BRB No. 07-0958 BLA

P. J. Claimant-Respondent v. CARPENTERTOWN COAL AND COKE COMPANY and BIRMINGHAM FIRE INSURANCE COMPANY/BROADSPIRE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/25/2008 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Dianna Cannon (Cannon & Match, P.C.), Salt Lake City, Utah, for claimant.

Christopher L. Wildfire (Pietragallo, Bosick & Gordon, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-5465) of Administrative Law Judge Jennifer Gee 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] The administrative law judge credited claimant with ten and three-quarter years of coal mine employment.[2] Decision and Order at 9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that although the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the medical opinion evidence established the existence of legal pneumoconiosis in the form of chronic obstructive pulmonary disease arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2). Weighing all the evidence together, the administrative law judge found that it established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Further, employer conceded total disability pursuant to 20 C.F.R. §718.204(b)(2), and the administrative law judge found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that it established the existence of legal pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief reiterating its contentions, to which claimant has responded. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's 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,

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[1] Claimant filed his claim for benefits on February 18, 2004. Director's Exhibit 2. The district director issued a Proposed Decision and Order awarding benefits on October 25, 2004. Director's Exhibits 8, 33. Employer requested a formal hearing and the case was transferred to the Office of Administrative Law Judges on January 21, 2005. Director's Exhibits 34, 38.

[2] The record indicates that claimant's last coal mine employment was in Pennsylvania. Director's Exhibits 3, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings of ten and three-quarter years of coal mine employment and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

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).

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 failed to consider all of the relevant evidence when she credited Dr. Gagon's opinion to find that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Specifically, employer argues that the administrative law judge did not consider evidence which, if credited, would reflect that claimant's smoking history was more extensive than the administrative law judge found it to be. Employer's contention has merit.

There are four medical opinions of record. Dr. Shockey, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and diagnosed coal workers' pneumoconiosis due to coal dust exposure and chronic bronchitis due to smoking. Director's Exhibit 12 at 4. In his report, Dr. Shockey recorded claimant's smoking history as two packs per day from 1958 to 2001.

Dr. Farney, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed Dr. Shockey's report and claimant's medical treatment records. Dr. Farney diagnosed severe COPD due to "chronic tobacco exposure," and reported that he found no evidence of pneumoconiosis. Employer's Exhibit 1 at 4. Dr. Farney stated that although "COPD can be associated with coal dust exposure," in this case claimant's coal dust exposure history did not account for "the degree of respiratory impairment and symptoms noted." *Id*. In rendering this opinion, Dr. Farney recorded a "40-80 pack year cigarette smoking history." Employer's Exhibit 1 at 2. Dr. Farney determined that "[i]n comparison of his occupational and exposure histories the overwhelming risk factor is tobacco smoke." Employer's Exhibit 1 at 4.

Dr. Gagon, who is Board-certified in Family Medicine and who had been treating claimant for three to four years, diagnosed "coal miner's pneumoconiosis and COPD." Claimant's Exhibit 1. Noting that claimant was exposed to coal dust for nineteen years and "was a 2 PPD smoker from 1958 until 2001," Dr. Gagon opined that claimant's "lung disease is . . . about 75% caused by smoking and 25% caused by coal dust with the coal dust exacerbating his COPD." Claimant's Exhibit 1.

Finally, Dr. Goodman, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and diagnosed claimant with severe COPD due to "heavy tobacco smoking over many years." Employer's Exhibit 3 at 3. In rendering this diagnosis, Dr. Goodman noted that claimant had indicated a smoking history of "2 packs per day x 45 years" during an April 5, 2000 pulmonary function evaluation. Dr. Goodman noted further that, "[c]omments appear elsewhere in the records, in Dr. Gagon's progress notes, suggesting that this history underestimates the claimant's true tobacco smoking habit." Employer's Exhibit 3 at 2.

Before evaluating the credibility of the foregoing opinions, the administrative law judge found it necessary to accurately determine claimant's smoking history. Decision and Order at 13. The administrative law judge considered claimant's hearing testimony and the smoking histories reported in the medical opinions. The administrative law judge found that if "Claimant's testimony is to be believed he smoked a total of 38.95 to 42.94 pack years." Decision and Order at 13. The administrative law judge further found Dr. Shockey's smoking history to be eighty-six pack years, Dr. Farney's smoking history to be forty to eighty pack years, Dr. Gagon's smoking history to be eighty-six pack years, and Dr. Goodman's smoking history to be ninety pack years. *Id.* at 14. The administrative law judge noted that the medical records reflected a "substantially higher" smoking history than that testified to by claimant, and noted further that smoking habits can vary during the course of a lifetime. The administrative law judge determined that claimant's actual smoking history fell in the middle of a range:

> It . . . seems reasonable to assume that patients will naturally be more forthcoming with their treating physicians than those assessing them for benefits. In this case, however, the history taken by Dr. Gagon was consistent with that offered by other physicians in the record. I believe that the true history falls somewhere in the middle. Therefore, using Claimant's testimony as a low end and Dr. Gagon's history as a high end, I find that claimant had a substantial and heavy smoking history of approximately 40 to 86 pack years ending around 2000.

Id.

The administrative law judge then found that Dr. Gagon's opinion was well-reasoned and entitled to great weight. The administrative law judge found that although Dr. Gagon's history of nineteen years of coal mine employment was inflated compared to the administrative law judge's finding of ten and three-quarter years, the discrepancy was moot, because Dr. Gagon believed that claimant had "sufficient exposure to coal mine dust to warrant a diagnosis of pneumoconiosis." Decision and Order at 16. The administrative law judge found this to be consistent with her finding of ten and three-quarter years of coal mine dust exposure. *Id.* The administrative law judge further found

that Dr. Gagon's opinion that 75% of claimant's lung disease was due to smoking and 25% was due to coal mine dust was persuasive because Dr. Gagon did not minimize claimant's smoking history, yet recognized that coal dust exposure exacerbated claimant's COPD.

By contrast, the administrative law judge found that the opinions of Drs. Shockey, Farney, and Goodman were not well-reasoned or well-documented because they did not adequately explain why claimant's COPD was unrelated to coal mine dust exposure.

Employer specifically contends that the administrative law judge erred by failing to consider all of the smoking history evidence that was detailed in Dr. Gagon's treatment records when determining the length of claimant's smoking history. The administrative law judge found that the upper limit of claimant's smoking history was eighty-six pack years, based on Dr. Gagon's August 16, 2005 report noting that claimant smoked two packs per day from 1958 to 2001. However, employer points to notations in Dr. Gagon's treatment records apparently describing a more extensive smoking history. On September 15, 2000, Dr. Gagon recorded that claimant "smokes 2 to 3 packs a day at least." Director's Exhibit 32. In a treatment note dated September 19, 2000, Dr. Gagon noted that claimant was then smoking one to three cigarettes a day, but had been smoking three packs per day previously. *Id.* Additionally, Dr. Gagon's data recorded during his pulmonary function study of December 20, 2002, included a smoking history of three packs per day for forty-five years, and the notation "Pk Yrs: 135." *Id.*

Review of the administrative law judge's decision does not reflect that she considered this evidence, which, if credited, may indicate that the upper limit of claimant's smoking history was considerably higher than was found by the administrative law judge. As the administrative law judge recognized, the extent of claimant's smoking history is relevant to the credibility of the physicians' opinions regarding whether claimant's COPD arose out of his coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Additionally, employer notes, accurately, that the administrative law judge did not consider a December 19, 2002 report contained in Dr. Gagon's treatment records, wherein Dr. Gagon stated that claimant's COPD was not work related, nor did she consider that Dr. Gagon did not diagnose coal workers' pneumoconiosis until after claimant filed for black lung benefits. Claimant's Exhibit 1. Because the administrative law judge did not consider all of the relevant evidence, we are unable to conclude that substantial evidence supports her findings as to claimant's smoking history and that his COPD arose out of coal mine employment.

In light of the foregoing, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge to reconsider the medical opinion evidence. Specifically, on remand, the administrative law judge should consider all of the relevant evidence and determine the extent of

claimant's smoking history, then reassess the medical opinion evidence in light of her determination, if it has changed. *See* 30 U.S.C. §923(b); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge should reconsider the documentation and reasoning of the medical opinions and the weight to be accorded the opinions of Drs. Gagon, Farney, Goodman, and Shockey. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. After the administrative law judge has reconsidered the length of claimant's smoking history, she should reassess the effect of Dr. Gagon's inaccurate coal mine employment history on the credibility of his opinion. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of pneumoconiosis, she should then weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Pursuant to 20 C.F.R. §718.204(c), employer contends that the administrative law judge erred in her analysis of the medical opinions when she found that the evidence established that claimant's total disability is due to pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), we also vacate the

administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). If, on remand, the administrative law judge finds the existence of pneumoconiosis established, she must reconsider the evidence pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Awarding 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge