BRB Nos. 03-0432 BLA
and 03-0432 BLA-A

CALVIN E. CLINE, SR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/29/2004
	)	
WESTMORELAND COAL COMPANY)		
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand - Denying Benefits and the Decision and Order - Denying Claimant's Request for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Kathy L. Snyder and Dorothea J. Clark (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order on Second Remand - Denying Benefits and the Decision and Order - Denying Claimant's Request for Reconsideration of the Decision and Order (1994-BLA-1240) of Administrative Law Judge Clement J. Kichuk 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] This case involving a duplicate claim for benefits pursuant to 20 C.F.R. §725.309(d) (2000) is before the Board for the third time. The full procedural history is found in *Cline v. Westmoreland Coal Co*., 21 BLR 1-69, 1-71-72 (1997).

In *Cline*, the Board vacated the administrative law judge's order denying claimant's motion to compel discovery of medical information obtained by employer and instructed the administrative law judge, on remand, to reconsider claimant's motion under 29 C.F.R. §18.14 and 20 C.F.R. §725.455. The Board also vacated the administrative law judge's Decision and Order denying benefits and instructed the administrative law judge to determine, on remand, whether claimant established a material change in conditions under the standard set forth in *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), and, if the administrative law judge ultimately awarded benefits, to address employer's challenge to its designation as the responsible operator. *Cline*, 21 BLR at 1-73, 1-77.

On remand, Judge Kichuk (the administrative law judge) granted claimant's motion to compel discovery and employer forwarded the requested items to claimant, who submitted them into the record. The administrative law judge applied the standards set forth in *Rutter*, 86 F.3d 1358, 20 BLR 2-227, and found that the evidence developed since the denial of claimant's prior claim established that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge concluded that claimant demonstrated a material change in conditions as required by Section 725.309(d) (2000), but that the entire

[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 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

record did not establish the existence of either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304(a), (c) (2000). Consequently, the administrative law judge denied benefits and did not address employer's argument that it was improperly designated as the responsible operator.

On appeal to the Board for the second time in *Cline v. Westmoreland Coal Co.*, BRB Nos. 00-0183 BLA and 00-0183 BLA-A (April 13, 2001), the Board affirmed on the merits the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) (2000) based on his finding that total disability was established pursuant to 20 C.F.R. §718.204(c) (2000). The Board also affirmed the administrative law judge's finding that the x-ray evidence failed to establish the existence of either simple or complicated pneumoconiosis and affirmed the finding of no pneumoconiosis at Section 718.202(a)(1), (3) (2000). The Board, however, vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) (2000) and instructed the administrative law judge, on remand, to determine whether the relevant evidence establishes the existence of pneumoconiosis as defined in the Act.

On remand, after examining each medical report to determine whether it was documented, reasoned, supported by the objective medical evidence and rendered by a Board-certified physician, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis as defined in the Act pursuant to Section 718.202(a)(4). Accordingly, benefits were denied. Subsequently, the administrative law judge denied claimant's requests for reconsideration, as well as his additional motion to reopen the record, and granted employer's request to strike the appendix attached to claimant's request.

In the present appeal, claimant alleges for the first time that a request for information regarding an appeal to the Board in the prior claim was actually a modification request and that the request is still pending. In addition, claimant contends that the administrative law judge erred in his consideration and weighing of the medical opinions. Finally, claimant contends that the administrative law judge erred in denying reconsideration and in failing to reopen the record. Employer responds, urging affirmance of the decision denying benefits and the decision denying reconsideration. On cross-appeal, employer challenges the administrative law judge's application of the amended regulations. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to claimant's appeal, urging the Board to reject claimant's argument that there is a pending modification request.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Initially, we reject claimant's contention that a request for modification of claimant's original claim filed on January 28, 1980, is still pending. Director's Exhibit 33. On July 5, 1990, Administrative Law Judge Victor J. Chao denied benefits on that claim. In a letter to the Board dated August 25, 1990, claimant requested a determination of the status of his appeal of Judge Chao's decision, but an appeal had not been filed with the Board. Consequently, the Board acknowledged receipt of claimant's letter and treated it as a notice of appeal of the denial. However, the appeal was dismissed as untimely pursuant to 20 C.F.R. §802.205 on February 13, 1991. *Cline v. Westmoreland Coal Co.*, BRB No. 90-2207 BLA (Feb. 13, 1991) (unpub.). Claimant subsequently submitted a petition for modification on July 1, 1991, which was denied by the district director on October 11, 1991. Director's Exhibit 33. Claimant took no further action on his 1980 claim. On July 27, 1993, claimant filed the instant duplicate claim for benefits. Director's Exhibit 1. Claimant now contends that his August 25, 1990, letter should have been regarded as a request for modification, citing *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), and *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

Claimant urges the Board to remand this case to the district director for adjudication of the modification request "implicitly" made by claimant on August 25, 1990, Claimant's Brief at 26, notwithstanding the fact that claimant filed a formal request for modification on July 1, 1991, which was considered and denied by the district director on October 11, 1991. Claimant's argument lacks merit. Claimant's letter to the Board clearly indicates his intent to appeal Judge Chao's decision since claimant mentioned an "appeal" four times in his letter. Furthermore, the district director's denial of claimant's 1991 modification request contained instructions informing claimant that if he were dissatisfied with the

determination, he could request a hearing within sixty days or file additional evidence in support of his request. Instead, claimant took no further action until filing the duplicate claim in 1993. Consequently, we reject claimant's argument that his 1980 claim remains viable.

Claimant next contends that the administrative law judge erred in refusing claimant's request to reopen the record on remand to allow claimant to submit new evidence. Specifically, claimant contends that the administrative law judge abused his discretion in denying claimant's motion to reopen the record for the inclusion of Dr. Wiot's report dated December 20, 2002, in which the physician reviewed his previous reports and clarified his conclusions regarding the x-ray and CT scan evidence.[2] The administrative law judge noted that the Board had affirmed his finding that the x-ray evidence, combined with the CT readings, was insufficient to establish the existence of both simple pneumoconiosis and complicated pneumoconiosis. Decision and Order on Reconsideration at 3-4; *see* 20 C.F.R. §§718.202(a)(1), 718.304. The administrative law judge expressed his agreement with employer's statement that 29 C.F.R. §18.54 (a), (c) directs that no additional evidence shall be admitted into the record after the record is closed, with the exception of new and material evidence, and that Dr. Wiot's report was not substantive evidence, but impeachment material offered to undermine the credibility of employer's expert witness. Decision and Order on Reconsideration at 4.

The decision as to whether to reopen the record on remand is within the province of the administrative law judge. 20 C.F.R. §725.456(e); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Coal Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988). Under the facts of this case, however, it is unclear how the administrative law judge determined that Dr. Wiot's December 20, 2002, report was not new, material evidence. Claimant states that he was unaware of Dr. Wiot's ten x-ray readings and a CT scan dated May 13, 1994, until

[2] Claimant filed a Request for Reconsideration of the Decision and Order on Second Remand - Denying Benefits on December 18, 2002, and subsequently filed a Motion to Reopen the Record on January 3, 2003, to which claimant attached an appendix containing a medical opinion by Dr. Wiot dated December 20, 2002. Employer filed a response to claimant's motion for reconsideration, a motion to strike the appendix and an objection to the motion to reopen the record. Decision and Order Denying Reconsideration at 3; Claimant's Brief at 12; Employer's Brief at 4-5.

after the Board's decision in *Cline*, 21 BLR 1-69, and the administrative law judge's subsequent Order on Reconsideration of Claimant's Motion to Compel Discovery Denied by Administrative Law Judge George A. Fath issued in 1998, three years after the record closed. Claimant's Brief at 50, 54-55. Furthermore, claimant seeks to submit Dr. Wiot's December 20, 2002, report, not as impeachment evidence, as argued by employer and accepted by the administrative law judge, but rather to clarify Dr. Wiot's opinion on the etiology of the large opacities. Claimant's Brief at 55. Claimant alleges that the new report corrects the administrative law judge's earlier determination that Dr. Wiot's opinion supports the opinions of the readers who attributed the large opacities to tuberculosis instead of pneumoconiosis. *Id.*

The administrative law judge stated that he was not persuaded by claimant's motion to enter Dr. Wiot's commentary into the record since the Board had previously affirmed his finding that the x-ray evidence, combined with the CT scan readings, was not sufficient to establish the existence of either simple pneumoconiosis or complicated pneumoconiosis. Decision and Order on Reconsideration at 3-4. The administrative law judge, however, has not considered the relevance of this evidence and provided a rationale for his agreement with employer's suggestion that Dr. Wiot's recent report is impeachment evidence. In addition, the administrative law judge has failed to make a specific determination that good cause was not shown for the untimely submission. *See* 20 C.F.R. §725.456(b)(1). In light of claimant's proffered submission, we vacate the administrative law judge's denial of claimant's Motion to Reopen the Record and remand this case to the administrative law judge for further consideration. If, on remand, the administrative law judge determines that the evidence is incomplete or inconclusive on this issue, he may, within his discretion, reopen the record for the submission of the report into the record and, if so, to provide the parties with an opportunity to obtain and submit additional x-ray and/or CT scan evidence on this issue or remand the case to the district director to develop relevant evidence. 20 C.F.R. §725.456(e); *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(*en banc*)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc recon.*)(McGranery, J., concurring).

In the interest of completeness, we will address claimant's other arguments on appeal. On the merits, claimant contends that the administrative law judge erred in finding that claimant failed to establish the existence of "legal" pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Specifically, claimant asserts that the administrative law judge erroneously accorded less weight to the opinions of Drs. Rasmussen and Zaldivar, who concluded that claimant's chronic obstructive pulmonary disease was due to a combination of coal dust exposure and smoking, and claimant asserts that the administrative law judge improperly relied

on the opinions of Drs. Stewart, Fino, Crisalli, Morgan, Renn and Loudon, who concluded that claimant did not suffer from pneumoconiosis and that claimant's chronic obstructive pulmonary disease was due solely to smoking.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[3] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered primarily the opinions of eight physicians who rendered opinions regarding the existence of pneumoconiosis. The opinions of Drs. Rasmussen and Zaldivar support a finding of both clinical and legal pneumoconiosis, whereas the opinions of Drs. Stewart, Fino, Crisalli, Morgan, Renn and Loudon clearly support a finding that claimant does not suffer from clinical pneumoconiosis, but these opinions do not necessarily reflect that claimant does not suffer from legal pneumoconiosis. The administrative law judge found, however, that the medical opinion evidence was insufficient to establish the existence of both clinical and statutory or "legal" pneumoconiosis pursuant to Section 718.202(a)(4). In so finding, the administrative law judge noted that while Drs. Villaneuva, Green, Rasmussen and Zaldivar attributed claimant's pulmonary impairment, at least in part, to coal dust exposure, the opinions of Drs. Crisalli, Morgan, Fino, Renn, Loudon, Stewart and Daniel diagnosed a pulmonary condition due solely to smoking, not coal dust exposure, and that these opinions were better documented and reasoned and more persuasive. Decision and Order on Second Remand at 5-15.

Claimant contends the administrative law judge has confused the issues of medical pneumoconiosis and legal pneumoconiosis in his consideration of the medical opinions by factoring in the x-ray and CT scan evidence in his weighing of the medical opinions on the issue of legal pneumoconiosis. Claimant also contends that the medical opinions, relied on by the administrative law judge, used the medical definition of pneumoconiosis instead of the legal definition of pneumoconiosis. Claimant's assertions have merit. As noted by the administrative law judge, Dr. Zaldivar diagnosed a moderate airway obstruction with moderate diffusion impairment, he opined that the obstruction may be due to smoking and pneumoconiosis, and attributed the diffusion impairment together with the lost residual volume to the presence of complicated pneumoconiosis. Decision and Order on Remand at 7. In rejecting Dr. Zaldivar's opinion, the administrative law judge questioned the impact Dr. Zaldivar's lack of knowledge regarding claimant's family history of tuberculosis would have had upon his interpretation of the x-rays as showing complicated pneumoconiosis. Decision

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

and Order on Second Remand at 7. The administrative law judge indicated that Dr. Rasmussen concluded that claimant's chronic lung disease is the consequence of his smoking and coal mine dust exposure. Decision and Order on Remand at 8. In rejecting Dr. Rasmussen's opinion, the administrative law judge stated that Dr. Rasmussen insisted on crediting the reliability of the positive x-ray readings notwithstanding the preponderance of negative readings by the other experts and the compatibility of the changes with tuberculosis. Decision and Order on Second Remand at 8. The administrative law judge also gave diminished weight to Dr. Rasmussen's opinion since he had discounted the CT scan results, whereas the administrative law judge determined that the "CT scan merits consideration as it clearly constitutes 'relevant evidence' on the issue of legal pneumoconiosis in this case." Decision and Order on Second Remand at 9. After evaluating the medical opinions, the administrative law judge credited those rendered by Drs. Crisalli, Morgan, Fino, Renn, Loudon, Stewart; the administrative law judge emphasized that the opinions were based in part upon the negative x-ray evidence, thus obscuring the distinction between medical pneumoconiosis and legal pneumoconiosis.[4] Decision and Order on Second Remand at 9-13.

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit recognized that evidence showing that a miner does not have medical pneumoconiosis is not dispositive and must be weighed together with evidence establishing legal pneumoconiosis in determining whether a claim is established. Furthermore, the court acknowledged that administrative law judges should be mindful of the different diagnostic purposes of various pieces of evidence, and recognized that although there is a meaningful distinction between evidence of medical pneumoconiosis and evidence of legal pneumoconiosis, it cannot be said that evidence showing that a miner does not have medical pneumoconiosis is *irrelevant* to the question of whether the miner has established pneumoconiosis for purposes of a black lung claim. *Compton*, 211 F.3d at 210-11 n. 8, 9, 22 BLR 2-173-74 n. 8, 9.

In this case, we are unable to discern whether the administrative law judge actually weighed the evidence supportive of a finding of legal pneumoconiosis contained in the opinions of Drs. Zaldivar and Rasmussen with the conflicting evidence in the other reports of no legal pneumoconiosis, or whether the administrative law judge rejected the evidence supportive of a finding of legal pneumoconiosis because it was outweighed by evidence that established no medical pneumoconiosis. Because the administrative law judge apparently found

[4] The administrative law judge's consideration of Dr. Morgan's opinion, which apparently was not admitted into the record, was also error.

that the x-ray evidence, which relates to the existence of medical pneumoconiosis, was dispositive in evaluating the medical opinion evidence on the issue of legal pneumoconiosis, the manner in which the administrative law judge weighed the evidence under *Compton*, 211 F.3d 203, 22 BLR 2-162, is flawed. In light of this error, we vacate the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and instruct the administrative law judge, on remand, to weigh the relevant evidence together in accordance with the standard enunciated in *Compton*, 211 F.3d 203, 22 BLR 2-162.

Finally, employer's contention on cross-appeal that the administrative law judge erred in retroactively applying the revised regulations set forth at 20 C.F.R. §718.201 is without merit since the United States Court of Appeals for the District of Columbia Circuit held that the provisions of revised Section 718.201 are not impermissibly retroactive as applied to pending claims. *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001).

Accordingly, the administrative law judge's Decision and Order on Second Remand - Denying Benefits and the Decision and Order - Denying Claimant's Request for Reconsideration are affirmed in part, vacated in part and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's holding that the administrative law judge erred in considering the x-ray evidence while evaluating the medical opinion evidence pursuant to Section 718.202(a)(4) and in finding that claimant

failed to establish the existence of legal pneumoconiosis thereunder. The administrative law judge referred to the fact that the Board had affirmed his findings at Section 718.202(a)(1), (a)(3). Decision and Order on Second Remand at 2. Consistent with *Compton*, the administrative law judge considered the negative weight of the x-ray evidence in his evaluation of the medical opinion evidence and based his credibility determination on the totality of the factors relied upon by the various physicians in reaching their conclusions. In considering whether the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge addressed the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Second Remand at 5-13.

The administrative law judge extensively compared and contrasted the opinions of Drs. Rasmussen and Zaldivar with the contrary opinions and, as instructed by the Board, fully discussed and weighed the conflicting medical opinions of record. Decision and Order on Second Remand at 6-13. In this regard, the administrative law judge noted that Dr. Zaldivar was unaware of claimant's family history of tuberculosis and that while Dr. Zaldivar concluded that claimant's moderate airway obstruction may be due to smoking and pneumoconiosis, this conclusion was persuasively challenged and refuted by equally qualified examining and reviewing physicians. Decision and Order on Second Remand at 7. In addition, the administrative law judge determined that Dr. Rasmussen's conclusion that it was not possible to distinguish between the effects of smoking and coal dust exposure was not persuasive in light of the contrary opinions of the other physicians who provided a basis for their opinions. Decision and Order on Second Remand at 8-9.

Considering the conflicting medical opinion evidence together, the administrative law judge determined that the opinions of Drs. Rasmussen and Zaldivar were less persuasive than the contrary opinions of Drs. Crisalli, Morgan, Fino, Renn, Loudon, Stewart and Daniel and found that claimant failed to establish the existence of "legal" or statutory pneumoconiosis by a preponderance of the evidence. As such, the administrative law judge provided valid criticisms of the opinions of Drs. Zaldivar and Rasmussen and reasonably accorded greater weight to the contrary opinions. The administrative law judge, within his discretion as fact-finder, rationally found that the opinions of Drs. Crisalli,

Morgan, Fino, Renn, Loudon, Stewart and Daniel, all of whom are Board-certified pulmonologists, were better reasoned and documented and more persuasive than the contrary opinions of Drs. Rasmussen and Zaldivar. Decision and Order on Second Remand at 14. Therefore, I would reject claimant's assertion that the administrative law judge erred in his consideration and weighing of the medical opinion evidence.

I concur in all other respects with the majority's opinion.

ROY P. SMITH
Administrative Appeals Judge