BRB No. 04-0657 BLA

EDWARD L. GEARY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MESA COALS, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	DATE ISSUED: 04/19/2005
	)	
Employer/Carrier-Respondents	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edward L. Geary, Centertown, Kentucky, *pro se*.[1]

Lois A. Kitts and James M. Kennedy (Baird & Baird, P.S.C.), for employer/carrier.

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[1] By motion dated August 23, 2004, counsel for claimant withdrew his representation of claimant. By order dated September 13, 2004, the Board informed claimant that this appeal will be reviewed under the general standard of review utilized for appeals filed by claimants who are not represented by counsel and, notified employer and the Director, Office of Workers' Compensation Programs (the Director) of the time in which to file response briefs herein. *Geary v. Mesa Coals, Inc.*, BRB No. 04-657 BLA (Sep. 13, 2004) (Order) (unpub.).

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

PER CURIAM:

Claimant, without the assistance the counsel, appeals the Decision and Order – Denial of Benefits (03-BLA-5775) of Administrative Law Judge Robert L. Hillyard on a subsequent claim[2] 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). Initially, the administrative law judge credited claimant with twenty-four and three-quarter years of qualifying coal mine employment. Next, the administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge concluded that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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[2] Claimant, Edward L. Geary, filed his first application for benefits on February 3, 1998, which was denied by the district director on June 4, 1998 because claimant failed to establish the existence of pneumoconiosis, that the disease arose at least in part out of coal mine employment, or that the disease was totally disabling. Director's Exhibits 1, 31. On July 19, 2001, claimant filed a subsequent claim for benefits which is pending on appeal. Director's Exhibit 3.

Relevant to Section 718.202(a)(1), the administrative law judge found that, of the four x-ray interpretations of the two newly submitted x-ray films, three are negative and one is positive for the existence of pneumoconiosis. Decision and Order at 6-7; Director's Exhibits 9-11. The administrative law judge, within a proper exercise of his discretion, considered the radiological expertise of the physicians and found that the negative interpretations of Dr. Wiot, a Board-certified radiologist and B-reader, and Dr. Respsher, a B-reader, outweighed the positive interpretation of Dr. Simpao, whose radiological qualifications, if any, are not contained in the record. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. The administrative law judge conducted a qualitative and quantitative analysis of the newly submitted x-ray evidence in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Accordingly, as the administrative law judge's determination was rational and supported by substantial evidence, we affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[3] *See* 20 C.F.R. §718.202(a)(1).

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (a)(3). A review of the record reveals that there is no biopsy evidence; hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Similarly, a review of the record reveals that none of the presumptions set forth in Section 718.202(a)(3) is applicable as the record contains no evidence establishing that claimant has complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305, and this is a living miner's claim, *see* 20 C.F.R. §718.306. Consequently, we affirm the administrative law judge's determinations, pursuant to Section 718.202(a)(2) and (a)(3), that the existence of pneumoconiosis was not established under these subsections. 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304 - 718.306; Decision and Order at 10.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the record reveals that there are two

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[3] A review of the record reveals that the administrative law judge failed to consider the x-ray reading of Dr. Becker, who interpreted the July 25, 2002 film as negative for the existence of pneumoconiosis. Director's Exhibit 11. We deem this error harmless, however, as this reading supports the administrative law judge's determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis, and therefore, would not undermine his analysis of the x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 6-7.

physicians' opinions of record. In a report dated August 23, 2001, Dr. Simpao diagnosed "coal workers' pneumoconiosis 1/1." Director's Exhibit 9. In a report based on an examination conducted on July 25, 2002, Dr. Repsher found no evidence of coal workers' pneumoconiosis or any other respiratory or pulmonary disease or condition, either caused or aggravated by coal mine employment. Director's Exhibit 11.

The administrative law judge found that Dr. Simpao's opinion was entitled to less weight because Dr. Simpao, who possessed no specialized medical qualification or demonstrated pulmonary expertise, based his diagnosis of pneumoconiosis upon claimant's coal mine employment history and his own positive x-ray interpretation, which was discredited by the administrative law judge because it was reread as negative by Dr. Wiot, a physician who possessed superior radiological expertise. This was rational. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003) (administrative law judge may not rely on physician's opinion that miner has pneumoconiosis when physician based his opinion entirely on x-ray evidence that was discredited by administrative law judge); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). Accordingly, the administrative law judge properly found that Dr. Simpao's failure to provide any other explanation for his pneumoconiosis diagnosis or to take into account claimant's forty-year, three pack-per-day cigarette smoking history rendered Dr. Simpao's opinion, which purported to be based on clinical findings beyond claimant's coal mine employment history and the x-ray interpretation, based solely on an x-ray reading. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). Hence, the administrative law judge properly discounted Dr. Simpao's opinion because it was inadequately reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11-12.

The administrative law judge found that the contrary opinion of Dr. Repsher was more persuasive and, therefore, entitled to dispositive weight because Dr. Repsher, who is Board-certified in internal medicine with a subspecialty in pulmonary diseases and critical care medicine, based his opinion, that claimant did not have pneumoconiosis, on supportive, objective, diagnostic tests, *i.e.*, a negative chest x-ray, non-qualifying arterial blood gas studies. The administrative law judge also noted that the doctor provided alternate explanations, *i.e.*, obesity and sleep apnea, as the causes of claimant's symptoms. Additionally, the administrative law judge noted that the opinion was rendered by a physician with superior credentials. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Further, the administrative law judge rationally determined that Dr. Repsher's diagnosis of chronic obstructive pulmonary disease was insufficient to establish

the existence of pneumoconiosis as defined in Section 718.201 because Dr. Repsher did not opine that the condition was caused or aggravated by claimant's coal mine employment. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); Decision and Order at 12. Consequently, the administrative law judge found that, while Dr. Repsher discounted the pulmonary function study he administered due to claimant's poor effort and, therefore, did not rely on that test as a basis for his conclusion, Dr. Repsher nevertheless rendered a well reasoned opinion. Because the administrative law judge's determination that Dr. Repsher's opinion was sufficiently documented and reasoned, is rational and supported by substantial evidence, we affirm his crediting of Dr. Repsher's opinion over the contrary opinion of Dr. Simpao pursuant to Section 718.202(a)(4). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (crediting of physician's report as reasoned is a credibility determination within purview of administrative law judge); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

We next turn to the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). In considering the newly submitted pulmonary function study and arterial blood gas study evidence, the administrative law judge listed and considered one non-qualifying pulmonary function study and one qualifying blood gas study, each dated August 23, 2001. Decision and Order at 7. Based on his consideration of these studies, in conjunction with the opinion of Dr. Repsher, the administrative law judge concluded that the pulmonary function and blood gas study evidence did not support total disability. Decision and Order at 14.

A review of the record, however, reveals that the administrative law judge overlooked some evidence in this subsequent claim: a non-qualifying pulmonary function study and a non-qualifying arterial blood gas study dated July 25, 2002. Director's Exhibits 9, 11. The administrative law judge erred, therefore, in failing to address these studies which were administered as part of Dr. Repsher's evaluation. 20 C.F.R. §§718.204(b)(2)(i), (ii); *see* 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

While the administrative law judge's error in failing to consider the non-qualifying studies may be harmless, since they would not change the administrative law judge's finding

that the new evidence fails to establish total disability, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), the administrative law judge's rejection of the blood gas study taken on August 23, 2001 is not supported by the evidentiary record.

When assessing the probative value of the August 23, 2001 blood gas study, which yielded qualifying results,[4] the administrative law judge relied on Dr. Repsher's opinion to conclude that this test was unreliable, and thus, insufficient to demonstrate total disability. The administrative law judge found, "Dr. Repsher opined in a well-reasoned opinion that the Miner's obesity and sleep apnea contributed to the qualifying readings, and he opined that the arterial blood gas reading was, therefore, unsupportive of total disability." Decision and Order at 14. After conducting a complete pulmonary evaluation of claimant including physical examination, chest x-ray, CT scan, pulmonary function study, and blood gas study, Dr. Repsher opined that claimant "has no arterial blood gas evidence of coal workers' pneumoconiosis" and that claimant's "symptoms of dyspnea on exertion are more than adequately explained by his morbid obesity and sleep apnea." Director's Exhibit 11. Dr. Respher, however, does not appear to have reviewed or invalidated the August 2001 qualifying blood gas study. Instead, the blood gas study referred to by Dr. Repsher was the non-qualifying blood gas study associated with his evaluation of claimant on July 25, 2002. Thus, contrary to the administrative law judge's finding, Dr. Repsher's opinion does not undermine the results of the qualifying blood gas study administered by Dr. Simpao on August 23, 2001. Because the record does not contain a qualified medical opinion or testimony by Dr. Repsher, or by any other physician of record, that claimant's obesity and sleep apnea caused the qualifying results of the August 2001 blood gas study, thereby rendering it an unreliable indicator of claimant's pulmonary capacity, the administrative law judge erred in mischaracterizing Dr. Repsher's opinion and relying on the mischaracterization to conclude that the results of the August 23, 2001 blood gas study were unreliable. *See Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984) (absent qualified medical testimony, administrative law judge does not have requisite medical expertise to find blood gas studies unreliable); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23 (1993) (interpretation of medical data is matter for medical experts rather than administrative law judge); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-133 (1984). Accordingly, we vacate the administrative law judge's findings under Section 718.204(b)(2)(i) and (ii) and remand the case to him to consider all pulmonary function and blood gas studies to determine whether the evidence is sufficient to demonstrate total respiratory disability.

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[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Likewise, we agree that the administrative law judge's discrediting of Dr. Simpao's opinion to find that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv) cannot be affirmed. The administrative law judge discounted the opinion of Dr. Simpao, that claimant suffers from a severe respiratory impairment that precludes claimant from performing his usual coal mine work, because it was based on a discredited x-ray, non-qualifying pulmonary function study, and Dr. Repsher's opinion that the abnormal blood gas study results were attributable to claimant's obesity and sleep apnea. Decision and Order at 15. As we previously stated, the administrative law judge mischaracterized Dr. Repsher's report in this regard by concluding that Dr. Repsher "submitted a well-reasoned alternative explanation for the abnormal arterial blood gas testing relied upon by Dr. Simpao." Decision and Order at 15; *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 15. Thus, because the administrative law judge's rejection of Dr. Simpao's opinion is premised on the mistaken belief that Dr. Repsher attributed the qualifying values of the August 23, 2001 arterial blood gas study to factors unrelated to claimant's coal dust exposure, the administrative law judge's discrediting of Dr. Simpao's opinion cannot be affirmed. *See Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984) (administrative law judge is not permitted to engage in medical speculation without foundation in evidence of record). Because this error may impact the administrative law judge's weighing of the medical opinion evidence and his credibility determinations on remand, we must vacate the administrative law judge's determination pursuant to Section 718.204(b)(2)(iv). *See Kennellis Energies v. Director, OWCP* [*Ray*], 333 F.3d 822, 826, 22 BLR 2-591, 2-598 (7th Cir. 2003) (making credibility determinations and resolving inconsistencies in evidence is within sole province of administrative law judge); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987).

Based on the foregoing discussion, therefore, we vacate the administrative law judge's finding that total respiratory disability was not established and we remand the case for the administrative law judge to reconsider all evidence relevant to whether claimant suffers from a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2)(i)-(iv). If, on remand, the administrative law judge finds that claimant establishes total respiratory disability, a change in a subsequent condition of entitlement will be demonstrated as a matter of law under 20 C.F.R. §725.309(d), and the administrative law judge must conduct a *de novo* review of the entire record on the merits to determine whether claimant has established entitlement to benefits. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge