BRB No. 07-0563 BLA

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| E.M. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 04/30/2008 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of Decision and Order–Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order–Awarding Benefits (2005-BLA-6204) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a subsequent 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] The

[1] Claimant's prior claim, filed on January 31, 2001 was denied on November 14, 2002, for failure to establish any element of entitlement. Director's Exhibits 1, 2, 42. Claimant filed the current, subsequent claim on March 10, 2004. Director's Exhibits 5, 30. Following the initial development of the evidence, the district director, on January 18, 2005, found pneumoconiosis arising out of coal mine employment established, but

administrative law judge credited claimant with twenty-six years of qualifying coal mine employment based on the parties' stipulations. The administrative law judge found that the most recent evidence established all of the elements of entitlement and, therefore, found that claimant had shown a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d)(3).[2] Further, finding the more recent evidence more probative than earlier evidence, the administrative law judge accorded it greater weight to find that claimant established the existence of pneumoconiosis by x-ray evidence and medical opinion evidence at 20 C.F.R. §718.202(a)(1) and (4) on the merits. Likewise, the administrative law judge found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that claimant established that he was totally disabled, based on pulmonary function study results and medical opinions at 20 C.F.R. §718.204(b)(2)(i) and (iv), and that his pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c), on the merits. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1) and (4) and disability causation at Section 718.204(c), on the merits. In response, claimant urges affirmance of the administrative

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denied benefits for failure to establish total disability. Director's Exhibit 30. On March 15, 2005 claimant moved for modification based on mistake of fact, arguing that he had qualifying pulmonary function study results on record that were mistakenly categorized as non-qualifying. Director's Exhibit 32. Upon further review, the district director found that a mistake in fact had occurred, granted modification and awarded benefits in an April 28, 2005 Proposed Decision and Order. Director's Exhibit 36. Employer, contesting the award, requested that the case to be transferred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 37.

[2] 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibits 1, 2, 42. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *see generally 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).

law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declines to participate in this 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.[4] 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).

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).

Employer first contends that the administrative law judge erred in finding that a preponderance of the more recent x-ray evidence established pneumoconiosis under Section 718.202(a)(1), when there was only one more positive x-ray interpretation than negative interpretations. We disagree. In evaluating the x-ray evidence, the administrative law judge found that: all five of the positive readings were rendered by B readers, including four by dually qualified B readers and Board-certified radiologists; while four negative readings were rendered by B readers, including three by dually qualified B readers and Board-certified radiologists.[5] The administrative law judge

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d) and his finding that total respiratory disability was established on the merits at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, because the miner was employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 8.

[5] In evaluating the x-ray evidence the administrative law judge accurately summarized the more recent x-ray evidence as follows:

A March 23, 2004 x-ray interpreted as positive for pneumoconiosis by Drs. Thomeier, and Gohel, both B readers and Board-certified radiologists, and as negative by Dr. Meyer, a B reader and Board-certified radiologist. Director's Exhibit 19; Claimant's Exhibit 3; Employer's Exhibit 4.

therefore, properly concluded based on the quality and quantity of the more recent conflicting x-ray evidence, claimant met his burden of establishing pneumoconiosis by a preponderance of the positive x-ray interpretation evidence which was read by better qualified readers.[6] Decision and Order at 6; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Employer also contends that the administrative law judge erred in considering only the most recent x-ray evidence, and not all the evidence of record, in finding that pneumoconiosis was established at Section 718.202(a)(1). We disagree. In this case, the administrative law judge properly determined that, due to the progressive and irreversible nature of pneumoconiosis, he would accord greater weight to the more recent medical evidence filed with the 2004 claim, over the earlier medical evidence submitted with the prior claims filed in 1995, 1997 and 2001, on the merits. Decision and Order at 17; *see Adkins*, 958 F.2d at 52, 16 BLR at 2-64. We, therefore, affirm the administrative law

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A July 2005 x-ray interpreted as positive by Dr. Colella, a B reader and Board-certified radiologist, but as negative by Dr. Renn, a B reader. Claimant's Exhibit 5; Employer's Exhibit 2.

An August 2005 x-ray interpreted as positive by Dr. Gohel, a B reader and Board-certified radiologist, but as negative by Dr. Meyer, a B reader and Board-certified radiologist.

An October 2005 x-ray interpreted as positive by Dr. Cohen, a B reader, but as negative by Dr. Meyer, a B reader and Board-certified radiologist. Claimant's Exhibits 1, 2; Employer's Exhibits 13, 14.

[6] We reject employer's contention that it was denied the opportunity to present an equal number of interpretations of the March 23, 2004 x-ray because claimant was allowed an x-ray reading in conjunction with the obligation of the Director, Office of Workers' Compensation Programs (the Director), to provide him with a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). All three of the readings of the March 23, 2004 x-ray submitted by the parties were within the evidentiary limitations at 20 C.F.R. §725.414. Dr. Thomeier's positive x-ray reading was submitted by the Director in conjunction with his obligation to provide claimant with a complete pulmonary evaluation. Director's Exhibit 19. The positive reading by Dr. Gohel was submitted as claimant's rebuttal reading pursuant to 20 C.F.R. §725.414(a)(2)(ii). The negative reading by Dr. Meyer was submitted by employer as its rebuttal reading pursuant to 20 C.F.R. §725.414(a)(3)(ii).

judges findings that the x-ray evidence of record establishes the existence of pneumoconiosis at Section 718.202(a)(1).

However, because this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge must weigh together all of the relevant evidence at Section 718.202(a)(1)-(4) in determining whether claimant has established the existence of pneumoconiosis at Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We turn, therefore, to employer's argument at Section 718.202(a)(4).

Addressing the medical opinion evidence at Section 718.202(a)(4), employer contends that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Rasmussen, Cohen and Celko, finding pneumoconiosis, over the contrary opinions of Drs. Renn and Fino.[7] Specifically, employer contends that the administrative law judge erred in crediting the opinions of Drs. Rasmussen, Cohen and Celko because they were more consistent with claimant's significant history of coal mine employment, and erred in finding the opinions of Drs. Rasmussen, Cohen and Celko more consistent with the medical data of record because they did not review as much of the medical data of record as Drs. Renn and Fino did.

In finding that the medical opinion evidence established pneumoconiosis at Section 718.202(a)(4), the administrative law judge stated that:

> the opinions of Drs. Rasmussen, Cohen, and Celko are more consistent with the credible objective clinical data, including the preponderance of the positive x-ray evidence and the qualifying pulmonary function studies before and after bronchodilators, and more consistent with [c]laimant's significant history of coal mine employment.[8]

[7] Dr. Renn opined that claimant did not have pneumoconiosis, and that his chronic bronchitis and pulmonary emphysema were due to tobacco smoking. Dr. Fino opined that claimant did not have pneumoconiosis and that his respiratory impairment was due to cigarette smoking.

[8] Dr. Cohen diagnosed pneumoconiosis based on twenty-six years of coal mine employment and dust exposure, symptoms of chronic lung disease, pulmonary function test results and a positive x-ray interpretation. Dr. Cohen found that claimant's coal mine employment history and combined twenty-one pack-year smoking history contributed to claimant's obstructive lung disease, causing a totally disabling respiratory impairment. Claimant's Exhibit 1.

Decision and Order at 14.

A medical opinion may be given less weight where physician does not have a complete picture of claimant's condition. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984). Further, a history of coal dust exposure does not by itself conclusively confirm that a claimant has pneumoconiosis or is disabled by it. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-342 (4th Cir. 1998), especially where, as in this case, claimant has a lengthy smoking history.[9]

In summarizing the medical evidence, the administrative law judge noted that while claimant's hospitalization and treatment notes did not include a specific diagnosis of pneumoconiosis, they did reference claimant's cigarette smoking habit. In fact, the administrative law judge stated that this evidence "suggest[ed] that the hospital physicians may relate [c]laimant's chronic obstructive pulmonary disease to his extensive smoking history." Decision and Order at 7; *see* 20 C.F.R. §718.201. The administrative law judge did not, however, consider this evidence in his evaluation of the opinions of Drs. Rasmussen, Cohen and Celko. Further, the administrative law judge did not fully discuss the opinion of Dr. Fino, who found insufficient objective medical data to diagnose coal workers' pneumoconiosis, but found claimant had a respiratory impairment caused by cigarette smoking. Dr. Fino testified that because claimant's employment mostly occurred after dust regulations were put into place, the amount of lost lung functions that he could attribute to the coal dust was insignificant compared to the total loss of lung volume. Employer's Exhibits 8, 9, 11 at 21-24. Therefore, Dr. Fino opined that even if claimant had coal workers' pneumoconiosis, it would not have contributed to

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Dr. Rasmussen found a marked loss of lung function on claimant's pulmonary function study results, which he opined reflected total disability. Dr. Rasmussen found that claimant had clinical pneumoconiosis. However, Dr. Rasmussen couldn't quantify the degree to which coal dust and cigarette smoking played a role in claimant's disability other than to find that both factors were significant. Claimant's Exhibit 4; Employer's Exhibit 11.

Dr. Celko diagnosed chronic obstructive pulmonary disease (COPD), pneumoconiosis and sleep disorders, significantly due to pulmonary function test results and a positive x-ray. Dr. Celko attributed claimants COPD to both claimant's smoking history and coal dust exposure. Director's Exhibit 16; Employer's Exhibit 17.

[9] The administrative law judge found that claimant acknowledged an ongoing smoking history of more than sixty years. Decision and Order at 5.

claimant's respiratory impairment. Employer's Exhibits 8, 9, 11. The administrative law judge improperly drew his own conclusions from the medical data and test results cited by Dr. Fino, without fully discussing the opinion in its totality. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-342.

Additionally, we note that, as employer contends, Drs. Renn and Fino reviewed all of the claimant's objective studies from 1976 to 2006, while Dr. Cohen reviewed only his own studies and those performed as part of the pulmonary evaluation performed by the Department of Labor. Further, as employer contends, the administrative law judge did not consider that Dr. Cohen referred to pulmonary function study results that were not in the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 23 BLR 1-273 (2007) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). Likewise, as employer contends, Dr. Rasmussen reviewed only his own studies and those of Dr. Cohen, while Dr. Celko reviewed no studies other than his own. We agree with employer, therefore, that the administrative law judge erred in summarily concluding that the opinions of Drs. Rasmussen, Cohen and Celko were more consistent with the pulmonary function study evidence, when they had not reviewed as much of the pulmonary function study as Drs. Renn and Fino had. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-342; *Stark*, 9 BLR at 1-37.

Furthermore, from the administrative law judge's analysis of Dr. Renn's opinion on claimant's ventilatory defects and whether they were reversible, it is unclear whether the administrative law judge considered Dr. Renn's opinion in full. Dr. Renn diagnosed chronic bronchitis and pulmonary emphysema due to cigarette smoking, extrinsic allergic asthma, no coal workers' pneumoconiosis and severe bronchoreversible obstructive ventilatory defect due to claimant's bronchitis, emphysema and asthma. Dr. Renn concluded that coal dust exposure was in no way a cause or contributor to the conditions diagnosed. Employer's Exhibits 2, 3.

Therefore, the administrative law judge did not sufficiently explain why he found the opinions of Drs. Rasmussen, Cohen and Celko to be more consistent with claimant's length of coal mine employment and the medical data of record, when, in fact, he cited to evidence that was not consistent with those doctors' findings. Futher, the administrative law judge did not consider the opinions of Drs. Fino and Renn in their totality. We, therefore, vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and remand the case for the administrative law judge to reconsider the medical opinion evidence thereunder.[10] *Hicks*, 138 F.3d at 533, 21 BLR at 2-342.

[10] Because we have vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), we also vacate his finding that claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). On remand, if the administrative law judge finds that pneumoconiosis is established at

Further, on remand, the administrative law judge must first weigh together the x-ray and the medical opinion evidence before determining whether pneumoconiosis is established. *See Compton*, 211 F.3d at 211, 22 BLR at 2-169-70.

Finally, employer contends that the administrative law judge erred in finding that the medical opinion evidence established that pneumoconiosis was a substantially contributing cause of claimant's total disability at Section 718.204(c). The administrative law judge accorded greater weight to the opinions of Drs. Cohen, Rasmussen and Celko over the opinions of Drs. Fino and Renn at Section 718.204(c) for the same reasons he accorded their opinions more weight at Section 718.202(a)(4). Decision and Order at 16. We have vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a), however, and remanded the case for further consideration thereunder. We, therefore, vacate the administrative law judge's findings at Section 718.204(c) and remand the case for further consideration of the medical opinions thereunder, if reached.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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Section 718.202(a), claimant would be entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b).