BRB No. 08-0796 BLA

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| J.T. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| FREEMAN UNITED COAL MINING COMPANY | ) | |
| | ) | |
| | ) | DATE ISSUED: 08/28/2009 |
| 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 the Decision and Order – Awarding Benefits of Administrative Law Judge William S. Colwell, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

John A. Washburn (Gould & Ratner), Chicago, Illinois, 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-05048) of Administrative Law Judge William S. Colwell, with respect to a subsequent claim[1] filed on March 21, 2003, 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 district director initially denied the current claim on January 26, 2004, and again on July

[1] Claimant filed his initial claim for benefits on June 8, 1987, resulting in a denial of benefits on August 11, 1987, for failure to establish any of the elements of entitlement. Director's Exhibit 1. No further action was taken by claimant as to this claim. *Id.*

14, 2004, in response to claimant's modification request because, while the additional evidence submitted on modification established proof of clinical pneumoconiosis, claimant failed to establish that his disabling respiratory condition is due to pneumoconiosis. Claimant requested a hearing, and the case was assigned to Judge Colwell (the administrative law judge).

After crediting claimant with twenty-eight years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant demonstrated a change in conditions pursuant to 20 C.F.R. §725.310 by establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, after a review of all of the evidence in the record, the administrative law judge determined that claimant met his burden of proving that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a), that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. 718.204(b), (c).[2] Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge failed to consider important probative evidence in the form of CT scans, pursuant to 20 C.F.R. §718.107(b). In addition, employer asserts that pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge relied on a medical report by Dr. Cohen that was not well-reasoned and irrationally discounted Dr. Repsher's medical opinion. Claimant responds, urging affirmance of the administrative law judge's award of benefits because it is rational and supported by substantial evidence. In its reply brief, employer specifically identifies alleged errors in Dr. Cohen's medical opinion. The Director, Office of Workers' Compensation Programs, has not filed a response brief 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 supported by substantial evidence, is rational,

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[2] Although the administrative law judge did not consider whether claimant could establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), remand is not required, as the record does not contain any biopsy evidence, there is no evidence of complicated pneumoconiosis and this claim was filed by a living miner after January 1, 1982. Director's Exhibit 3; 20 C.F.R. §§718.202(a)(2), (3), 718.304, 718.305(e).

[3] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but established that he has twenty-eight years of coal mine employment, as they are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We first address employer's argument that the administrative law judge erred in excluding the newly submitted CT scan evidence. During the post-hearing telephone conference, which was held to address the admissibility of certain evidence in light of the Board's decision in *Rose v. Buffalo Mining Co.*, 23 BLR 1-223 (2006), the administrative law judge asked the parties to submit evidence regarding whether the CT scans "are worthy to be considered and why they're under the current medical procedures." January 25, 2008 Conference Transcript at 9-10. In response, employer submitted a statement from Dr. Wheeler, explaining that CT scans make it possible "to produce true cross-sectional images of the human body . . . eliminating overlying shadows of soft tissues, bones and mediastinal structures that can hide small or even relatively large lesions on good quality multiple view chest x-rays." Employer's Exhibit 3. In addition, Dr. Wheeler stated that CT scans can perform "routine 3-5 mm thick scans made adjacent to each other to avoid missing any anatomy" and have "mediastinal settings to detect calcifications which would be missed on routine chest x-rays." *Id*. Claimant submitted a statement from Dr. Cohen, who agreed with Dr. Wheeler, "that CT scanning is a superior technology . . . [that] should and will be used to evaluate persons exposed to mineral dust." Claimant's Exhibit 9. Further, Dr. Cohen stated that "the preferred technique is High Resolution CT scan, or HRCT, the type used in [claimant's] case." Claimant's Exhibit 8.

Submitted for inclusion in the record are readings of CT scans dated June 12, 2001, February 14, 2003, and April 6, 2005. Director's Exhibit 29; Claimant's Exhibit 4; Employer's Exhibits 5, 7. The June 2001 scan was read by Dr. Romayo as negative for anything but "small calcified granuloma [in the] left upper lobe anteriorly." Employer's

[4] The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Exhibit 7. Likewise, Dr. Strange indicated that the February 2003 scan showed calcified granuloma but "no significant interstitial lung disease." Director's Exhibit 29. The April 2005 scan was interpreted by Drs. Wheeler and Cohen. Dr. Wheeler found no pneumoconiosis. Employer's Exhibit 5. In contrast, Dr. Cohen found "[s]cattered small opacities . . . consistent with simple coal [workers'] pneumoconiosis" and "pleural thickening in the right lower lobe." Claimant's Exhibit 4.

Concerning the April 2005 CT scan reading by Dr. Wheeler, the administrative law judge found that employer "did not demonstrate that the CT scan is medically acceptable and relevant to establishing or refuting [c]laimant's entitlement to benefits as required by §718.107(b)." Decision and Order at 6 n.4. The administrative law judge excluded all of the other CT scan interpretations in the record on the same grounds. *Id*.

Employer argues that the statements provided by Drs. Wheeler and Cohen satisfied the requirement set forth in 20 C.F.R. §718.107(b) to demonstrate that the CT scans are medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits. Employer also contends that the administrative law judge should not have "substitute[d] his opinion on the medical significance of CT scans for those of the experts and exclude[d] probative evidence." Employer's Brief at 12. Employer further maintains that "the preponderance of the evidence . . . is that this [c]laimant does not suffer from coal [workers'] pneumoconiosis." Employer's Brief at 13. In addition, employer states that "[t]he [administrative law judge's] failure to even consider such evidence mars his decision as it is arguable that the CT scan evidence was the best evidence available as to whether or not [claimant] suffers from [coal workers' pneumoconiosis]." *Id*. Claimant "agrees that the [CT scan readings] from Dr. Wheeler and Dr. Cohen should not have been excluded" but argues that "any resulting error is harmless as to the [e]mployer." Claimant's Brief at 5. Claimant states that "[t]he CT scan is a diagnostic tool used to establish the presence or absence of clinical pneumoconiosis" and, in this case, the administrative law judge found that the evidence established "legal pneumoconiosis, or chronic obstructive pulmonary disease arising out of coal mine employment, not classic or clinical pneumoconiosis." Claimant's Brief at 5-6.

As an initial matter, we reject claimant's contention that the administrative law judge's exclusion of the newly submitted CT scan evidence is harmless error. When summarizing his findings regarding the existence of pneumoconiosis, the administrative law judge noted that while "the Seventh Circuit does not currently require that chest x-ray and physician evidence be weighed together to determine the existence of pneumoconiosis[,] . . . I would find that [c]laimant has proved the existence of pneumoconiosis by the preponderance of the evidence overall." Decision and Order at 14. Because it is not clear from the administrative law judge's Decision and Order whether he found legal or clinical pneumoconiosis or both, inclusion of the CT scan

evidence in his consideration of the evidence under 20 C.F.R. §718.202(a) may have affected the administrative law judge's determination as to the existence of pneumoconiosis. Accordingly, we will address employer's allegation that the administrative law judge erred in excluding the CT scan evidence.

The regulations state that when a party submits "other medical evidence," like a CT scan, "[t]he party submitting the test or procedure . . . bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). In the present case, without providing any rationale, the administrative law judge found that this burden had not been met as to any of the CT scans. In rendering this finding, the administrative law judge did not address the statements from Drs. Wheeler and Cohen explaining how CT scans meet this burden, which claimant and employer submitted in response to a specific request from the administrative law judge. *See* Claimant's Exhibits 8, 9; Employer's Exhibit 13.

Because the administrative law judge did not provide a rationale for excluding the CT scan evidence and did not explicitly address the evidence relevant to 20 C.F.R. §718.107, we must vacate the administrative law judge's exclusion of the CT scan evidence and remand the case for further consideration. In addition, as previously noted, it is possible that the CT scan evidence will affect the administrative law judge's weighing of the evidence relevant to the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Thus, we must also vacate the administrative law judge's finding, based on his consideration of the newly submitted medical opinions and the medical opinion evidence as a whole, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b).[5]

On remand, the administrative law judge is instructed to reconsider the admissibility of the CT scan evidence pursuant to 20 C.F.R. §718.107. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring)(*aff'd on recon.*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall,

[5] We need not vacate the administrative law judge's determination that claimant demonstrated a change in condition pursuant to 20 C.F.R. §725.310, however, as the administrative law judge also found that the newly submitted evidence is sufficient to establish that claimant is totally disabled from a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 18. This finding has not been challenged on appeal and, therefore, is affirmed. *Skrack*, 6 BLR at 1-711. We also, affirm, therefore, the administrative law judge's determination that claimant established a change in condition under 20 C.F.R. §725.310. 20 C.F.R. §725.310(a); *see Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

JJ., concurring and dissenting), *aff'd* 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). In doing so, the administrative law judge should initially consider whether the party proffering the CT scan evidence has established its medical acceptability under 20 C.F.R. §718.107 and explain the basis for any determination. S*ee Webber*, 23 BLR at 1-134-135; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). If the administrative law judge determines that the CT scan evidence is medically acceptable, the administrative law judge must then resolve the conflict in the CT scan evidence and determine whether it supports a finding of clinical pneumoconiosis. The administrative law judge must then reconsider all of the evidence of record relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), taking care to distinguish between clinical and legal pneumoconiosis when rendering his findings. Should the administrative law judge determine that claimant has established the existence of pneumoconiosis, he must also reconsider whether claimant's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203.

Next, we address employer's arguments regarding the administrative law judge's weighing of the medical opinions of Drs. Cohen and Repsher as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge initially afforded less weight to the opinions of Drs. Pineda and Kress because Dr. Pineda provided contradictory conclusions in his two reports, while Dr. Kress failed to identify the evidence upon which he relied. Decision and Order at 7-8. As a result, the administrative law judge focused on the newly submitted opinions of Drs. Houser, Cohen and Repsher.

When considering Dr. Repsher's determination that claimant does not have clinical or legal pneumoconiosis, the administrative law judge "note[d] deficiencies in Dr. Repsher's rationale" listing: (1) Dr. Repsher's rejection of positive x-ray evidence based on his "unfounded prejudice" in not considering Drs. Cappiello and Ahmed to be reliable B-readers of chest x-ray evidence; (2) Dr. Repsher's reliance on claimant's nonqualifying blood gas study results when these results would not rule out the existence of some degree of impairment when considered with the other medical evidence; and (3) Dr. Repsher's belief "that a diagnosis of [COPD] must be associated with a smoking history," which the administrative law judge determined was inconsistent with the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). *Id*. at 12-13. Further, the administrative law judge found that Dr. Repsher, unlike Dr. Cohen, failed to diagnose a diffusion impairment or discuss the impact the existence of such an impairment would have on his diagnosis of asthma. While the administrative law judge recognized that "both Drs. Cohen and Repsher are [B]oard[-]certified pulmonary specialists with impressive curriculum vitaes, Dr. Cohen's curriculum vitae demonstrates his extensive experience specifically relating to coal workers' pneumoconiosis." *Id*. In addition, the administrative law judge noted that:

> Dr. Cohen set forth his rationale for relating [c]laimant's [COPD] to his coal mine dust exposure meeting the criteria for a diagnosis of legal pneumoconiosis. I find Dr. Cohen's opinion reasoned and documented; I assign it greater weight. I note that Dr. Houser also causally related [c]laimant's [COPD] to his coal mine dust exposure to support Dr. Cohen's diagnosis of legal pneumoconiosis. I find that the preponderance of the physician opinion evidence establishes the existence of pneumoconiosis at [20 C.F.R.] §718.202(a)(4).

Decision and Order at 13-14.

Employer contends that the administrative law judge erred by finding that Dr. Cohen's opinion was entitled to more weight than Dr. Repsher's opinion under 20 C.F.R. §718.202(a)(4). Employer asserts that Dr. Cohen's opinion was not well-reasoned or well-documented. In support of this contention, employer states that Dr. Cohen "does not explain how it would be possible for a miner to develop significant COPD approximately [fifteen] years after cessation of exposure to coal dust" in light of the Secretary of Labor's concession "that most common forms of pneumoconiosis are not latent and that moreover latent and progressive pneumoconiosis is rare, occurring in a small percentage of cases by all accounts." Employer's Brief at 14, *citing Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). In addition, employer asserts that Dr. Cohen's conclusion that claimant cannot have asthma due to his low diffusion capacity, based on past pulmonary function tests, is contradicted by a more recent pulmonary function test,[6] which should hold more weight, showing a normal diffusion capacity. Employer further points out inconsistencies in Dr. Cohen's estimation of the length of claimant's coal mine employment because at one point, Dr. Cohen states that claimant worked for twenty-eight years as a miner, and in another section, he identifies the length of claimant's coal mine employment as thirty-four years.[7]

Employer also argues that the administrative law judge "unfairly discounted" Dr. Repsher's opinion despite the fact that his opinion is more consistent with the medical evidence showing "significant reversibility of disease upon the use of a bronchodilator,

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[6] The most recent pulmonary function study results in the record, dated April 6, 2005, show that claimant's lung/alveolar volume (DL/VA) is 82% of predicted. In Dr. Cohen's report summarizing the medical evidence, he notes that this result is within normal limits. Claimant's Exhibit 4.

[7] In its brief, employer inadvertently refers to Dr. Cohen's initial report as Claimant's Exhibit 5, when it is labeled as Claimant's Exhibit 4.

the hallmark of asthma" and he has more experience, when compared to Dr. Cohen, in dealing with asthma. Employer's Brief at 15. Further, employer asserts that Dr. Repsher's discounting of the x-ray readings of Drs. Cappiello and Ahmed was acceptable because he should be able to rely upon "the readings of experts he believes have superior credentials." *Id*.

Claimant responds by stating that "[a]t best, the [e]mployer's argument is an improper request that the Board reweigh the evidence." Claimant's Brief at 6. Claimant argues that it is the role of the administrative law judge to weigh conflicting medical evidence and render credibility determinations, and that the administrative law judge properly performed his duties in this case. Further, claimant maintains that "Dr. Cohen was not required to explain the development of pneumoconiosis after cessation of exposure to coal dust" because "the disease is recognized as progressive and latent" and his opinion is not that claimant's disease suddenly developed, but rather that it is now disabling. *Id*. at 8, n.3.

In its reply, employer references pulmonary function test results and argues that these results are more consistent with a diagnosis of asthma. In addition, employer again asserts that, in light of Dr. Cohen's failure to explain how coal workers' pneumoconiosis developed so many years after claimant's coal dust exposure ended, his opinion was not well-reasoned.

We reject employer's specific allegations of error concerning the administrative law judge's treatment of the opinions of Drs. Cohen and Repsher pursuant to 20 C.F.R. §718.202(a)(4). It is the administrative law judge's job to weigh the evidence, draw inferences, and determine credibility. *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). In this case, the administrative law judge rationally gave greater weight to Dr. Cohen's opinion because of his "extensive experience relating to coal workers' pneumoconiosis" and because he clearly set forth "his rationale for relating [c]laimant's chronic obstructive pulmonary disease to his coal mine dust exposure." Decision and Order at 13; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). In addition, employer's contention, that Dr. Cohen's opinion should be given less weight because he fails to explain how claimant could develop COPD fifteen years after exposure to coal dust, is contrary to the definition of pneumoconiosis in 20 C.F.R. §718.201(2)(c), recognizing the disease as latent and progressive. *See Workman v. Eastern Assoc. Coal Corp*., 23 BLR 1-22 (2004)(*en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*). Further, the administrative law judge permissibly discounted Dr. Repsher's opinion based on deficiencies in his rationale, including his comment that suggested "that a diagnosis of [COPD] must be associated with a smoking history" and his analysis concerning claimant's chest x-rays and blood gas study results. Decision and Order at 13; *see Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155. We affirm, therefore, the administrative law

judge's discrediting of Dr. Repsher's opinion at 20 C.F.R. §718.202(a)(4) and his finding that Dr. Cohen provided a well-reasoned diagnosis of pneumoconiosis.

However, because Drs. Cohen and Repsher relied upon the CT scan evidence in rendering their opinions on the existence of pneumoconiosis, if the administrative law judge admits the CT scan evidence on remand, he must also re-evaluate the opinions of Drs. Cohen and Repsher at 20 C.F.R. §718.202(a)(4), in light of his findings with respect to the CT scan evidence. When making his findings regarding these medical opinions, the administrative law judge must distinguish between clinical and legal pneumoconiosis.

Further, in light of the fact that the administrative law judge relied upon findings that we have vacated to determine that claimant established total disability causation at 20 C.F.R. §718.204(c) on the merits, we must also vacate these findings. Should the administrative law judge determine that claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) on the merits, he must reconsider whether claimant has established total disability causation at 20 C.F.R. §718.204(c).

In summary, we vacate the administrative law judge's exclusion of the CT scan evidence and remand the case to the administrative law judge for reconsideration of whether the parties have satisfied the requirements of 20 C.F.R. §718.107. We also vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

On remand, the administrative law judge should first address the issue of the admissibility of the CT scan evidence. If he determines that this evidence is admissible, the administrative law judge must then resolve the conflict in the CT scan readings. The administrative law judge must then reconsider his weighing of the medical opinions under 20 C.F.R. §718.202(a)(4), in light of his findings regarding the CT scan evidence, and must make a specific determination as to whether claimant has established the existence of clinical and/or legal pneumoconiosis arising out of coal mine employment. Should the administrative law judge find the existence of pneumoconiosis arising out of coal mine employment established, he must determine whether claimant has proven that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c).

Accordingly, the Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further 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