



BRB No. 15-0024 BLA

CHARLES A. CHEMELLI)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PENN ALLEGHENY COAL COMPANY,)	
INCORPORATED)	
)	
and)	
)	
OLD REPUBLIC GENERAL INSURANCE)	DATE ISSUED: 10/09/2015
GROUP)	
)	
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 Awarding Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania,
for claimant.

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

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5774) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge adjudicated this claim pursuant to 20 C.F.R. Parts 718 and 725, and credited the parties' stipulation that claimant worked in coal mine employment for twelve years.² The administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he is not participating in this appeal. Employer has filed a reply brief, reiterating its arguments on appeal.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 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).

¹ Claimant's first application for benefits, filed on November 13, 1996, was denied by the district director on March 12, 1997, because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the current claim for benefits on April 5, 2011. Director's Exhibit 3.

² Because claimant established less than fifteen years of coal mine employment, claimant is not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

In challenging the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a), employer contends that the administrative law judge failed to apply controlling legal precedent set forth by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,⁴ in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Specifically, employer asserts that the administrative law judge failed to consider all of the record evidence in each subsection at Section 718.202(a), and then failed to weigh all relevant evidence together in determining whether the existence of pneumoconiosis was affirmatively established. Employer argues that the administrative law judge did not address and weigh the conflicting medical opinions regarding clinical and legal pneumoconiosis at Section 718.202(a)(4), and failed to reconcile his determination that the x-ray and CT scan evidence dating from October 2010 to February 2013 was negative for pneumoconiosis with his determination that the biopsy evidence from August 2012 was sufficient to establish the existence of clinical pneumoconiosis. In addition, employer maintains that the administrative law judge erred in failing to consider all of the relevant biopsy evidence, because he "ignored reports from the pathologists who performed the biopsies, Drs. Heggerre, Ohori, and Schneider." Employer's Brief at 17.

Based upon our review of the administrative law judge's analysis and the evidence of record, we are persuaded that employer is correct in maintaining that the administrative law judge's Section 718.202(a) determination must be vacated and the case remanded for further consideration. In *Williams*, the court held that all types of relevant evidence under Section 718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *Williams*, 114 F.3d at 22, 21 BLR at 2-111; *see also Dixie Fuel Co. v. Director, OWCP [Hensley]*, 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Therefore, it is incumbent upon the administrative law judge to examine and assess the probative value of the distinct types of evidence under each category, and then weigh all types of relevant evidence together. In the present case, the administrative law judge acknowledged that appellate jurisdiction of this case lies with the Third Circuit, Decision and Order at 7, and that both *Williams* and *Compton* held that "the administrative law judge must weigh all evidence together under 20 C.F.R. §718.202(a)," Decision and Order at 8-9, but he failed to apply that holding. Rather, he determined that the preponderance of the x-ray and CT scan evidence was insufficient to establish pneumoconiosis under the appropriate subsections, but that the biopsy reports of Drs.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Perper and Bush established the existence of clinical pneumoconiosis under Section 718.202(a)(2). Decision and Order at 9-14. The administrative law judge did not address the pathology reports from Drs. Heggerre, Ohori, and Schneider, Employer's Exhibits 11, 12, in determining whether the biopsy evidence established the existence of pneumoconiosis at Section 718.202(a)(2), nor did he consider the conflicting medical reports of record and render a specific determination as to whether this evidence established the existence of clinical and/or legal pneumoconiosis at Section 718.202(a)(4). Because the administrative law judge is required to examine and weigh all relevant medical evidence, we vacate his findings at Section 718.202(a), and remand this case for the administrative law judge to consider all of the x-ray, biopsy, CT scan, and medical opinion evidence of record and determine whether claimant has established the existence of pneumoconiosis under each category at Section 718.202(a)(1)-(4), and then apply *Williams* and weigh all relevant evidence together to determine whether claimant affirmatively established the existence of clinical and/or legal pneumoconiosis at Section 718.202(a).

Employer next contends that the administrative law judge erred in finding that claimant established disability causation at 20 C.F.R. §718.204(c). Specifically, employer maintains that the administrative law judge provided invalid reasons for according diminished weight to the opinions of Drs. Basheda and Fino, and failed to determine whether the contrary opinions of Drs. Knight, Begley, and Perper were well-reasoned and supported. Employer further asserts that the administrative law judge accorded enhanced weight to the opinion of Dr. Begley based solely on his status as claimant's treating physician, without addressing the treatment notes of Drs. Childs, Salinas, Fu and Gelacek diagnosing sarcoidosis, not pneumoconiosis, and without considering that claimant saw Dr. Begley for purposes of litigation and submitted no treatment records.⁵ Employer's Brief at 18-22. As the administrative law judge's

⁵ Employer additionally argues that the administrative law judge erroneously applied the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in finding that claimant established disability causation pursuant to Section 718.204(c)(1). Employer's Brief at 18. While the administrative law judge found that claimant was not entitled to the presumption, *see* Decision and Order at 6, 24, and that, therefore, "it remains Claimant's burden to show that pneumoconiosis is a substantially contributing cause of his pulmonary or respiratory disability," Decision and Order at 26, the administrative law judge concluded his disability causation analysis by stating that, "[b]ased upon the foregoing, the undersigned finds that Employer has not rebutted the presumption contained at 20 C.F.R. §718.305, and that Claimant, due to the presumption, has proven by a preponderance of the evidence that his coal workers' pneumoconiosis is a 'substantially contributing cause' of his total disability." Decision and Order at 28. Although it appears that this statement was included in the Decision and Order as a result

findings on the issue of the existence of pneumoconiosis affected his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's findings at Section 718.204(c), and remand this case for further consideration of all relevant evidence thereunder.

In determining whether claimant has legal or clinical pneumoconiosis and, if pneumoconiosis is established, whether pneumoconiosis is a substantially contributing cause of claimant's disabling respiratory impairment, the administrative law judge is instructed to reassess the conflicting medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and fully explain the reasons for his credibility determinations. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181 (1999). The administrative law judge must set forth a rationale that comports with the requirements of the Administrative Procedure Act⁶ in determining whether each opinion is well-reasoned and sufficient to meet claimant's burden. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Additionally, the administrative law judge must determine if Dr. Begley's report at Claimant's Exhibit 1 and his deposition testimony at Claimant's Exhibit 3 are properly admissible as treatment records.⁷ The administrative

of a clerical error, the administrative law judge must be mindful, on remand, that the amended Section 411(c)(4) presumption is not applicable in this case.

⁶ The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

⁷ Our review of the record reveals that, on his Evidence Summary Form, claimant designated, under "hospitalization and treatment records," the pulmonary function studies, blood gas studies, chest x-ray and electrocardiogram obtained at Miners Medical Center by Dr. Begley in conjunction with his initial physical examination of claimant on October 22, 2010. Director's Exhibit 14. Claimant submitted no other treatment records from Dr. Begley, but instead submitted a "supplemental report" from Dr. Begley to claimant's attorney that summarized his findings, Claimant's Exhibit 1, and testified by deposition, Claimant's Exhibit 3. Claimant did not designate Claimant's Exhibit 1 as treatment records on the Evidence Summary Form. Employer designated Director's Exhibit 16 and Employer's Exhibits 5, 6 and 7 as treatment records on its Evidence Summary Form.

law judge is further directed to consider the factors set forth at 20 C.F.R. §718.104(d) in determining whether a physician is a treating physician and, if so, the weight to be accorded to the physician's opinion. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge