BRB No. 00-1112 BLA

CLAUDE VANDYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: _____
VANDYKE BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on the Record-Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Susan D. Oglebay, Castlewood, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on the Record-Denying Benefits (1999-BLA-1086) of Administrative Law Judge Joseph E. Kane 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 first three applications for benefits were finally denied by the District Director of the Office of Workers' Compensation Programs and claimant took no further action on those denials. Director's Exhibits 27, 27A, 27B. On August 6, 1987, claimant filed the present application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000). A formal hearing was held on May 21, 1991, after which several adjudications by administrative law judges and the Board followed, addressing whether claimant established the requisite material change in conditions under 20 C.F.R. §725.309(d)(2000). Director's Exhibits 67, 70, 77, 79, 80, 82, 85. Ultimately, in a Decision and Order on Remand issued on April 8, 1998, Administrative Law Judge Clement J. Kichuk found that the newly submitted evidence did not establish either the existence of pneumoconiosis or that claimant was totally disabled, and therefore did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). Director's Exhibit 85; *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Accordingly, he denied benefits.

Thereafter, claimant timely filed a petition for modification with the District Director pursuant to 20 C.F.R. §725.310, and submitted new evidence. Director's Exhibits 87, 89. Claimant submitted several pages of treatment notes from Dr. J. Randolph Forehand, along with a report in which Dr. Forehand stated that claimant has

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[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.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

"coal workers' pneumoconiosis." Director's Exhibits 87, 92. The District Director denied benefits and claimant requested a hearing. Director's Exhibits 94, 95.

In the meantime, claimant submitted treatment records from Dr. Emory Robinette. Claimant's Exhibits 1, 3. Dr. Robinette's records included two chest x-ray readings and a report of a CT scan reading identifying interstitial fibrosis "consistent with coal workers' pneumoconiosis." *Id*. Additionally, Dr. Robinette's records included the results of an October 15, 1999, left lung biopsy. Claimant's Exhibit 1. The surgical pathology report described "prominent subpleural lymphatic anthracosis", "fibrosis and a moderate degree of deposition of black pigment", and "focal emphysematous change." *Id*. The pathologist's diagnoses were "Fibrosis and anthracosis", and "features consistent with simple coal workers' pneumoconiosis." *Id*. In the treatment notes, Dr. Robinette diagnosed "interstitial fibrosis of unknown etiology, most likely due to coal workers' pneumoconiosis," "C[W]P with underlying fibrosis," and "underlying pulmonary fibrosis with black lung disease." *Id*. In addition, claimant submitted a November 15, 1999 letter from Dr. Robinette, in which Dr. Robinette stated that claimant had "bilateral pulmonary fibrosis," and concluded that claimant's severe lung disease would likely cause a rapid deterioration in lung function. Claimant's Exhibit 2.

Employer responded with the x-ray and CT scan readings of several physicians who concluded that claimant does not have pneumoconiosis but has emphysema and non-specific fibrosis unrelated to coal mine dust exposure. Employer's Exhibits 1-20, 22-30. Employer also submitted the reports of two pathologists who reviewed the lung biopsy tissue slides and concluded that the slides revealed coal dust deposition, but did not contain diagnostic findings of coal workers' pneumoconiosis. Employer's Exhibits 31, 38. In addition, employer submitted the report of Dr. McSharry, who examined and tested claimant and reviewed most of the evidence of record, and concluded that claimant does not have pneumoconiosis, but is totally disabled by lung disease due to asthma and smoking. Director's Exhibit 20. Finally, employer submitted the medical report of Dr. Fino, who reviewed the medical evidence of record and concluded that claimant does not have clinical or legal pneumoconiosis, but has a totally disabling respiratory impairment due to smoking and diffuse interstitial pulmonary fibrosis. Employer's Exhibit 39.

The case was scheduled for a hearing before an administrative law judge, but due to a deterioration in claimant's health the parties agreed to submit the case for a decision on the record. Decision and Order at 1; Employer's Brief at 3. Employer, in its closing brief to the administrative law judge, conceded that claimant is totally disabled and indicated that employer no longer contested whether there was a material change in conditions. [2000] Employer's Brief at 3.

The administrative law judge accepted employer's concession and found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, demonstrating a material change in conditions pursuant to 20

C.F.R. §725.309(d). *See Rutter, supra*. Turning to the merits, the administrative law judge found that the x-ray readings viewed in light of the readers' radiological credentials were in equipoise and thus did not support a finding of the existence of pneumoconiosis. The administrative law judge additionally found that the biopsy evidence did not contain a diagnosis of pneumoconiosis. The administrative law judge further found that the medical opinions and CT scan readings did not support a finding of the existence of pneumoconiosis. Weighing all of the evidence together, the administrative law judge concluded that the existence of pneumoconiosis was not established. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, --- BLR --- (4th Cir. 2000). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the biopsy evidence did not contain a diagnosis of pneumoconiosis, and argues that the administrative law judge did not accord proper weight to the opinion of claimant's treating physician, Dr. Robinette. Employer responds, urging affirmance of the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[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 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'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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant contends that the administrative law judge did not apply the legal definition of pneumoconiosis and mischaracterized the surgical pathology report when he concluded that the biopsy findings of "fibrosis and anthracosis" and "features consistent with coal workers' pneumoconiosis", were not a diagnosis of pneumoconiosis.

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[2] We affirm as unchallenged on appeal the administrative law judge's findings that claimant is totally disabled by a respiratory or pulmonary impairment, and that the weight of the chest x-ray evidence and CT scan readings do not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4). *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).

The Act defines the term "pneumoconiosis" as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). The implementing regulation at 20 C.F.R. §718.201(a) mirrors this statutory language, and further provides: "This definition includes both medical or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." 20 C.F.R. §718.201(a). The regulation at 20 C.F.R. §718.201(a)(1) regarding clinical pneumoconiosis provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, *anthracosis*, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1)(emphasis supplied). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "anthracosis" is among the list of "coal dust-specific diseases" included in 20 C.F.R. §718.201, and which satisfy the definition of pneumoconiosis "whenever . . . present in the miner at a detectable level. . . ." *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661-62 (4th Cir. 1999). A credible biopsy diagnosis of anthracosis, with a related disease process of subpleural fibrosis, "fall[s] within the definition of 'pneumoconiosis' as defined by the Act and implementing regulations." *Hapney v. Peabody Coal Co*., --- BLR ---, BRB No. 00-0336 BLA (June 29, 2001)(*en banc*)(Smith, J., and Dolder, J., dissenting in part and concurring in part). However, a biopsy finding of anthracotic pigmentation "shall not be sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. §718.202(a)(2).

Here, the pathologist who signed the surgical pathology report, Dr. Hudgens, described "prominent subpleural lymphatic anthracosis," "mild fibrosis and a moderate degree of black pigment," and "focal emphysematous change" in claimant's lung tissue. Claimant's Exhibit 1. The diagnoses were "[f]ibrosis and anthracosis"[3] and "features consistent with simple coal workers' pneumoconiosis." *Id*. The administrative law judge, without citing the regulatory definition including the term "anthracosis," found that Drs. Buddington and Hudgens "were both unclear . . . as to whether they linked the fibrosis with the anthracosis/black pigment deposition." Decision and Order at 17. The

[3] The diagnosis of "fibrosis and anthracosis" listed at the top of the report was followed by the initials "RSB", which the administrative law judge took to be the initials of Dr. R.S. Buddington, whose name was printed on the report. Claimant's Exhibit 1.

administrative law judge characterized the biopsy finding of focal emphysematous change as "ambiguous," and reasoned that "Dr. Buddington's failure to link the fibrosis and anthracosis, and make a diagnosis of coal workers' pneumoconiosis, [was] strong evidence that he did not come to a conclusion of coal workers' pneumoconiosis on biopsy." *Id*. The administrative law judge concluded that "if Dr. Buddington [had] intended that a diagnosis of coal workers' pneumoconiosis be understood, he would not have simply stated 'fibrosis and anthracosis.'" *Id*.

We are unable to affirm the administrative law judge's finding for several reasons. First, the administrative law judge did not consider that "anthracosis" is a term included within the regulatory definition of pneumoconiosis. *See* 20 C.F.R. §718.201(a); *Fuller, supra*; *Hapney, supra*. Thus, contrary to the administrative law judge's apparent requirement, Section 718.201(a) does not require a physician to also diagnose "coal workers' pneumoconiosis," for his or her diagnosis of "anthracosis" to be considered pneumoconiosis under the Act and regulations. Second, the administrative law judge did not explain his finding that Drs. Hudgens and Buddington did not "link" the fibrosis with the anthracosis, when their report diagnoses fibrosis "and" anthracosis.[4] Claimant's Exhibit 1; *see* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000)(*en banc*). Third, the administrative law judge's analysis of the Hudgens/Buddington pathology report reflects a failure to consider the report as a whole in assessing whether pneumoconiosis as defined under the Act and regulations was diagnosed therein. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91, 1-93 (1988).

Consequently, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2) and remand this case for him to reweigh the biopsy evidence in accord with 20 C.F.R. §§718.201(a)(1), 718.202(a)(2), *Fuller, supra*, and *Hapney, supra*, and determine whether it supports a finding of the existence of pneumoconiosis. The administrative law judge must then weigh together all relevant evidence to determine whether the existence of pneumoconiosis is established. *See Compton, supra*. Contrary to claimant's contention, the administrative law judge on remand need not accord

[4] In making this finding, the administrative law judge was appropriately concerned that the diagnosed condition is not merely anthracotic pigmentation. *See* 20 C.F.R. §718.202(a)(2). But in making this determination, the administrative law judge may be better advised to simply compare the biopsy tissue findings of Drs. Hudgens and Buddington with the contrary findings of employer's pathologists, Drs. Tomashefski and Crouch, Employer's Exhibits 31, 38, and make a credibility determination. *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).

determinative weight to Dr. Robinette's opinion as the treating physician. *See Hicks, supra*; *Akers, supra*; *Berta v. Peabody Coal Co.*, 16 BLR 1-69, 1-70 (1992). However, as the administrative law judge weighed the medical opinions previously, based in part on his findings as to the biopsy evidence, Decision and Order at 19-20, nothing precludes the administrative law judge from weighing the medical opinions differently on remand if he concludes that the biopsy evidence supports a finding of the existence of pneumoconiosis. *See Compton, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge