

BRB No. 00-0721 BLA

COY L. McCLANAHAN)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
CONSOLIDATION COAL COMPANY)	
)	
Employer-Petitioner)	
)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Coy L. McClanahan, Homosassa, Florida, *pro se*.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Mary Forrest-Doyle (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (99-BLA-1309) of Administrative Law Judge Linda S. Chapman 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 October 15, 1984 was finally denied by the district director on March 28, 1985 because the medical evidence failed to establish that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 35. On October 23, 1996, claimant filed the current claim, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d)(2000). The district director denied the claim and claimant requested a hearing, but he did not appear at the January 11, 2000 hearing. Claimant subsequently informed the administrative law judge that he wished to have a decision on the documentary record only. Memorandum To File, Jan. 28, 2000.

In her Decision and Order, the administrative law judge credited claimant with "at least 14 years" of coal mine employment, Decision and Order at 4, and found that the medical evidence developed since the prior denial established that claimant suffers from a totally disabling respiratory or pulmonary impairment. Consequently, the administrative law judge found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000).² 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). Considering the merits of the claim, the administrative law judge found that the medical evidence established the existence of pneumoconiosis arising out of coal mine employment and that claimant's total disability is due to pneumoconiosis. Accordingly, she awarded benefits. The administrative law judge additionally found that employer is the operator responsible for the payment of benefits.

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. Where a citation to the regulations is followed by "(2000)," the reference is to the old regulations.

² The revised version of this regulation, applicable to subsequent claims filed on or after January 20, 2001, no longer uses the term "material change in conditions." 20 C.F.R. §725.309(d); 65 Fed. Reg. 80067-68.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical evidence regarding the existence of pneumoconiosis and the causation of claimant's totally disabling respiratory impairment. Employer argues further that the administrative law judge erred in finding employer to be the responsible operator when, employer asserts, the Department of Labor did not adequately pursue the corporate officers of claimant's most recent employer before identifying Consolidation Coal Company as the responsible operator. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's responsible operator arguments as contrary to the Board's holdings in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(*en banc*)(McGranery, J., concurring and dissenting), and *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Hall and Nelson, JJ., concurring and dissenting).³

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded. The Director states that none of the regulations at issue in the lawsuit affects the outcome of this case. Employer, however, contends that two challenged regulations, 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The administrative law judge in this case weighed the evidence based in part on the principle that pneumoconiosis is progressive. However, the outcome of the case is the same under both the existing law recognizing the progressive nature of pneumoconiosis, see *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R.

³ We affirm as unchallenged on appeal the administrative law judge's findings of at least fourteen years of coal mine employment, that claimant is totally disabled by a respiratory or pulmonary impairment, and that a material change in conditions was demonstrated. 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).

§718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Further review indicates that all of the physicians agree that claimant has a disabling impairment which is respiratory in nature, and that no physician believes that claimant suffers from a nonrespiratory or nonpulmonary disability. Therefore, contrary to employer's assertion, 20 C.F.R. §718.204(a) is not implicated on this record. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

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'Keefe 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).

To determine whether claimant has pneumoconiosis, the administrative law judge first considered sixteen readings of three chest x-rays taken on October 4 1984, November 16, 1984, and December 19, 1996. There were seven positive readings, seven negative readings, and two readings which were not classified under the ILO system for the presence or absence of pneumoconiosis. The administrative law judge found the earliest x-ray negative for pneumoconiosis, and found the conflicting expert readings of the two later x-rays to be at best in equipoise when the readers' radiological qualifications were considered. See *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Considering all three x-rays, the administrative law judge found that "the x-ray evidence, standing alone, does not establish the presence of pneumoconiosis under 20 C.F.R. 718.202." Decision and Order at 16.

The administrative law judge then examined the medical reports and testimony of several different physicians. The only category of pneumoconiosis diagnosed therein was "clinical" pneumoconiosis,⁴ based largely upon the x-rays. See 20 C.F.R. §718.201(a)(1). Examining physicians Drs. Krishna Rao and Stuart Brooks diagnosed claimant as having "silicosis" arising out of coal mine employment and

⁴ The physicians of record diagnosed obstructive lung disease, but no physician related the obstructive lung disease to dust exposure in claimant's coal mine employment. See 20 C.F.R. §718.201(a)(2)(b).

“coal workers' pneumoconiosis,” respectively. Director's Exhibit 11; Employer's Exhibit 1. Dr. Gregory Fino, based on his B-readings of the November 16, 1984, and December 19, 1996 x-rays and a review of claimant's medical record, diagnosed “silicosis” arising out of coal mine employment. Employer's Exhibit 4. By contrast, Dr. Jerome Wiot, who read claimant's x-rays, and Dr. Ben Branscomb, who read claimant's x-rays and reviewed his medical records, stated that claimant's chest x-rays are negative for pneumoconiosis but positive for granulomatous disease because the opacities are calcified. Director's Exhibits 44, 46; Employer's Exhibit 2. Dr. Fino considered these and other negative readings, but stated that calcified opacities are a classic finding for silicosis, and explained that his reading of the x-rays and his review of claimant's clinical evidence supported that diagnosis. Employer's Exhibit 3 at 10-12.

After considering all of the medical reports and testimony, the administrative law judge found that Dr. Fino's opinion outweighed those of Drs. Wiot and Branscomb, which were found not well reasoned. According “substantial weight” to Dr. Fino's conclusions, the administrative law judge “consider[ed] all of the medical opinions of record, in conjunction with the x-ray evidence,” to find that claimant “established the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202.” Decision and Order at 18; see 20 C.F.R. §§718.201(a)(1), 718.202(a).

Employer contends that the administrative law judge failed to weigh together the x-rays and medical opinions, and did not explain why she credited Dr. Fino's diagnosis when the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis. Subsequent to the issuance of the administrative law judge's Decision and Order Awarding Benefits, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh together all types of evidence to determine whether the existence of pneumoconiosis is established pursuant to Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Here, contrary to employer's contention, the administrative law judge weighed the x-ray evidence together with the medical opinions. The administrative law judge found that the x-rays alone did not establish the existence of pneumoconiosis, but when she additionally considered the medical reports and testimony addressing whether claimant has clinical pneumoconiosis, she found that the medical opinions weighed in conjunction with the x-rays established the existence of coal workers' pneumoconiosis. Furthermore, the administrative law judge explained that she accorded substantial weight to Dr. Fino's diagnosis because it was well reasoned and supported by his reading of the x-rays and by his review of the clinical evidence

of record.⁵ 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 specifically noted that Dr. Fino considered the negative readings by other physicians, but explained persuasively why the calcified opacities were indicative of silicosis arising out of coal mine employment.⁶ Under these circumstances, we hold that the administrative law judge weighed the x-ray and medical opinion evidence together consistently with *Compton*, and that substantial evidence supports her finding. Therefore, we affirm the administrative law judge's finding that the existence of coal workers' pneumoconiosis arising out of coal mine employment was established. See 20 C.F.R. §§718.202(a); 718.203(b).

Employer next contends that substantial evidence does not support the administrative law judge's finding that claimant's total disability is due in part to pneumoconiosis. Under the standard applicable at the time of the administrative law judge's decision, a miner's total disability was due to pneumoconiosis if pneumoconiosis was a contributing cause, that is, a necessary condition, of the miner's disability. See *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). The currently applicable causation test is now phrased as whether pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Under either formulation, the administrative law judge did not adequately explain how she reconciled a physician's testimony with his written report in relying primarily on that physician's opinion to find that claimant's total disability is due to pneumoconiosis. Therefore, we must vacate the administrative law judge's finding and remand the case for further consideration.

Dr. Rao initially wrote that claimant's totally disabling respiratory impairment

⁵ In citing the clinical evidence, Dr. Fino explained that claimant's work history, his pulmonary function study values over time, and his chest x-ray changes over time pointed to the diagnosis of silicosis. Employer's Exhibit 3 at 9-13.

⁶ Contrary to employer's contention, the administrative law judge permissibly accorded less weight to Dr. Branscomb's opinion because he assumed that pneumoconiosis does not progress absent further dust exposure as a basis for concluding that claimant does not have pneumoconiosis. See *Mullins, supra*; *Richardson, supra*. The administrative law judge also reasonably questioned Dr. Wiot's rationale for labeling all of the x-ray abnormalities, even the uncalcified opacities, as histoplasmosis. The administrative law judge was not persuaded by Dr. Wiot's preference for diagnosing only one disease instead of two. See *Underwood v Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997)(the administrative law judge is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weigh it, and draw his or her own conclusions).

was due to both chronic obstructive pulmonary disease from smoking and to silicosis from coal mine employment. Director's Exhibit 11. Later, after reviewing additional medical data, Dr. Rao modified his opinion to state that claimant's total disability "seems to be from his smoking," and testified that claimant probably would be as disabled as he currently is had he never worked as a miner. Director's Exhibit 44 (Dep. Tr. labeled "Employer's Exhibit 9" at 13-14). The administrative law judge relied exclusively on Dr. Rao's original, written report to find disability causation established because she found that Rao's subsequent testimony did not exclude coal workers' pneumoconiosis as a causative factor or explicitly retract the earlier, written assessment.

It is not clear to us how the administrative law judge reconciled Dr. Rao's testimony with his written report in light of either the old or the new disability causation standard. In his testimony, Dr. Rao seemed to back away from his written opinion, testifying that claimant would currently be as disabled due to smoking-related lung disease had he never worked as a miner. See *Ballard*, 65 F.3d at 1196, 19 BLR at 320 (if claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not be awarded); 20 C.F.R. §718.204(c)(pneumoconiosis must have a material, adverse effect on the miner's respiratory or pulmonary condition, or materially worsen a totally disabling respiratory or pulmonary impairment which is unrelated to coal mine employment). That Dr. Rao did not exclude coal workers' pneumoconiosis or explicitly retract his report does not sufficiently explain how his opinion as a whole constitutes substantial evidence that claimant's total disability is due to pneumoconiosis under the applicable standard. Review of the record indicates that Dr. Rao's testimony was similar to the opinions of Drs. Brooks, Branscomb, and Fino, who attributed claimant's total disability to smoking. Although the administrative law judge permissibly questioned Dr. Brooks's and Dr. Branscomb's reliance on the assumption that pneumoconiosis would not have progressed after claimant left the mines, see *Mullins, supra*; *Richardson, supra*, she did not sufficiently explain why she discounted Dr. Fino's opinion.⁷ See *Hicks, supra*; *Akers, supra*. Because the administrative law judge did not provide sufficient reasoning for us to determine whether substantial evidence supports her finding, see *Hicks, supra*; *Akers, supra*, we must vacate the administrative law judge's finding and remand this case for her to reweigh the medical evidence under 20 C.F.R. §718.204(c), as

⁷ The administrative law judge found that the reasons provided by Dr. Fino for attributing claimant's disability to smoking were not an adequate explanation for excluding pneumoconiosis, but did not explain why those reasons were inadequate. Decision and Order at 21.

amended.⁸

Accordingly, the administrative law judge's Decision and Order Awarding 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

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

⁸ In the event that benefits are awarded on remand, employer's challenge to its designation as the responsible operator based on the Department's alleged failure to name the corporate officers of Round Mountain Coal Company as responsible operators fails for the reasons set forth in *Lester* and *Mitchem, supra*.