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

by the positive interpretations by Drs. Alexander and Pathak, who are also dually-qualified as B readers and Board-certified radiologists. Decision and Order at 4-5, 13; Director's Exhibit 14; Employer's Exhibit 3. The administrative law judge found the February 24, 2004 x-ray to be positive because it was read as positive by Dr. Alexander, and as negative by Dr. Dahhan, a B reader. Decision and Order at 5, 13; Claimant's Exhibit 1; Employer's Exhibit 1. Considering the x-ray evidence as a whole, the administrative law judge determined that "the two positive x-ray studies taken in February 2004 outweigh the negative May 31, 2003 study because they are the most recent x-rays in the record." Decision and Order at 13. The administrative law judge concluded, therefore, that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1).[3] *Id*.

Employer contends that the administrative law judge's finding under 20 C.F.R. §718.202(a)(1) must be vacated, as the administrative law judge ignored evidence and impermissibly relied on the most recent x-rays. Employer's allegations of error have merit, in part. With respect to the administrative law judge's reliance upon what he determined to be the most recent x-rays of record, the administrative law judge permissibly recognized that because pneumoconiosis may be latent and progressive, it is reasonable to accord greater weight to more recent, positive x-ray evidence for pneumoconiosis. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration *en banc*); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 13-14. However, employer is correct in asserting that the administrative law judge's finding that the most recent x-ray evidence was sufficient to establish the existence of pneumoconiosis cannot be affirmed, as the administrative law judge did not explain his apparent decision to exclude interpretations of a more recent x-ray dated January 10, 2007 from consideration at 20 C.F.R. §718.202(a)(1).

At the hearing in this case, held on January 25, 2007, the administrative law judge left the record open to allow the parties to obtain and review, *inter alia*, x-rays and CT scans obtained by Dr. Vaezy in conjunction with his treatment of claimant subsequent to his report dated October 25, 2005. Hearing Transcript at 29-30. At his post-hearing deposition, Dr. Vaezy, who stated he had previously been a B reader, interpreted the January 10, 2007 x-ray as positive for pneumoconiosis, while Dr. Repsher, a current B reader, interpreted it as negative. Employer's Exhibits 6, 7. In summarizing the medical

[3] "Clinical pneumoconiosis" is defined in 20 C.F.R. §718.201(a)(1) as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

opinion evidence, the administrative law judge indicated that Dr. Vaezy "discussed a 2007 x-ray study which is not in the record," Decision and Order at 10; *see* Employer's Exhibit 7 at 31-32, and that Dr. Repsher "reviewed a January 10, 2007, x-ray that is not in the record," Decision and Order at 9; *see* Employer's Exhibit 6 at 6. The administrative law judge did not address these readings at 20 C.F.R. §718.202(a)(1). Decision and Order at 13-14.

Although it is apparent that the administrative law judge excluded the readings of the January 10, 2007 x-ray from his consideration of the x-ray evidence, we cannot discern the rationale underlying the administrative law judge's action. The Administrative Procedure Act (APA) requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Accordingly, we must vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and remand the case to the administrative law judge to clarify his finding with respect to the admissibility of the readings by Dr. Vaezy and Dr. Repsher of the January 10, 2007 x-ray under the evidentiary limitations set forth in 20 C.F.R. §725.414. The administrative law judge must set forth his ruling in detail, including his rationale. If the administrative law judge finds that the readings of this film are admissible, he must reconsider whether the x-ray evidence of record, as a whole, is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports and deposition testimony of Drs. Baker, Dahhan, Repsher and Vaezy. Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD), arterial hypoxemia and chronic bronchitis, and indicated that smoking was the major cause of these conditions, with a minor contribution from coal dust exposure, in light of a thirty-three year smoking history and history of coal mine employment of ten years or less. Director's Exhibits 12, 36. Dr. Dahhan diagnosed COPD due to smoking. Employer's Exhibit 1. Dr. Repsher diagnosed COPD due to smoking or asthma. Employer's Exhibits 4, 6. Dr. Vaezy diagnosed clinical pneumoconiosis, based upon x-rays, and severe COPD due to smoking and coal dust exposure. Claimant's Exhibits 3, 4.

The administrative law judge found that Dr. Baker's opinion was not well-reasoned regarding the etiology of claimant's COPD because Dr. Baker did not explain what he meant by a "borderline history of coal dust exposure" and failed to reconcile the inconsistencies in his opinion regarding the extent to which coal dust exposure played a role in claimant's COPD. Decision and Order at 16; Director's Exhibit 36. The administrative law judge also noted that Dr. Baker's opinion was "based on limited

medical data as compared to the remaining three physicians' opinions." *Id*. The administrative law judge determined that Dr. Dahhan's opinion regarding the cause of claimant's obstructive impairment had little probative value because the doctor relied, in part, upon the fact that claimant's obstructive defect responded to bronchodilator therapy, while claimant's post-bronchodilator pulmonary function studies were still qualifying. The administrative law judge stated that this "suggests that the . . . respiratory impairment is due to a combination of factors, including possible coal miners pneumoconiosis, which is not susceptible to bronchodilator therapy." Decision and Order at 16. The administrative law judge determined that Dr. Repsher's opinion, that claimant's COPD was due entirely to smoking, was entitled to little weight because the studies cited by Dr. Repsher in support of his conclusion are contrary to those relied upon by the Department of Labor (DOL) in support of the amended definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). *Id*. at 17. In addressing Dr. Vaezy's opinion, the administrative law judge stated:

> [A]s the Claimant's treating physician since 2003, Dr. Vaezy has extensive knowledge of [claimant's] respiratory and pulmonary history. Dr. Vaezy failed to provide a particularly well-reasoned explanation for his conclusion that the Claimant's COPD was due in part to coal dust exposure, conclusively stating that the Claimant's COPD is caused, in part, by coal dust exposure. But this conclusion is supported by the progression of the disease demonstrated on x-ray, as well as the fact that the Claimant's disease is largely irreversible; namely, the pulmonary function study results were qualifying pre- and post-bronchodilator. As a result, Dr. Vaezy's opinion supports a finding of legal pneumoconiosis.

*Id.* The administrative law judge concluded that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).[4] *Id*.

With respect to the administrative law judge's consideration of Dr. Vaezy's opinion, employer contends that the administrative law judge applied an incorrect legal standard in determining that Dr. Vaezy's opinion was sufficient to establish the existence

[4] "Legal pneumoconiosis" is defined in 20 C.F.R. §718.201(a)(2) as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), a disease "arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

of pneumoconiosis at 20 C.F.R. §718.202(a)(4). This contention has merit. In determining that Dr. Vaezy's opinion was sufficient to establish that claimant's COPD was significantly related to, or substantially aggravated by, coal dust exposure, in accordance with 20 C.F.R. §718.201(a)(2), the administrative law judge did not fully resolve the ambiguities present in Dr. Vaezy's statements regarding the cause of claimant's COPD.[5] In addition, in crediting Dr. Vaezy's opinion without rendering a definitive finding that it was reasoned and documented, the administrative law judge appears to have relieved claimant of his burden of proving the existence of legal pneumoconiosis by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Employer is also correct in maintaining that the administrative law judge improperly relied upon his own understanding of the significance of the extent to which claimant responded to bronchodilators in discrediting Dr. Dahhan's opinion that claimant's COPD was caused solely by cigarette smoking. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).

Regarding the administrative law judge's discrediting of Dr. Repsher's opinion, employer argues that the administrative law judge erred in treating the statements made by DOL in the preamble to the revised regulations as binding.[6] Employer also asserts

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[5] In his report dated October 25, 2005, Dr. Vaezy indicated that claimant's obstructive impairment was "mostly due to his smoking," but is also "due in part to his coal dust exposure." Claimant's Exhibit 3. Dr. Vaezy stated in his report dated January 30, 2007, that claimant's "severe respiratory impairment" was "mostly due to [claimant's] smoking; however, this is due in part to his coal dust exposure also." Claimant's Exhibit 4. At his post-hearing deposition, Dr. Vaezy indicated that claimant's ten-year history of coal dust exposure "didn't help" claimant's emphysema; that "you can't separate [smoking and coal dust exposure] and you can't tell whether ten percent of it is, you know, coal dust exposure or whatever it is, but there's no doubt that any coal dust that he was exposed to, hurt him too and wasn't helpful to his chronic inflammation and chronic bronchitis;" that he agreed with Dr. Baker's characterization of the causal role of coal dust exposure as "minor;" and that "I just want to be fair and be correct by saying that some of [claimant's obstructive lung disease] possibly, and I don't know what percent of it, possibly is related to coal dust." Employer's Exhibit 6 at 16, 19, 28-29.

[6] In the preamble to the revised regulations, the Department of Labor stated that:

> The Department attempts to clarify that not all obstructive lung disease is pneumoconiosis. It remains the claimant's burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine

that, contrary to the administrative law judge's finding, Dr. Repsher's analysis is not inconsistent with DOL's position as set forth in the preamble. As indicated, Dr. Repsher determined that claimant had severe COPD and stated that it was not due to coal dust exposure, but probably due to smoking or asthma. Employer's Exhibits 4, 6. Dr. Repsher based his conclusions, in part, upon several epidemiological studies, published in the medical literature between 1975 and 1994, that he felt were "especially relevant" as support for his belief that "to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the inhalation of coal mine dust." Decision and Order at 8-9; Employer's Exhibit 4 at 4. The administrative law judge found:

> Dr. Repsher stated that the average loss of FEV1 in a non-smoking and non-asthmatic coal miner with 0/0 to 3/3 coal workers' pneumoconiosis is so small that it is not detectable and that "to an overwhelming probability[,]" the Claimant's COPD is a result of cigarette smoking or asthma. This is contrary to the medical studies noted in the Federal Register for the 2000 amendments to the Regulations . . . While Dr. Repsher's statements are not hostile to the Act because he leaves open a "vanishingly small" window of possibility that coal dust could have caused the Claimant's COPD, his reasoning is not compelling and, as a result, his opinion is less probative.

Decision and Order at 17, quoting Employer's Exhibit 6 at 17.

Although the administrative law judge indicated that he discredited Dr. Repsher's opinion because it was based upon studies that are inconsistent with DOL's position regarding the link between coal dust exposure and COPD, the administrative law judge did not explain how the studies relied upon by Dr. Repsher conflict with the studies cited by DOL, nor did he explain how Dr. Repsher's opinion conflicts with DOL's view that

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> employment and therefore falls within the statutory definition of pneumoconiosis. The Department has concluded, however, that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes "legal" pneumoconiosis.

65 Fed. Reg. 79923 (Dec. 20, 2000).

coal dust exposure may cause obstructive lung disease. *See* 65 Fed. Reg. at 79923 (Dec. 20, 2000). Thus, the administrative law judge did not comply with the requirements of the APA in setting forth his findings regarding Dr. Repsher's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1988); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We vacate, therefore, the administrative law judge's determination that Dr. Repsher's opinion is less probative on the issue of the existence of pneumoconiosis.

In light of the foregoing, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must reconsider whether the preponderance of the medical opinion evidence supports a finding of pneumoconiosis as defined in 20 C.F.R. §718.201(a). In so doing, the administrative law judge must reconsider the opinions of Drs. Vaezy, Dahhan and Repsher and determine whether each opinion is reasoned and documented. The administrative law judge must also set forth his findings, including the underlying rationale, in detail, in accordance with the APA, based on his consideration of all of the relevant medical opinion evidence, and taking into account the quality of the reasoning provided by each of the physicians.

Lastly, as was the case with their readings of the January 10, 2007 x-ray, *see discussion supra* at 3-4, the administrative law judge did not address whether the CT scan readings rendered by Drs. Vaezy and Repsher during their post-hearing depositions were admissible. The administrative law judge must make a finding on remand as to the admissibility of these interpretations. If the administrative law judge determines that they are properly part of the record in accordance with the evidentiary limitations at 20 C.F.R. §725.414, he must consider whether they are sufficient to establish the existence of either clinical or legal pneumoconiosis. If the administrative law judge determines that claimant has established the existence of pneumoconiosis by a preponderance of the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge must then consider whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

With respect to 20 C.F.R. §718.204(c), because the administrative law judge relied upon his finding that claimant established pneumoconiosis at 20 C.F.R. §718.202(a)(4) in determining that claimant proved that he is totally disabled due to legal pneumoconiosis, we vacate the administrative law judge's finding under 20 C.F.R. §718.204(c). If the administrative law judge again finds the evidence sufficient to establish the existence of pneumoconiosis, he must reconsider the evidence relevant to whether claimant has satisfied his burden of establishing, by reasoned and documented medical opinion evidence, that pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c). 20 C.F.R. §718.204(c); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610, 22 BLR 2-288, 2-303 (6th Cir. 2001), citing *Peabody*

*Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997)(a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment). In weighing the medical opinions under 20 C.F.R. §718.204(c), the administrative law judge should be mindful of the distinction between clinical and legal pneumoconiosis and ensure that his analysis of the issue of total disability causation recognizes this distinction.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge