BRB No. 10-0643 BLA

DONALD EDWARD OYLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/18/2011
	)	
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05698) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).[1] The administrative law judge initially considered whether the

[1] Claimant's prior claim, filed on June 27, 1973, was denied by the Social Security Administration and the Department of Labor, as claimant did not establish any of the

recent amendments to the Act were applicable to claimant's subsequent claim and determined that, because it was filed before January 1, 2005, the amendments did not apply. The administrative law judge then credited claimant with twenty-nine years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.107. The administrative law judge further found that he was not required to address the issue of whether claimant otherwise demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), as the evidence of record, when considered as a whole, was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in discounting the newly submitted medical opinions in which Drs. Cohen and Istanbouly diagnosed legal pneumoconiosis pursuant to Section 718.202(a)(4).[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response in claimant's appeal, unless specifically requested to do so.[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, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

---

requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim on June 18, 2002. Director's Exhibit 5.

[2] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 (a)(1)-(3) and that the recent amendments to the Act are not applicable, based on the filing date of the subsequent claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 6.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement, he is required to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Cohen and Istanbouly.[5] Dr. Cohen examined claimant on August 16, 2005, and prepared a report dated September 24, 2005. Director's Exhibit 38. Dr. Cohen determined that claimant has coal workers' pneumoconiosis, chronic bronchitis, and suffers from an obstructive and restrictive impairment with a severely impaired FEV1, moderate diffusion impairment and mild hypoxemia. *Id*. Dr. Cohen attributed these conditions to a combination of smoking and coal dust exposure. *Id*. With respect to the x-ray taken on August 16, 2005, Dr. Cohen noted in his narrative report that, under the ILO classification system, the film was borderline negative for pneumoconiosis, with q/t opacities at a profusion of 0/1. *Id*. Dr. Cohen stated, "this does not change my opinion that [claimant] has historical and physiological evidence of coal workers' pneumoconiosis related to coal dust exposure." *Id.* In his deposition testimony, Dr. Cohen indicated that, although had he attached the correct ILO form, he had inadvertently transcribed the wrong x-ray reading in his narrative report and that the x-ray obtained in conjunction with his examination of claimant was actually positive for pneumoconiosis, with q/p opacities in a profusion of 1/0. Claimant's Exhibit 43 at 8, 18.

---

[5] The record also contains the medical opinions of Drs. Harris and Weiss. Dr. Harris examined claimant on March 10, 2003, and diagnosed a moderate impairment related to chronic bronchitis and chronic obstructive pulmonary disease. Director's Exhibit 12. Dr. Harris indicated that the cause of claimant's impairment was primarily his coal mine employment. *Id*. Dr. Weiss, who is claimant's treating cardiologist, noted that claimant has a history of black lung disease. Claimant's Exhibit 2 at 11. Because claimant has not raised any allegation of error regarding the administrative law judge's findings that the opinions of Drs. Harris and Weiss are insufficient to establish the existence of pneumoconiosis, we affirm his findings, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4, 6.

Dr. Istanbouly examined claimant on March 19, 2008. Claimant's Exhibit 2. Based on an x-ray, pulmonary function study, blood gas study, and a thirty-year history of underground mining, Dr. Istanbouly diagnosed coal workers' pneumoconiosis, a moderate obstructive defect, a mild restrictive defect and mild hypoxemia and identified coal dust exposure as a contributing cause of claimant's impairments. *Id*. In a letter dated February 2, 2009, Dr. Istanbouly agreed with Dr. Cohen's conclusion, that claimant has simple pneumoconiosis, and stated that claimant "cannot go back to do the same job that he did in his last year of employment in the coal mines" as a laborer and roof bolter. *Id*. Dr. Istanbouly reiterated his opinion in a subsequent deposition but, in response to a question on cross-examination, also indicated that claimant has complicated pneumoconiosis. Claimant's Exhibit 3 at 60-61, 142. In addition, Dr. Istanbouly stated that, even if the x-ray evidence is negative for pneumoconiosis, a restrictive defect could be caused by coal dust inhalation, as there is no correlation between the degree of pneumoconiosis seen on x-ray and a defect revealed on a pulmonary function test. *Id.* at 108-09, 113.

With respect to Dr. Cohen's opinion, the administrative law judge noted, under Section 718.202(a)(1), that the x-ray reading described in Dr. Cohen's report did not match the reading of the x-ray that appeared on the ILO form attached to the report. Decision and Order at 4. The administrative law judge indicated that, although Dr. Cohen "attempted to brush off the discrepancy . . . as a typo":

> [A] comparison of the two readings demonstrates that this is not the case, for the two readings have other significant differences aside from whether the x-ray is 0/1 or 1/0. In the narrative report, Dr. Cohen notes the presence of q/t opacities, whereas the form lists q/p opacities. Further, in the narrative report he notes findings of pleural thickening, and states the "Symbol CO was checked." But the x-ray interpretation form states there are no pleural abnormalities, and CO is not checked. In short, these discrepancies cannot be reconciled.

Id. (internal citations omitted). When considering Dr. Cohen's opinion at Section 718.202(a)(4), the administrative law judge stated:

> I find that Dr. Cohen's opinion is not credible. His mix-up regarding the x-ray evidence – obviously a key element in any doctor's report of a black lung examination – is, by itself, sufficient to make a trier of fact wary of Dr. Cohen's medical findings and conclusions. But it is his disingenuous statements explaining this discrepancy that cause me to conclude that his opinion cannot be relied on.

Id. at 5.

The administrative law judge discredited Dr. Istanbouly's diagnosis of legal pneumoconiosis because he overstated the length of claimant's underground mining and did not provide a valid rationale for his conclusion that claimant is incapable of performing his usual coal mine job. Decision and Order at 5. The administrative law judge further determined that the credibility of Dr. Istanbouly's opinion was diminished by his erroneous diagnosis of complicated pneumoconiosis. *Id*. at 5-6.

Based upon his findings concerning the medical opinions of Drs. Cohen and Istanbouly, the administrative law judge concluded that there was no reason to discuss the opinions in which Drs. Repsher and Tuteur ruled out the presence of pneumoconiosis in any form. The administrative law judge found, therefore, that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 6.

Claimant argues that the administrative law judge erred in finding that the credibility of Dr. Cohen's diagnosis of legal pneumoconiosis was entirely diminished by his "disingenuous" explanation of the confusion regarding the reading of claimant's August 16, 2005 x-ray. Claimant's Brief at 9, *quoting* Decision and Order at 5. Claimant's contention has merit. On direct examination at his deposition, Dr. Cohen engaged in the following exchanges with counsel:

> Q. The x-ray that you read, was that borderline negative or borderline positive?
>
> A. We performed an x-ray on [claimant] on August 16, which was quality one, showed very few – some parenchymal opacities. And on my B reading form here, I note it was 1/0, which is positive for pneumoconiosis. Although, I think in my report, when I was reviewing it, I must have had a typo because in my report, I haven't correctly transcribed the correct *report*.
>
> ***
>
> Q. . . . On the B reader form, you reference [the ILO classification] as Q/P and in the narrative report, you reference it Q/T.
>
> A. *The narrative report is entirely incorrect.* It also mentions a pacemaker and other things. On the computer, *I pasted the wrong report by mistake. That one is completely incorrect.* The one on the official NIOSH CD reading form is the correct reading.

Director's Exhibit 43 at 7-8, 18 (emphasis added). In determining that Dr. Cohen attributed the discrepancy between the two x-ray readings to a "typo," and that this explanation was "disingenuous," the administrative law judge did not address the testimony in which Dr. Cohen stated that he inadvertently pasted the interpretation of an entirely different x-ray into his narrative report and that the ILO form attached to the

report contained the correct reading. Decision and Order at 4, 5. In addition, claimant is correct in maintaining that the administrative law judge did not consider Dr. Cohen's diagnosis of a combined obstructive and restrictive impairment attributable, in part, to coal dust exposure or his statement that, even if a miner's x-ray is negative for pneumoconiosis, obstructive lung disease related to coal dust can be present and can be associated with significant clinical impairment.

Because the administrative law judge did not address the entirety of Dr. Cohen's opinion, we must vacate his determination that Dr. Cohen's diagnosis of legal pneumoconiosis was entitled to no weight at Section 718.202(a)(4) and remand this case to the administrative law judge for reconsideration of Dr. Cohen's opinion. *See Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); 20 C.F.R. §§718.201(b), 718.202(b). Based on a complete review of Dr. Cohen's report, the administrative law judge must reassess whether Dr. Cohen's diagnosis of pneumoconiosis is entitled to probative weight and set forth his findings in detail, including the underlying rationale, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With respect to the administrative law judge's weighing of Dr. Istanbouly's opinion, claimant asserts that the administrative law judge erred in discrediting Dr. Istanbouly's diagnosis of legal pneumoconiosis, based on his alleged overstatement of claimant's underground coal mine employment history. Claimant contends that his surface and underground work histories both resulted in a substantial amount of exposure to coal mine dust. Claimant further argues that the administrative law judge erred in discrediting Dr. Istanbouly's opinion because he diagnosed complicated pneumoconiosis. Claimant's allegations of error have merit.

When considering the evidence relevant to the length of claimant's coal mine employment, the administrative law judge credited claimant's hearing testimony, that he worked twenty nine years between 1970 and 1999, with at least ten years spent underground as a laborer, and the remainder working on the surface. Decision and Order at 2. The administrative law judge also indicated that he accepted claimant's testimony that his "work, whether underground or on the surface, was very dusty."[6] *Id*. at 2, *citing* Hearing Transcript at 19-23, 25. Because this testimony, if fully credited, tends to establish that claimant's job on the surface involved dust exposure equal to what he experienced underground, the administrative law judge should have considered it when

[6] Claimant stated that he was always exposed to dust, that he never wore a mask, that he inhaled a lot of dust working underground and that his surface job was "very dusty too," because he was located at the point where the coal exited the mine and fell onto a stacker belt. Hearing Transcript at 19-21, 25.

assessing whether Dr. Istanbouly's mistaken impression that claimant worked underground for the entire length of his coal mine employment detracted from the probative value of his diagnosis of legal pneumoconiosis.[7] *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

Additionally, we agree with claimant that the administrative law judge erred in finding that the probative value of Dr. Istanbouly's diagnosis of legal pneumoconiosis was diminished by the conflict between his statement that claimant could no longer do his last coal mine job, and his statement that claimant's exertional dyspnea has been stable since he retired, due to the mine's closure. The administrative law judge omitted from consideration, however, the fact that Dr. Istanbouly indicated, in his February 2, 2009 report that it was claimant who "mention[ed] that his exertional dyspnea has been stable since he retired in 1999." Claimant's Exhibit 1. The administrative law judge also did not address Dr. Istanbouly's testimony, at his subsequent deposition, that claimant's subjective observation does not necessarily establish that his lung disease is not getting worse. Claimant's Exhibit 3 at 121.

Finally, we cannot discern whether the administrative law judge's discrediting of Dr. Istanbouly's opinion because of his diagnosis of "complicated pneumoconiosis" is rational and supported by substantial evidence. In his deposition, Dr. Istanbouly provided the following testimony:

> Q. Would you agree that [claimant] doesn't have complicated coal workers' pneumoconiosis?
>
> A. No, I disagree.
>
> Q. You believe he has complicated coal workers' pneumoconiosis?
>
> A. Yes.
>
> Q. And what is the basis [of the diagnosis] of complicated pneumoconiosis made on?
>
> A. Based on the abnormality on his PFT. Now, I think what you mean here is the intensity?

[7] Dr. Istanbouly also maintained that, if he assumed a history of ten years of underground coal mine employment and nineteen years of surface coal mine employment involving similar dust exposure, he would still attribute claimant's pulmonary impairment, in part, to coal dust exposure. Claimant's Exhibit 3 at 140-41.

Q. No, you – I'm referring to a specific disease process that deals with large opacities in the lungs.

A. To me, based on his symptoms, based on the abnormality on the chest x-ray and PFT, it is complicated. . . .

Q. Okay, but was there a chest x-ray that was a certain size of large opacities in his – his lung fields?

A. I don't have his x-ray right now, but based on my report, no . . . .

Q. Okay, but you – is it your opinion that he still has complicated pneumoconiosis?

A. Yes.

***

Q. Okay. Doctor, do you have any reason to believe medically speaking as to whether [claimant] has progressive massive fibrosis?

A. I don't think so. So far, there's no evidence it's progressive massive . . . .

Q. Okay. Now Doctor, you indicated earlier that you – you weren't willing to exclude complicated pneumoconiosis, would you tell the administrative law judge what is the difference between complicated coal workers' pneumoconiosis and progressive massive fibrosis?

A. Well, again, I saw this patient only for one time, I didn't watch his condition over the next six months, one year.

Q. I'm not asking about him in particular.

A. So a complicated one has to be progressive massive so based on a single evaluation, I just reviewed his symptoms since retirement, it seems his symptoms [have] been getting worse . . . . So based on that I felt it could be complicated case.

Q. You didn't want to exclude it?

A. No.

Q. Are you making that diagnosis now of complicated coal workers' pneumoconiosis?

A. It's based on my evaluation from last year, I haven't seen him since then so I don't know how he is doing now.

Claimant's Exhibit 3 at 60-62, 143-44. Based upon Dr. Istanbouly's testimony, it does not appear that he used the term "complicated pneumoconiosis" to refer to the condition described in 20 C.F.R. §718.304,[8] as Dr. Istanbouly acknowledged that his x-ray reading did not meet the criteria for a diagnosis of complicated pneumoconiosis or progressive massive fibrosis. Claimant's Exhibit 3 at 61. Nevertheless, the administrative law judge stated:

> Complicated pneumoconiosis is a diagnosis based on x-ray or pathology evidence of large opacities or massive lesions, or other evidence equating to such findings. *See* [20 C.F.R.] §718.304. It cannot be based on pulmonary function tests or other evidence of a pulmonary impairment. By basing a diagnosis of complicated pneumoconiosis on evidence which does not equate to large opacities on x-ray or massive lesions by pathological evidence, Dr. Istanbouly has shown either a complete lack of expertise regarding the diagnosis of pneumoconiosis or extreme bias toward the claimant. In either case, his opinion has no probative value.

---

[8] In pertinent part, 20 C.F.R. §718.304 provides:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray (*see* §718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . . .
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section[.]

20 C.F.R. §718.304.

Decision and Order at 6. It is also unclear whether the administrative law judge's finding constitutes a determination that Dr. Istanbouly's diagnosis of "complicated pneumoconiosis," rather than his opinion as a whole, has no probative value.

Because the administrative law judge did not accurately characterize, or fully address, Dr. Istanbouly's opinion and rendered ambiguous findings, we must vacate his decision to discredit Dr. Istanbouly's opinion under Section 718.202(a)(4). *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005). On remand, the administrative law judge must reconsider Dr. Istanbouly's opinion in its entirety and determine whether he has set forth a reasoned and documented diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4). *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

If the administrative law judge concludes, on remand, that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), claimant will have established a change in an applicable condition of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3. The administrative law judge must then consider whether the evidence of record, as a whole, is sufficient to establish claimant's entitlement to benefits and render specific findings, as necessary, pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge