BRB No. 00-1053 BLA

LAMAR L. SAFLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
U.S. STEEL MINING COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order--Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

William J. Evans (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denial of Benefits (1999-BLA-0856) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant's initial application for benefits, filed on March 4, 1984, was finally denied by the District Director of the Office of Workers' Compensation Programs on August 30, 1994. Director's Exhibit 20. On June 13, 1997, claimant filed the present application for benefits, 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)(2000).

The administrative law judge credited claimant with twenty-six years of coal mine employment, and found that the evidence developed since the previous denial demonstrated that claimant is totally disabled by a respiratory or pulmonary impairment, but did not establish that he suffers from pneumoconiosis or that his total disability is due to pneumoconiosis. Consequently, the administrative law judge found that the new evidence did not establish a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge did not sufficiently explain his rationale for finding that the medical opinion evidence established neither that claimant has pneumoconiosis nor that he is totally disabled due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] We affirm as unchallenged on appeal the administrative law judge's findings of twenty-six years of coal mine employment, that the x-ray evidence does not establish the existence of pneumoconiosis, and that claimant is totally disabled by a respiratory or pulmonary impairment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (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 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).

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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1511, 20 BLR 2-302, 2-320-21 (10th Cir. 1996). The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

The District Director denied claimant's prior claim because the evidence then in the file did not establish the existence of pneumoconiosis or that claimant's disability was due to pneumoconiosis. Director's Exhibit 20. Therefore, the inquiry was whether the medical evidence developed since the prior claim demonstrated material worsening with respect to these elements. *See Brandolino, supra*.

In this case, the administrative law judge concluded that a material change in conditions was not established because the new evidence did not establish the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis. However, a claimant need not "go as far as proving that he or she actually satisfies one of the elements" of entitlement, but need only make a threshold showing "that his or her condition has worsened materially from the time of the prior denial" to establish a material change in conditions. *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-317. Because we must remand this case for the administrative law judge to reweigh the medical opinion evidence regarding the existence of pneumoconiosis and disability causation, *see* discussion, *infra*, we vacate his finding

pursuant to 20 C.F.R. §725.309(d)(2000) and instruct him to consider the material change issue in accordance with *Brandolino, supra*.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge did not provide an adequate rationale for his finding that the medical opinions developed since the prior denial do not establish the existence of pneumoconiosis. The administrative law judge considered the conflicting reports and testimony of Drs. David S. James and Robert J. Farney. Review of the record indicates that Drs. James and Farney are both Board-certified in Internal Medicine and Pulmonary Disease. Further review indicates that both physicians agree that claimant's chest x-rays are negative for "clinical pneumoconiosis," *see* 20 C.F.R. §718.201(a)(1), and that claimant is totally disabled by chronic obstructive lung disease and hypoxemia. The physicians disagree as to the etiology of these impairments.

On August 22, 1997, Dr. James examined and tested claimant and reviewed his medical records and diagnosed him with chronic obstructive lung disease due to both smoking and coal dust exposure. Director's Exhibit 4; Claimant's Exhibit 1. Dr. James attributed claimant's moderate obstruction in part to his significant history of coal dust exposure, citing a medical study and a medical textbook chapter concluding that chronic exposure to coal mine dust can cause obstructive pulmonary disease. The study and the textbook chapter are in the record. Claimant's Exhibits 8, 9.

Additionally, Dr. James estimated claimant's smoking history to be "at least 51 and potentially as great as 100" pack years. Claimant's Exhibit 1 at 4. Dr. James nevertheless concluded that both exposure to coal mine dust and cigarette smoke "played a causative role in the development of [claimant's] chronic obstructive pulmonary disease." *Id*. In support, Dr. James stated, based upon medical literature in the record, Claimant's Exhibit 10, that the FEV1 value of a typical smoker with sixty-one or more pack years is expected to be approximately 78% of predicted, whereas claimant's FEV1 score was only 54% of predicted, suggesting that his lung function decline was not due to smoking alone. Dr. James further concluded that claimant's pulmonary function and blood oxygenation worsened significantly since 1994, with the decline in FEV1 being greater than would be expected due to age alone.

At his deposition Dr. James reiterated the foregoing points, and clarified that he believed that claimant's disabling blood oxygen levels were also due in part to coal mine dust exposure. Claimant's Exhibit 7 at 78. Dr. James cited a medical study to support his view that chronic coal dust exposure can cause hypoxemia, and

indicated that he would attempt to find the study.[3] *Id*. Dr. James again discussed the medical literature concerning coal mine dust exposure and obstructive lung disease, and maintained that claimant has more obstruction than would be expected from smoking alone and has no other obvious cause of the excess obstruction but coal mine dust exposure. Claimant's Exhibit 7 at 21-22, 90.

[3] After the deposition, employer propounded an interrogatory asking Dr. James to identify the medical literature associating abnormal blood oxygen levels with coal mine dust exposure. Employer's Exhibit 10. In response, Dr. James provided the citation and a copy of the article, which is in the record. Claimant's Exhibit 8.

By contrast, Dr. Farney concluded, based on a review of the medical records, that claimant has hypoxia, emphysema, and ventilatory obstruction due solely to smoking.[4] Employer's Exhibit 8. Dr. Farney disagreed with Dr. James's view of the medical literature regarding coal dust exposure and obstructive lung disorders, stating that the literature establishes that coal mine dust exposure causes at best only mild obstruction, unless significant fibrosis in the form of clinical coal workers' pneumoconiosis is present. Employer's Exhibit 8 at 3-4. Additionally, Dr. Farney reasoned that because claimant's exposure to cigarette smoke for 51 to 100 pack years was greater than his 26 years of coal mine dust exposure, the exposure to cigarette smoke was more significant. In this regard, Dr. Farney cited a medical study in support of his view that the toxicity of cigarette smoke is greater than that of coal mine dust. This study is in the record. Employer's Exhibit 5. In addition, Dr. Farney noted that claimant's lung function progressively declined while he was no longer exposed to coal dust but continued to smoke, and "in the absence of fibrotic lung disease (CWP medical definition)." Employer's Exhibit 8 at 4. Dr. Farney also stated that he was unaware of any data associating coal dust exposure with hypoxemia. Consequently, Dr. Farney concluded that claimant's pulmonary impairment is unrelated to coal mine dust exposure.

In a supplemental report, Dr. Farney reviewed one of the medical studies relied upon by Dr. James and concluded that the study was methodologically flawed and did "not support the proposition that coal dust exposure causes hypoxemia in coal miners in the absence of radiographic CWP," or that coal dust exposure would have caused claimant's hypoxemia. Employer's Exhibit 8 at 2.

At his deposition, Dr. Farney reiterated the reasoning in his written report. Employer's Exhibit 11. Dr. Farney also indicated that he had reviewed all of the medical studies cited by Dr. James, and believed that it was better to rely instead on a 1981 study of 249 Utah miners, in order to compare claimant with a similar population. Employer's Exhibit 11 at 24-25, 50. Dr. Farney stated that the authors of this study concluded that in the absence of cigarette smoking, long-term, underground coal mine employment in Utah resulted in no significant impairment in pulmonary function. *Id*. The study referenced by Dr. Farney is not in the record.

[4] Dr. Farney's review included the report of his 1994 examination of claimant in connection with the prior claim.

The administrative law judge summarized the medical opinions and recognized that "both Dr. James and Dr. Farney find total disability due to a pulmonary condition[;] it is the etiology of that condition which is at issue." Decision and Order at 12. The administrative law judge then accorded less weight to Dr. James's opinion because Dr. James did not perform an exercise blood gas study, the pulmonary function study Dr. James administered was non-qualifying,[5] and "the chest x-ray did not establish the presence of the disease." *Id*. Finding these to be "discrepancies" in Dr. James's opinion, the administrative law judge found that Dr. Farney's opinion was better documented and reasoned. *Id*. Consequently, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4).

Under the circumstances presented here, we agree with claimant that the administrative law judge did not adequately explain how the three factors he identified relate to the etiology dispute between Drs. Farney and James. *See* Administrative Procedure Act (APA), 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); *Caudill v. Arch of Kentucky, Inc.,* 22 BLR 1-97, 1-101 (2000)(*en banc*). Review of the record indicates that neither Dr. Farney nor Dr. James saw the need for an exercise blood gas study, in view of claimant's documented hypoxemia at rest.[6] Claimant's Exhibit 7 at 43, 101; Employer's Exhibit 11 at 29. Further review indicates that Dr. James acknowledged that the pulmonary function study he administered was non-qualifying, but he explained that the FEV1 value of the study was abnormal and diagnostic of moderate obstruction. Claimant's Exhibit 7 at 47-50. Dr. Farney interpreted the same study as revealing mild to moderate obstruction. Employer's Exhibits 8 at 2, 11 at 47. The dispute was over the etiology of the obstruction present. Finally, Dr. James, a B-reader, agreed with Dr. Farney that all of claimant's chest x-rays are negative for clinical pneumoconiosis, and did not base his diagnosis on a chest x-ray finding. *See* 20 C.F.R. §718.202(a)(4)(providing for a diagnosis of pneumoconiosis as defined in 20 C.F.R. §718.201, "notwithstanding a negative X-ray.").

In sum, the administrative law judge did not provide valid reasons for his weighing of the medical opinion evidence because his reasons, as formulated, do not clearly address whether claimant suffers from pneumoconiosis as broadly defined in the Act and regulations. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201(a). Consequently, the administrative law judge's determination that claimant failed to

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[5] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] All nine blood gas studies in the record are qualifying at rest; there are no exercise studies. Director's Exhibits 3, 6, 20. Based on claimant's blood gas study values, he has been on supplemental oxygen since 1990. Director's Exhibit 20.

establish the existence of pneumoconiosis cannot be affirmed. Therefore, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for further consideration.

On remand, the administrative law judge must reweigh the medical opinions pursuant to 20 C.F.R. §718.202(a)(4) to determine whether claimant has proved that his respiratory impairment constitutes "legal pneumoconiosis" pursuant to 20 C.F.R. §718.201(a)(2).[7] The administrative law judge "is not bound to accept the opinion or theory of any given physician, but may weigh the medical evidence and draw his own inferences." *American Coal Co. v. Benefits Review Board [Callor]*, 738 F.2d 387, 391, 6 BLR 2-81, 2-89 (10th Cir. 1984). The administrative law judge should assess the quality of the physicians' reasoning, *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-339 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993), and fully articulate whatever credibility determination he makes. *See Caudill, supra*. Additionally, because the administrative law judge's finding as to the existence of pneumoconiosis was determinative of his finding that disability causation was not established, Decision and Order at 14, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2000), and instruct him to determine whether claimant's total disability is due to pneumoconiosis as set forth in revised 20 C.F.R. §718.204(c)(1).

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, including "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). In developing the definition of "legal pneumoconiosis," the Department of Labor reviewed and discussed the pertinent medical literature, including the studies cited by Drs. James and Farney. *See* 65 Fed. Reg. 79920, 79938-44.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge