BRB No. 07-0154 BLA

R.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	
	)	DATE ISSUED: 08/30/2007
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (04-BLA-6422) of Administrative Law Judge Daniel A. Sarno, Jr., 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). Claimant filed this claim for benefits on July 7, 2003. Director's Exhibit 3. The administrative law judge credited claimant with twenty years of coal mine employment pursuant to the parties'

stipulation.[1] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim,[2] the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the medical opinion evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against claimant. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In considering the claim on the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, total disability, and total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that the evidence established the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c).[3] Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, reiterating its contentions. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[2] Claimant's first claim for benefits, filed on December 4, 1993, was denied on August 22, 1994, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

[3] Because employer does not challenge the administrative law judge's finding that total disability was established at 20 C.F.R. §718.204(b)(2), the finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer contends that the administrative law judge erred in mechanically according controlling weight to Dr. Chaney's opinion, based on his status as claimant's treating physician, when weighing the evidence pursuant to Section 718.202(a)(4). The United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The court has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Williams*, 338 F.3d at 513, 22 BLR at 2-647. The court explained that the case law and applicable regulatory scheme clearly provide that administrative law judges must evaluate treating physicians just as they consider other experts. *Id.*

Based on a physical examination, coal dust exposure history, and laboratory studies, Dr. Chaney, in a report dated October 29, 2005, diagnosed both clinical and legal pneumoconiosis "significantly contributed to, or substantially aggravated by, dust exposure in coal mine employment." Claimant's Exhibit 2. Dr. Chaney also indicated that he treated claimant from 1982 to the present.[4]

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[4] The remaining medical opinion evidence of record consists of the opinions of Drs. Rosenberg, Baker, and Broudy. In a report dated December 28, 2005, based on a review of reports by Drs. Chaney, Baker, and Broudy, and Dr. Chaney's treatment records, Dr. Rosenberg concluded that claimant does not have clinical or legal pneumoconiosis, but has obstructive lung disease due to smoking. Employer's Exhibit 3. In a report dated August 1, 2003, based on a physical examination, work and smoking histories, and objective tests, Dr. Baker diagnosed "Coal workers' Pneumoconiosis 1/0," as well as chronic bronchitis, chronic obstructive pulmonary disease (COPD), and hypoxemia due to coal dust exposure and smoking. Director's Exhibit 11. In a report dated October 14, 2005, based on physical examination, coal mine employment history, smoking history, and objective tests, Dr. Broudy diagnosed COPD due to smoking, and reported that there was no evidence of any chronic lung disease arising from claimant's coal mine employment. Employer's Exhibit 1.

The administrative law judge determined that the opinion of Dr. Chaney was entitled to substantial weight because, as claimant's treating physician, he had treated claimant for over twenty years. Decision and Order at 10. The administrative law judge noted that treatment records indicated that Dr. Chaney had seen and treated claimant regularly between April 2002 and June 2005, prescribing medication and performing objective studies to monitor claimant's condition.[5] Decision and Order at 9. The administrative law judge concluded that these factors "equipped Dr. Chaney with superior knowledge of the Claimant's respiratory condition as expressed in his opinion and treatment records." Decision and Order at 10. The administrative law judge further found that Dr. Chaney's opinion was "well reasoned and documented." *Id*. The administrative law judge therefore determined that Dr. Chaney's opinion "will be given greater weight than the others." *Id*. The administrative law judge discredited Dr. Rosenberg's contrary opinion because Dr. Rosenberg did not examine claimant, and because he did not review a positive x-ray reading by Dr. Alexander.[6] Based on this analysis, the administrative law judge found that the new medical opinions established the existence of pneumoconiosis.

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[5] Section 718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

1) Nature of relationship.

2) Duration of relationship.

3) Frequency of treatment.

4) Extent of treatment.

The regulation also requires the administrative law judge to weigh the treating physician's opinion "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[6] The administrative law judge's reference to Dr. Alexander's x-ray reading in this context is puzzling, since the administrative law judge found that the x-ray evidence was in equipoise and did not establish the existence of pneumoconiosis. Decision and Order at 8. No specific basis appears in the administrative law judge's decision for discounting Dr. Broudy's opinion. Decision and Order at 8-10.

We agree with employer's contention that the administrative law judge erred in his application of the treating physician rule at 20 C.F.R. §718.104(d) to Dr. Chaney's opinion. While the administrative law judge properly addressed the factors found at Section 718.104(d)(1)-(4), he did not explain how the factors, or Dr. Chaney's examination of claimant, actually gave Dr. Chaney an understanding of claimant's pulmonary condition that was superior to that gained by Dr. Rosenberg from his review of the medical evidence of record, or by Dr. Broudy from his examination and testing of claimant. *See Williams*, 338 F.3d at 513, 22 BLR at 647. Moreover, the administrative law judge did not assess the validity of the reasoning of Dr. Chaney's opinion in light of its underlying documentation. *See* 20 C.F.R. §718.104(d)(5); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, the administrative law judge did not address the fact that Drs. Rosenberg and Broudy are both Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Chaney is Board-certified in Family Medicine. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647. We must therefore vacate the administrative law judge's finding at Section 718.202(a)(4), and remand the case for him to reconsider the relevant evidence, consistent with Section 718.104(d) and *Williams*.

Further, because we have vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), we also vacate the administrative law judge's finding of total disability due to pneumoconiosis at Section 718.204(c). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, he must reconsider the evidence pursuant to Section 718.204(c).[7]

[7] Although we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established based on new evidence, we need not vacate his determination that a change in an applicable condition of entitlement was established at 20 C.F.R §729.309(d). Specifically, in addressing the merits of the claim, the administrative law judge relied solely on the new evidence to find that claimant established that he is totally disabled. Decision and Order at 12-13. Total disability was an element of entitlement that was previously adjudicated against claimant. Director's Exhibit 1. As noted above, employer does not challenge the total disability finding. *See* n.3, *supra*. Therefore, substantial evidence supports the administrative law judge's conclusion that a change in an applicable condition of entitlement was established based on new medical evidence. *See* 20 C.F.R. §725.309(d).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is affirmed in part and 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