BRB No. 12-0628 BLA

JOSEPH E. ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENTERPRISE COAL COMPANY	)	
	)	
and	)	
	)	
AIG CASUALTY COMPANY	)	DATE ISSUED: 08/23/2013
	)	
Employer/Carrier-Respondents	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

H. Brett Stonecipher (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05188) of Administrative Law Judge Lystra A. Harris (the administrative law judge) rendered on a claim filed on September 15, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law

judge found that claimant established eleven years of coal mine employment and a total respiratory disability pursuant to 20 C.F.R. §718.204(b), but that he failed to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that he failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1) and that he failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[1] Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to claimant's appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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[1] Claimant does not challenge the administrative law judge's finding that the medical opinion evidence failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). That finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge's eleven year length of coal mine employment finding, his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3) and his finding that a total respiratory disability was established pursuant to 20 C.F.R. §718.204(b)(2) are also affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

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

20 C.F.R. §718.202(a)(1)
Clinical Pneumoconiosis

Claimant contends that the administrative law judge erred in finding that the x-ray evidence failed to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). The relevant x-ray evidence consists of seven readings of three x-rays. Dr. Rasmussen, a B reader, read the March 9, 2010 x-ray as positive for pneumoconiosis. Director's Exhibit 12. The x-ray was reread as negative by Dr. Wiot, a B reader and Board-certified radiologist, and as positive by Dr. Alexander, a B reader and Board-certified radiologist. Director's Exhibit 26; Claimant's Exhibit 1. The August 17, 2010 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative by Dr. Shipley, a B reader and Board-certified radiologist. Likewise, the February 21, 2011 x-ray was read as positive for pneumoconiosis by Dr. Alexander, and as negative by Dr. Shipley.

In considering the x-ray evidence, the administrative law judge first stated:

> For the purpose of analyzing the x-ray evidence, I give more weight to the opinions of physicians who are Board-certified radiologists and B readers than I do to the opinions of physicians who are not Board-certified radiologists, but are B readers. I give more weight to the opinions of the former because they have wide professional training in all aspects of x-ray interpretation. Unless the record indicates a specific reason to assign greater or lesser weight to an interpretation, I give equal weight to interpretations made by physicians who possess the same professional credentials (for example, all Board-certified radiologists).

Decision and Order at 5-6.

Consequently, in evaluating the x-ray evidence, the administrative law judge found:

> The first x-ray, administered in March 2010, was interpreted by two dually[-]qualified physicians (Drs. Alexander and Wiot) and by one B reader (Dr. Rasmussen). Based on credentials alone, I give less weight to the interpretation of Dr. Rasmussen. Both Drs. Rasmussen and Alexander found evidence of clinical pneumoconiosis, while Dr. Wiot found none. With no reason to value the opinion of Dr. Wiot over that of Dr. Alexander, I find the evidence connected to the March 2010 x-ray basically in equipoise.

> The x-ray administered on August 2010 was interpreted as positive for pneumoconiosis by Dr. Alexander, but negative by Dr. Shipley, who I note is also dually[-]certified. With no reason to give more weight to one interpretation, I find the evidence regarding this x-ray also to be in equipoise.
>
> The final x-ray, administered in February 2011, was also interpreted positively by Dr. Alexander and negatively by Dr. Shipley. Again, I find the x-ray evidence in equipoise.
>
> Therefore, as it is the [c]laimant's burden to establish this element by a preponderance of the evidence, and based on the interpretations of these three x-rays, I find the [c]laimant has not established that he has pneumoconiosis under [Section 718.202(a)].

Decision and Order at 5-6.

Claimant contends, however, that the administrative law judge erred in failing to accord any weight to the positive x-ray reading of Dr. Rasmussen because he is only a B reader. We disagree.

Contrary to claimant's contention, the administrative law judge properly evaluated the x-ray evidence. She permissibly accorded greater weight to the x-ray readings of readers who are both B readers and Board-certified radiologists, than to the x-ray reading of Dr. Rasmussen, who is only a B reader. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 131 (1984). Further, as the x-ray readings of the dually-qualified readers were evenly divided between positive and negative readings for pneumoconiosis, she rationally found that the x-ray evidence was in equipoise on the issue of clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, the administrative law judge properly found that claimant failed to establish the existence of clinical pneumoconiosis by x-ray evidence pursuant to Section 718.202(a)(1) and we affirm her finding thereunder.

20 C.F.R. §718.202(a)(4)
Legal Pneumoconiosis

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The medical opinion evidence consists of the opinions of Drs. Alam and Rasmussen, who attributed claimant's chronic obstructive pulmonary

disease (COPD) to both smoking and coal mine employment, and the opinions of Drs. Broudy and Westerfield, who attributed it to smoking alone.

In evaluating the medical opinion evidence, the administrative law judge accorded less weight to the opinions of Drs. Alam and Rasmussen. The administrative law judge accorded less weight to the opinion of Dr. Alam because, although diagnosing the existence of emphysema and chronic bronchitis, he "never stated that coal dust exposure was an etiology (actual or potential) of these diseases." Decision and Order at 11. The administrative law judge also accorded less weight to Dr. Alam's opinion because the doctor mischaracterized claimant's eleven-year above-ground coal mine employment as "underground," did not identify which of claimant's medical records he reviewed in preparing his report, and did not state whether he knew that claimant had a 40-60 pack year smoking history when he characterized claimant's smoking history as "long." Decision and Order at 11. Regarding the opinion of Dr. Rasmussen, the administrative law judge accorded it less weight because Dr. Rasmussen, unlike Drs. Broudy and Westerfield,[3] "did not review any other medical evidence beyond [that obtained in] his [own] pulmonary evaluation of … [c]laimant." Decision and Order at 12. In light of the foregoing, and because the only other physicians, Drs. Broudy and Westerfield, attributed claimant's COPD to smoking, the administrative law judge concluded that claimant failed to establish the existence of legal pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).

Claimant contends, however, that the administrative law judge erred in his weighing of the medical opinion evidence. First, claimant contends that the administrative law judge erred in according less weight to Dr. Alam's opinion on the issue of legal pneumoconiosis because the doctor never attributed claimant's emphysema or chronic bronchitis to his coal mine employment. Claimant contends that this is error because Dr. Alam did, in fact, state that coal dust exposure *substantially aggravated* the miner's underlying emphysema and caused secondary damage to the lungs. Thus, claimant contends that Dr. Alam's opinion, regarding the cause of claimant's emphysema, is sufficient to meet the definition of legal pneumoconiosis.[4] Further,

[3] The administrative law judge noted that both Dr. Broudy and Dr. Westerfield had the opportunity to review evidence other than that generated by their own evaluations of claimant and also had the opportunity to review Dr. Rasmussen's report. Decision and Order at 12.

[4] Legal pneumoconiosis is defined to include:

> any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or

claimant contends that the administrative law judge erred in rejecting Dr. Alam's opinion because the doctor mistakenly described claimant's coal mine employment as underground, as opposed to above-ground. Claimant contends that the doctor's reference to claimant's coal mine employment as being underground was clearly "a typographical error." Claimant's Brief at 8. Additionally, claimant contends that the administrative law judge erred in rejecting Dr. Alam's opinion because the doctor's finding that claimant had a "long" history of smoking does not contradict the findings of other doctors that he had a 40-60 year history of smoking. Claimant's Brief at 9. Claimant also contends that the administrative law judge erred in rejecting Dr. Alam's opinion because the doctor did not "specifically [identify] which medical records he reviewed while preparing his report," Decision and Order at 11, when, in fact, the medical data on which he relied was clearly identified.[5] Finally, claimant contends that the administrative law judge should have accorded the opinion of Dr. Alam "significant weight" because he is claimant's treating physician. Claimant's Brief at 19-20.

At the outset, we note, as claimant contends, that Dr. Alam stated that coal dust exposure was a *substantially aggravating* factor in claimant's pulmonary condition. This statement is consistent with the definition of legal pneumoconiosis, which includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related

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> obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2). Further:

> For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(2), (b)(emphasis added).

[5] Claimant notes that the FEV_1 value reported by Dr. Alam "was in line with the decrease reported by the other doctors." Claimant's Brief at 19. Therefore, claimant contends that there was no reason to discredit his opinion for lack of documentation. Further, claimant contends that Dr. Alam's finding that claimant had "a long history of tobacco abuse" was in keeping with the 40 pack-years described by Dr. Broudy, the 53 pack-years described by Dr. Rasmussen and the 40-60 pack-years described by Dr. Westerfield. Claimant's Brief at 19.

to, or *substantially aggravated by*, dust exposure in coal mine employment.[6] 20 C.F.R. §718.201(a)(2), (b). Thus, we agree with claimant that the administrative law judge mischaracterized Dr. Alam's opinion on the issue of legal pneumoconiosis. Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence does not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). We remand the case for the administrative law judge to reconsider Dr. Alam's opinion in light of the definition of legal pneumoconiosis set forth at Section 718.201(a)(2), (b).

Further, because we must remand this case for the administrative law judge to reconsider Dr. Alam's opinion, the administrative law judge should also consider whether Dr. Alam's reference to claimant's coal mine employment as "underground" coal mine employment was a substantive, or merely a typographical, error since, in the same report, he acknowledged that claimant's coal mine employment was above-ground, *i.e.*, working as a dozer operator and in a preparation plant where he [was] exposed to a significant amount of coal dust." Claimant's Exhibit 2. On remand, the administrative law judge should consider the effect, if any, of this discrepancy on Dr. Alam's opinion regarding the cause of claimant's respiratory impairment. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984). Additionally, on remand, the administrative law judge should consider whether Dr. Alam's opinion that claimant has a "long" history of smoking is consistent with his own finding that claimant had a 40 pack-year history of smoking and the 40-60 pack-year smoking history identified by Drs. Broudy, Rasmussen and Westerfield. *See Fitch v. Director, OWCP*, 9 BLR 1-45 (1986). Further, the administrative law judge should reconsider whether Dr. Alam's reference to claimant's pulmonary function studies and blood gas studies, without identifying them by date, provides sufficient underlying documentation to support Dr. Alam's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

Finally, Dr. Alam states that he has been "follow[ing] [claimant] … for almost a year[.]" Claimant's Exhibit 2. Thus, the administrative law judge should consider, as claimant contends, whether Dr. Alam's opinion is entitled to additional weight as that of

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[6] Specifically, Dr. Alam opined that the main cause of claimant's disabling respiratory impairment:

> is severe emphysema caused by his continuous and long term tobacco abuse[,] [but that] [c]oal dust exposure has *substantially aggravated* the underlying condition[,] even though the mining employment is [eleven] years, which is a sufficient time to cause secondary damage to the lungs.

Claimant's Exhibit 2 (emphasis added).

a treating physician. In doing so, the administrative law judge must take into consideration the nature of the relationship between doctor and claimant, the duration of the relationship, the frequency of the treatment and the extent of the treatment. 20 C.F.R. §718.104(d)(1)-(4). Further, she must determine whether Dr. Alam's opinion is credible "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Next, claimant asserts that the administrative law judge erred in according less weight to the opinion of Dr. Rasmussen because, unlike Drs. Alam, Broudy and Westerfield, he is not a Board-certified pulmonologist. Claimant asserts that this case should be considered in light of *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). In *Martin*, the United States Court of Appeals for the Sixth Circuit stated:

> Dr. Fino's credentials are not necessarily 'superior' to Dr. Rasmussen's …. Dr. Fino is Board-certified in both Internal Medicine and Pulmonary Disease, whereas Dr. Rasmussen is Board-certified in Internal Medicine only. But Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis.

Martin, 400 F.3d at 307, 23 BLR at 2-286. In this case, Dr. Rasmussen's curriculum vitae reflects that he is Board-certified in Internal and Forensic Medicine and that he has held various positions in pulmonary medicine in the Appalachian region, such as Chief Medical Officer of the Appalachian Coal Miners Research Coal Unit and Associate Chief of Internal Medicine at Miners Memorial Hospital in Beckley, West Virginia. Director's Exhibit 12. In addition, Dr. Rasmussen's curriculum vitae shows that he is a Senior Disability Analyst and Diplomate of the American Board of Disability Analysts. Director's Exhibit 12.

Thus, claimant contends that Dr. Rasmussen's considerable experience in pulmonary medicine and the treatment of coal worker's pneumoconiosis provides him with comparable expertise to physicians who are Board-certified pulmonologists. The administrative law judge's decision to accord less weight to Dr. Rasmussen's opinion merely because he is not a Board-certified pulmonologist, is, therefore, vacated. On remand, the administrative law judge must consider the credibility of Dr. Rasmussen's opinion in light of his experience in pulmonary medicine and the treatment of coal worker's pneumoconiosis. *Martin*, 400 F.3d at 307, 23 BLR at 2-286.

Additionally, claimant contends that the administrative law judge erred in crediting the opinions of Drs. Broudy and Westerfield that claimant's respiratory

impairment is due to smoking alone. As claimant contends, the administrative law judge erred in crediting the opinions of Drs. Broudy and Westerfield over the opinion of Dr. Rasmussen because they reviewed more x-rays, as the absence of clinical pneumoconiosis does not preclude a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201. The administrative law judge must, therefore, reconsider the opinions of Drs. Broudy and Westerfield along with the opinions of Drs. Alam and Rasmussen in determining whether claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Finally, on remand, as claimant asserts, the administrative law judge must reconsider the credibility of the opinions of Drs. Broudy and Westerfield, that claimant's respiratory impairment was more typical of a smoking-induced respiratory impairment than a coal dust-induced respiratory impairment, pursuant to *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007) and 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). In adopting the 2001 amended regulations, the Department of Labor recognized that, "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis" and "that [t]he risk is additive with smoking," and that medical literature "supports the theory that dust-related emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence does not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). We remand the case for the administrative law judge to reconsider the medical opinion evidence thereunder. If the administrative law judge finds that the evidence establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), she must then consider whether claimant's disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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