BRB No. 07-0675 BLA

M.C. Claimant-Respondent v. CANTERBURY COAL COMPANY and THE FIRE & CASUALTY COMPANY OF CONNECTICUT Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2008 DECISION and ORDER

Appeal of the Decision and Order -- Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Raymond F. Keisling (Carpenter, McCadden & Lane), Wexford, Pennsylvania, for employer/carrier.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order -- Awarding Benefits (06-BLA-5721) of Administrative Law Judge Daniel L. Leland on a subsequent claim[1] 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). The administrative law judge credited claimant with thirty-six years and six months of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established total respiratory disability based on the newly submitted evidence pursuant to 20 C.F.R. §718.204(b) and, therefore, found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Next, considering all the evidence of record *de novo*, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established at Section 725.309(d), by finding total respiratory disability established at Section 718.204(b) based on the newly submitted evidence. Employer also contends that the administrative law judge erred in finding total disability due to pneumoconiosis pursuant to Section 718.204(c), on the merits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the

[1] Claimant filed his first application for benefits on February 3, 1992. Director's Exhibit 1. Administrative Law Judge Daniel L. Leland denied benefits on December 29, 1997, because claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Claimant appealed the denial and the Board vacated Judge Leland's findings under Sections 718.202(a)(1), (a)(4), and 718.204(c)(2) (2000) and remanded the case for further consideration. [*M.C.*] *v. Canterbury Coal Co.*, BRB No. 98-0597 BLA (Mar. 26, 1999) (unpub.); Director's Exhibit 1. On remand, Judge Leland found that while claimant established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a) and 718.203(b), claimant failed to establish total respiratory disability at Section 718.204(c) (2000), and accordingly, denied benefits. Claimant appealed and the Board affirmed the denial of benefits. [*M.C.*] *v. Canterbury Coal Co.*, BRB No. 99-1085 BLA (July 17, 2000) (unpub.); Director's Exhibit 1. Subsequently, claimant filed a second application for benefits on July 20, 2001, which the district director denied on August 19, 2002, because claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b). Director's Exhibit 2. Claimant took no further action on this claim. On March 30, 2005, claimant filed a third application for benefits, which is the subject of this appeal. Director's Exhibit 4.

newly submitted evidence established total respiratory disability at Section 718.204(b) and, therefore, a change in an applicable condition of entitlement under Section 725.309(d). The Director also argues that the administrative law judge properly relied on Dr. Cohen's opinion to find disability causation at Section 718.204(c).[2]

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. 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).

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.[3] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where claimant 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 a totally disabling respiratory impairment pursuant to Section 718.204(b). In considering the new evidence submitted in this subsequent claim, the administrative law judge found that a change in an applicable condition of entitlement was established as all of claimant's new blood gas study evidence yielded qualifying results and all of the newly submitted medical opinions concluded that claimant could no longer perform his usual coal mine employment. 20

[2] We affirm the administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment on the merits pursuant to 20 C.F.R. §718.202(a) and 718.203(b) as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

C.F.R. §§718.204(b)(2)(ii), (iv), 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); Director's Exhibits 13, 18, 19; Claimant's Exhibits 1, 6.

Employer first contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established based on Dr. Cohen's opinion finding total respiratory disability. Employer argues that Dr. Cohen did not provide a competent and reliable medical opinion with respect to whether claimant was now totally disabled and whether his condition had, therefore, changed because Dr. Cohen did not review any of claimant's prior medical records. Essentially, employer asserts that the administrative law judge erred in relying on Dr. Cohen's opinion because he did not consider the prevailing conclusion in previous medical reports, that claimant did not have a disabling respiratory impairment in rendering his total disability assessment. The Director responds, asserting that employer's "argument is without merit for the simple reason that [S]ection 725.309(d) provides that the requisite change is established if the claimant establishes an element (capable of change) that was previously decided against the claimant. 20 C.F.R. §725.309(d); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995)." Director's Letter Brief at 1.

Section 725.309(d) contains no provision or requirement that the administrative law judge, or the physician upon whose opinion the administrative law judge may rely, render a comparative analysis of the medical evidence associated with prior claims when determining whether a miner has affirmatively demonstrated a change in an element previously adjudicated against him in the denial of the prior claim. *See* 20 C.F.R. §725.309(d)(3). In this case, the administrative law judge determined that the prior claim was denied based on claimant's failure to demonstrate total respiratory disability at Section 718.204(b)(2). In reviewing the newly submitted evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge found that, "[a]ll of the blood gas studies have qualifying values and all of the physicians who examined the miner found that he has a pulmonary impairment that prevents him from performing his usual coal mine job as a general inside laborer." Decision and Order at 5. Because the administrative law judge determined that the newly submitted evidence was sufficient to demonstrate total respiratory disability, he properly found that a change in an applicable condition of entitlement was established at Section 725.309(d)(3). *See Swarrow*, 72 F.3d at 317, 20 BLR at 2-94; *Allen v. Mead Corporation*, 22 BLR 1-63, 1-66-67 (2000) (*en banc*). Employer's argument on this issue is, therefore, rejected.[4]

[4] A review of the report of Dr. Fino, filed by employer in this claim, belies employer's contention. Dr. Fino, who had examined claimant on three separate occasions, found in his most recent examination of claimant, set forth in a report dated September 22, 2005, that claimant was totally disabled from returning to his last mining

The administrative law judge, however, erred in failing to consider both the old and new evidence in finding total respiratory disability. In cases where the administrative law judge finds that claimant has affirmatively demonstrated a change in an applicable condition of entitlement under Section 725.309, the administrative law judge must then consider whether all of the evidence of record, including that evidence submitted with the previous claims, affirmatively establishes entitlement to benefits. *Swarrow*, 72 F.3d at 317, 20 BLR at 2-94; *accord Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). While the administrative law judge considered the newly submitted evidence in this case in determining whether a change in an applicable condition of entitlement was established, it is unclear whether the administrative law judge considered all the record evidence in assessing whether claimant was totally disabled, on the merits. Accordingly, we remand this case for the administrative law judge to consider all the relevant evidence, including that submitted with the prior claims, to determine whether total respiratory disability was established at Section 718.204(b).[5]

Employer next argues that the administrative law judge erred in relying on the opinion of Drs. Cohen and Celko, over the contrary opinion of Dr. Fino, to find that claimant's pneumoconiosis was totally disabling at Section 718.204(c), on the merits.[6]

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job from a respiratory standpoint, noting that his significant disabling respiratory impairment developed since 2001. Director's Exhibit 19. Moreover, we note that employer does not challenge the administrative law judge's finding that the newly submitted blood gas studies are qualifying and established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii).

[5] In association with claimant's 2005 claim, there are four non-qualifying pulmonary function studies, four qualifying arterial blood gas studies, and the opinions of Drs. Cohen, Celko, and Fino, that claimant has a totally disabling respiratory impairment. Director's Exhibits 13, 18, 19, Claimant's Exhibits 1, 6. In association with claimant's 2001 claim, there are two non-qualifying pulmonary function studies, one qualifying arterial blood gas study and one non-qualifying study, and the opinions of Drs. Fino and Kucera that claimant is not totally disabled. Director's Exhibit 2. In association with claimant's 1992 claim, there are two non-qualifying pulmonary function studies, three qualifying arterial blood gas studies and one non-qualifying blood gas study, and the opinions of Drs. Fino and Kettering that claimant is not totally disabled. Director's Exhibit 1.

[6] In a report dated April 20, 2006, Dr. Cohen opined that claimant's pneumoconiosis was a significant contributor to the development of claimant's totally disabling respiratory impairment. Claimant's Exhibit 1. In a report dated September 12, 2005, Dr. Celko opined that claimant is totally disabled due to coal workers' pneumoconiosis. Director's Exhibit 18. On September 22, 2005, Dr. Fino concluded that

Employer contends that the administrative law judge erred in relying on these physicians' opinions because they were based on inaccurate cigarette smoking and coal mine employment histories. Employer also argues that the administrative law judge impermissibly ignored the stipulation of the Department of Labor that claimant worked in qualifying coal mine employment for twenty-eight years and five and one-half months, contrary to the administrative law judge's finding of thirty-six years and six months.

Relying in part on his analysis of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge reviewed the medical opinion at Section 718.204(c) and found that the opinions of Drs. Celko and Cohen outweighed that of Dr. Fino, as the conclusions of Drs. Celko and Cohen, that claimant was totally disabled due to coal workers' pneumoconiosis, were better reasoned and documented. Decision and Order at 7.

Employer contends that the administrative law judge failed to resolve the conflicts in the record regarding the length of claimant's smoking history. Specifically, employer argues that even though the administrative law judge properly found that "claimant smoked cigarettes from age 16 to his early 70s," he ignored earlier evidence of record that claimant smoked "almost a pack of cigarettes a day," when he found that claimant "only smoked a carton of cigarettes a month." Brief of Employer at 9. Employer contends that, because the smoking history found by the administrative law judge conflicts with claimant's previous testimony and the smoking histories he gave to various physicians, the administrative law judge erred in failing to evaluate and reconcile the discrepancies and thus, erred in relying on the opinions of Drs. Celko and Cohen to find disability causation.

An accurate account of the miner's smoking history is relevant to a determination of whether the evidence establishes disability causation at Section 718.204(c), and the administrative law judge must resolve any discrepancies in the evidence regarding claimant's smoking history, before he can assess the credibility of the opinions regarding disability causation. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985). In this case, however, employer has failed to cite to any specific evidence of record or relevant testimony demonstrating that claimant ever reported that he smoked one package of cigarettes per day. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); Brief of Employer

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claimant's totally disabling respiratory impairment was attributable to idiopathic interstitial pulmonary fibrosis and that, assuming claimant had coal workers' pneumoconiosis, it did not contribute to his disability. Director's Exhibit 19.

at 9. Further, a review of record belies employer's contention.[7] During the formal hearing on January 10, 2007, claimant's testimony revealed a history of four or five cigarettes per day, or the equivalent of ten packs of cigarettes per month, commencing at the age of sixteen and quitting in his early seventies. Hearing Transcript at 16-19. Dr. Celko recorded a smoking history of one half pack of cigarettes per day from 1949 to 1995 and Dr. Cohen recorded a ten to seventeen pack-year smoking history. These histories are consistent with the administrative law judge's determination that claimant "smoked ten packs of cigarettes a month from age sixteen to his early seventies." Decision and Order at 3; Director's Exhibit 18; Claimant's Exhibit 1. Employer's argument that the administrative law judge erred in relying on the opinions of Drs. Celko and Cohen at Section 718.204(c) because they relied on erroneous smoking histories is, therefore, rejected.

Employer also contends that the medical opinions of Drs. Cohen and Celko contain inconsistencies with respect to the length of claimant's coal mine employment, which affect their findings on disability causation. During the course of their pulmonary evaluations of claimant, all three physicians, namely Drs. Cohen, Celko, and Fino, recorded a forty-three year history of coal mine employment. Claimant's Exhibit 1; Director's Exhibits 18, 19. The list of contested issues reflects that the parties stipulated that the miner worked "at least 28 years and 5-½ months in or around one or more coal mines." Director's Exhibit 41. The administrative law judge credited claimant with thirty-six years and six months. Thus, because there are inconsistencies in the record regarding claimant's length of coal mine employment, we vacate the administrative law judge's finding of disability causation at Section 718.204(c) and remand this case for the administrative law judge to determine the significance, if any, of the difference in the length of coal mine employment found by him and that found by the physicians of record on this issue.[8] *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director,*

[7] A review of the record demonstrates that previous smoking histories recorded by other physicians of record consistently reported that claimant smoked less than one pack of cigarettes per day, *i.e.*, Dr. Kettering's 1992 report stated less than one pack per day for forty-one years; both of Dr. Fino's reports from 1992 and 2001 stated less than one pack per day for forty-one years; Dr. Kucera's 2001 report stated 3/4 pack per week from the age of 18 to 62 years; Dr. Fino's 2005 report stated less than one pack per day for thirty-five years; Dr. Celko's 2005 report stated one half pack per day from 1949 to 1995; Dr. Cohen's report noted a ten to seventeen pack-year history. Director's Exhibits 1, 2, 18, 19; Claimant's Exhibit 1.

[8] Relevant to Section 718.204(c), Drs. Cohen and Celko opined that claimant was totally disabled due to pneumoconiosis, while Dr. Fino opined that claimant was totally disabled due to idiopathic interstitial pulmonary fibrosis. Director's Exhibits 18, 19; Claimant's Exhibit 1. Drs. Kucera and Kettering did not diagnose a totally disabling

OWCP, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988).

In conclusion, we affirm the administrative law judge's determination that a change in an applicable condition of entitlement was established at Section 725.309(d), and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b) on the merits. We vacate, however, the administrative law judge's determination that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b), (c) on the merits and remand the case for the administrative law judge to reconsider all the relevant evidence of record in determining whether claimant established total disability pursuant to Section 718.204(b) and, if reached, disability causation pursuant to Section 718.204(c). *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the Decision and Order -- Awarding 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.

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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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respiratory impairment and hence, did not render opinions concerning disability causation. Director's Exhibits 1, 2.