BRB No. 97-1554 BLA

JAMES R. GRIMMETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/APOGEE	)	DATE ISSUED:
	)	
COAL COMPANY	)	
	)	
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 and the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (96-BLA-1438) of Administrative Law Judge Ralph A. Romano awarding benefits 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). In his Decision and Order, the administrative law judge found that claimant's prior claim had been finally denied on May 7, 1980 and that the present

claim was a duplicate claim under the provisions of 20 C.F.R. §725.309.[1] The administrative law judge credited claimant with twenty-four years of coal mine employment and determined that claimant had four dependents. The administrative law judge found the newly submitted evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment and a material change in conditions at Section 725.309. On the merits, the administrative law judge found the evidence of record insufficient to meet claimant's burden of proof at 20 C.F.R. §718.202(a)(1)-(3), but sufficient to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge found claimant entitled to the presumption that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b) and that rebuttal had not be established. The administrative law judge also found the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c)(1), (4), (b). The administrative law judge granted claimant's counsel's fee petition in a supplemental order. Accordingly, benefits and counsel fees were awarded. On appeal, employer challenges the findings of the administrative law judge at Sections 718.202(a)(4), 718.204(c)(1),(4), 718.204(b), and 725.309 as well as the award of attorney fees. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant filed his initial application for benefits with the Social Security Administration (SSA) in 1973 which SSA denied on September 10, 1973 on the grounds claimant was still working as a miner. Director's Exhibit 25. Under the 1977 Amendments to the Act, claimant elected review of his claim by SSA where his claim was again denied. *Id*. SSA forwarded the claim to the Department of Labor which again denied the claim on the grounds that claimant failed to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id*. Claimant took no further action until he filed the present claim on October 6, 1995. Director's Exhibit 1.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, that claimant had four dependents, and at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 pursuant to 20 C.F.R. Part 718, claimant must prove 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, employer challenges the findings of the administrative law judge at Section 718.204(c)(1) and (4). Employer asserts that the administrative law judge erred when he found the reports of Drs. Walker and Repsher supportive of a finding of total disability when the physician's diagnosed non-respiratory conditions. Employer's contentions have merit. Claimant bears the burden of proving that he has a totally disabling respiratory impairment at Section 718.204(c). *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). Since the administrative law judge did not determine if claimant established the presence of a totally disabling respiratory impairment, we must vacate the findings of the administrative law judge at Section 718.204(c)(4) and remand this case for the administrative law judge to evaluate the medical opinions of Drs. Walker and Repsher to determine if these physicians diagnosed a totally disabling respiratory impairment in well-documented and reasoned opinions. In addition, since a physician may determine that a claimant does not suffer from a totally disabling respiratory impairment even when his objective tests are qualifying under the regulatory tables, we vacate the findings of the administrative law judge on the report of Dr. Zaldivar as he improperly accorded less weight to this report on the grounds that the physician's finding that claimant was not totally disabled by a respiratory impairment contradicted his objective test results. *See Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *Fuller v. Gilbraltar Coal Corp.*, 6 BLR 1-1291 (1984). On remand, before deciding the credibility of the physician's opinions, including the opinion of Dr. Zaldivar, the administrative law judge should make a determination as to the exertional requirements of claimant's usual coal mine employment in order to make a comparison of the exertional levels needed by claimant to perform his job and the physician's opinion regarding claimant's abilities to do his job.[3] *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9

[3] As employer raises no challenges to the finding of the administrative law judge that the report of Dr. Rasmussen is sufficient to meet claimant's burden of proof at 20 C.F.R. §718.204(c)(4), we affirm that finding. *Skrack, supra*.

BLR 1-104 (1986); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). In light of our decision to vacate the findings of the administrative law judge at Section 718.204(c)(4), we must also vacate the finding of the administrative law judge that claimant established a material change in conditions pursuant to Section 725.309 and remand this case for the administrative law judge to reconsider the newly submitted evidence to determine if claimant has established an element of entitlement previously decided against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Furthermore, contrary to employer's general assertion that the administrative law judge erred in finding the pulmonary function study evidence sufficient to meet claimant's burden of proof, the administrative law judge properly found the most recent pulmonary function studies qualifying under the regulatory tables and permissibly accorded determinative weight to these studies because these tests were the most recent. *See Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). We, therefore affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c)(1).

In considering the evidence regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge acted within his discretion when he accorded less weight to the medical opinions of Drs. Repsher and Loudon because these physicians did not examine claimant. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). With respect to Dr. Zaldivar's opinion, the administrative law judge accorded this opinion less weight because the physician concluded that claimant does not have emphysema as the capillary beds in the lungs are intact and the obstruction is due to inflammation of these beds rather than a destruction of lung tissue as one would expect to see with emphysema or advanced pneumoconiosis and then stated that the obstruction is due to a combination of smoking and asthma. The administrative law judge however failed to provide his rationale for finding Dr. Zaldivar's opinion inconsistent. Decision and Order at 8-9. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Thus, the administrative law judge must reconsider this opinion. Further, although a physician is not required to account for all possible etiological factors before deciding that claimant suffers from a respiratory impairment related to coal mine employment, the administrative law judge, in the instant case, must review the rationale provided by Dr. Rasmussen for his findings and specifically explain why he finds this report better reasoned and documented. *Sykes v. Itmann Coal Co.*, 7 BLR 1-820 (1985). The administrative law judge should examine the validity of the reasoning of Dr. Rasmussen's opinion in light of the studies conducted and the objective indications upon which the medical opinion is based. *Director,*

OWCP v. Siwiec, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). Additionally, the administrative law judge must also determine if the report of Dr. Tan is reasoned as her diagnosis is based on non-qualifying objective studies and the x-ray was read as negative by a better qualified reader. Director's Exhibit 25; *Fields v. Island Creek Coal Co.*, 10 BLR 1-1987). We, therefore, vacate the finding of the administrative law judge at 20 C.F.R. §718.202(a)(4) and remand this case for further consideration of the medical opinion evidence.

At Section 718.204(b), the administrative law judge impermissibly accorded little weight to the medical opinions of Drs. Zaldivar, Repsher, Walker, and Loudon simply because these physicians did not diagnose pneumoconiosis. In determining if the medical opinion evidence is relevant as to the issue of causation, the administrative law judge must look at the factors upon which the physician relied to make his determination. We, therefore, vacate the findings of the administrative law judge at Section 718.204(b) and remand this case for the administrative law judge to reconsider the medical opinion evidence in light of the decisions of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-84 (4th Cir. 1995).

Finally, we vacate the award of attorney fees as the administrative law judge failed to provide an explanation for his rejection of employer's argument concerning specific time charges and costs. *See* 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) and 30 U.S.C. §932(a). If benefits are again awarded, the administrative law judge must consider employer's challenge to claimant's counsel's fee petition and articulate a reason for his decision concerning these arguments.

Accordingly, the Decision and Order awarding benefits and the Supplemental Decision and Order Awarding Attorney Fees of the administrative law judge is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge