BRB No. 07-0269 BLA

R.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAFER BROTHERS CONSTRUCTION, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/21/2007
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6485) of Administrative Law Judge Adele Higgins Odegard 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). This case involves a subsequent claim filed

on February 10, 2003.[1] The administrative law judge found that the new evidence established the existence of "clinical pneumoconiosis" pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the new medical opinion evidence established the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in finding that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

[1] Claimant initially filed a claim for benefits on March 15, 1999. Director's Exhibit 1. In a Decision and Order dated September 29, 2000, Administrative Law Judge Gerald M. Tierney noted that employer's carrier "stipulated to all CM-1025 issues…but for the issue of total disability due to pneumoconiosis." *Id.* In support of a finding of pneumoconiosis, Judge Tierney noted that all of claimant's x-rays established the existence of pneumoconiosis and that each of the examining physicians diagnosed pneumoconiosis. *Id.* Judge Tierney also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R §718.203(b) (2000). *Id.* Judge Tierney further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* However, Judge Tierney found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Accordingly, Judge Tierney denied benefits. *Id.* By Decision and Order dated October 9, 2001, the Board affirmed Judge Tierney's finding that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *[R.S.] v. Shafer Bros. Constr., Inc.*, BRB No. 01-0139 BLA (Oct. 9, 2001) (unpub.). The Board, therefore, affirmed Judge Tierney's denial of benefits. *Id.* Claimant filed a second claim on February 10, 2003. Director's Exhibit 3.

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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where 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). Claimant's prior claim was denied because he failed to establish that his total disability was due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3). To determine whether claimant is totally disabled due to pneumoconiosis, the administrative law judge first considered whether the new evidence established that claimant's respiratory impairments arose out of coal mine employment, so as to constitute "legal" pneumoconiosis.[2]

Employer argues that the administrative law judge erred in finding that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] In making this determination, the administrative law judge considered

[2] As noted by the administrative law judge, in the adjudication of claimant's prior claim, Judge Tierney found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) (2000). Judge Tierney did not address whether the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). However, Judge Tierney found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). In making this finding, Judge Tierney credited Dr. Renn's opinion, that claimant's pulmonary impairment was entirely due to chronic bronchitis and pulmonary emphysema related to cigarette smoking, over the contrary opinions of Drs. Jaworski and Rasmussen that claimant's pulmonary impairment was caused in part by his coal dust exposure. Director's Exhibit 1.

[3] "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).

the newly submitted medical opinions of Drs. Jaworski, Renn, and Spagnolo.[4] Dr. Jaworski attributed claimant's chronic obstructive lung disease to "cigarette smoking with contribution to [sic] coal dust exposure." Director's Exhibit 11. Dr. Renn opined that claimant's ventilatory impairment was attributable, in its entirety, to cigarette smoking, which caused claimant's chronic bronchitis and pulmonary emphysema. Employer's Exhibits 1, 7. Dr. Spagnolo opined that none of claimant's medical conditions was related to his coal dust exposure. Employer's Exhibit 5.

The administrative law judge credited Dr. Jaworski's opinion, that claimant's breathing impairments arose out of his coal mine employment, over the contrary opinions of Drs. Renn and Spagnolo. Consequently, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 17.

Dr. Jaworski's Opinion

In finding that the new medical opinion evidence established the existence of legal pneumoconiosis, employer argues that the administrative law judge failed to properly consider whether Dr. Jaworski's opinion was sufficiently reasoned. We agree. In her consideration of Dr. Jaworski's opinion, the administrative law judge stated:

> Dr. Jaworski did not find that coal dust exposure was the predominant factor in the Claimant's breathing impairment. However, while he found that cigarette smoking was the main reason for the Claimant's chronic obstructive lung disease, he also found that the coal dust exposure was a contributing cause. He made this determination based on the Claimant's history of exposure to coal dust, and stated that he could not differentiate between the two factors "based on spirometry alone." Instead, his conclusion was "mostly based on the history and, clearly, he has a very significant history of cigarette smoking." When questioned in his deposition about whether there were other ways, other than spirometry to differentiate between the two etiologies, Dr. Jaworski stated:
>
> > Well, I'm not sure whether there's a lot of other testing that would help me. Diffusion would be helpful to some degree, but you could not really disregard the presence of obstruction in the face of coal dust exposure, so I think it's mainly the amount of coal dust exposure vis-à-vis the amount of cigarette smoking.

[4] Drs. Jaworski and Renn also submitted reports in connection with claimant's prior 1999 claim. Director's Exhibit 1.

(EX4 at 26-27).

> Further, when questioned about the possibility "that the degree of cigarette smoking history that [the Claimant] had could be solely responsible for the obstruction that he demonstrates["], Dr. Jaworski stated that "it could [as] [w]e do see smokers who never worked in the coal mines and they develop very severe lung disease." However, he did not discount his previous conclusion that coal mine dust was a contributing factor in this particular Claimant's case (EX 4 at 27).
>
> As noted above, Dr. Jaworski did not state that coal dust exposure was the sole factor in the Claimant's breathing impairment, but instead stated that, along with cigarette smoking, the coal dust exposure was one of the two factors that made a "predominant contribution" to the Claimant's disabling "severe to very severe chronic obstructive lung disease," diagnosed on the basis of "history, physical exam, and results of PFTs." I infer from this statement that Dr. Jaworski determined that coal dust-induced lung disease has a material adverse effect on the Claimant's respiratory condition. I find that Dr. Jaworski's opinion was well-documented, and well-reasoned. I am also impressed that Dr. Jaworski admitted the limited extent to which he was able to make a conclusion with complete certainty. I therefore give his opinion substantial weight.

Decision and Order at 14-15 (footnote omitted).

Although the administrative law judge accurately noted that Dr. Jaworski indicated that claimant's chronic obstructive lung disease was due in part to his coal dust exposure, the administrative law judge cited only one basis provided by the doctor for his opinion: claimant's history of coal dust exposure. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized that a lengthy coal mine employment history alone does not conclusively establish that a miner's impairment or disability is due to pneumoconiosis or coal dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998). Although the administrative law judge noted that Dr. Jaworski indicated that his diagnosis of "severe to very severe chronic obstructive lung disease" was based upon "history, physical exam, and results of PFTs," the administrative law judge did not address Dr. Jaworski's explanation, if any, for how these factors supported his opinion regarding the etiology of claimant's chronic obstructive lung disease. Consequently, we instruct the administrative law judge, on remand, to reconsider whether Dr. Jaworski's opinion, regarding the etiology of claimant's chronic obstructive lung disease, is

sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

As employer accurately notes, the administrative law judge also erred in failing to address whether Dr. Jaworski's opinion was definitive enough to support a finding that claimant's chronic obstructive lung disease was attributable to his coal dust exposure, since Dr. Jaworski conceded that claimant's cigarette smoking could be solely responsible for his obstructive pulmonary impairment.[5] *See United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Employer's Exhibit 4 at 27.

Dr. Renn's Opinion

Employer also contends that the administrative law judge erred in her consideration of Dr. Renn's opinion. Dr. Renn attributed claimant's chronic bronchitis and pulmonary emphysema solely to his cigarette smoking. *See* Employer's Exhibits 1, 7. The administrative law judge accorded less weight to Dr. Renn's opinion because he found that the doctor relied upon an inaccurate smoking history. The administrative law judge found that:

> Dr. Renn wrongly recorded in his report that the Claimant told him in his first examination that he smoked two packs per day. Also, Dr. Renn mentioned in his report and in his deposition that the Claimant told another physician that he had a three package per day smoking history, but I found no such report in the record. Dr. Renn used these unsupported numbers, including the unattributed three package per day history, to reach an "average" of all the various numbers he used, which totaled one and a half packages per day. Therefore, while Dr. Renn attributed the Claimant's impairment to tobacco smoking, he is quite unclear as to his understanding of the Claimant's smoking history, and his conclusion seems to be based on an inflated smoking history of two and three package per day reports that

[5] The administrative law judge noted that Dr. Jaworski, after conceding that claimant's cigarette smoking could be solely responsible for claimant's obstructive pulmonary impairment, did not discount his previous conclusion that coal mine dust was a contributing factor to claimant's obstructive lung disease. However, by stating that all of claimant's obstructive pulmonary impairment could be attributable to his cigarette smoking, Dr. Jaworski accepted the possibility that claimant's pulmonary impairment was not attributable to his coal dust exposure. The administrative law judge erred in not addressing the significance of this statement.

> are not supported by the record. As a result, I can give little weight to his opinion as it pertains to the Claimant's cigarette smoking.

Decision and Order at 16.

First, contrary to the administrative law judge's characterization, employer notes that there is, in fact, evidence in the record supportive of a finding of a three-pack-a-day smoking history. Although Dr. Jaworski, in his May 1, 2003 report, indicated that claimant smoked less than one pack of cigarettes a day from age twenty to age fifty-five, employer accurately notes that claimant's May 1, 2003 pulmonary function pulmonary study report (signed by Dr. Jaworski) lists a smoking history of three packs of cigarettes a day. Director's Exhibit 15.

Second, the administrative law judge erred in not addressing Dr. Renn's testimony that his conclusions regarding the etiology of claimant's pulmonary impairment would remain the same even if he relied upon a smoking history of one pack or less of cigarettes a day for thirty-four years. *See* 30 U.S.C. §923(b); Employer's Exhibit 7 at 13.

Finally, the administrative law judge did not adequately discuss and resolve the discrepancies in claimant's reported smoking history. Although the administrative law judge noted the differing smoking histories reported by claimant, *see* Decision and Order at 13, the administrative law judge did not render a determination as to the length of claimant's smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993) *see also Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Consequently, on remand, the administrative law judge must render a specific finding regarding the length of claimant's smoking history and address the effect that it has on the credibility of the physicians' opinions.

The administrative law judge also accorded less weight to Dr. Renn's opinion because she found that it was "inconsistent with the Department's regulations concerning the additive nature of cigarette smoking and coal mine dust." Decision and Order at 16. However, because Dr. Renn did not assume that coal dust exposure can never cause an obstructive lung disease, his opinion is not inconsistent with the regulations. *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

In her consideration of Dr. Renn's opinion, the administrative law judge found that, because cigarette smoking and coal mine employment both played a potential role in claimant's breathing impairment, the fact that claimant received treatment for cigarette-induced lung disease did not mean that claimant may not have also been affected by coal dust exposure. Decision and Order at 16. In requiring employer to disprove that claimant's coal dust exposure played a role in his breathing impairment, the

administrative law judge improperly provided claimant with a presumption that his breathing impairment was caused in part by his coal dust exposure. Claimant is required to establish all elements of entitlement, including that his obstructive lung disease arose out of his coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent*, 11 BLR at 1-27.

The administrative law judge also discredited Dr. Renn's opinion because the doctor opined that claimant's "bronchoreversibile" pulmonary function study results were "consistent with the variability of tobacco smoke-induced chronic bronchitis." *Id.* The administrative law judge stated:

> I note that all [of] Claimant's pulmonary function tests, both in this claim, and in the previous claim, produced qualifying results under the relevant regulation at §718.104 (*See* Decision at 3). Also, as discussed below, the Claimant has qualifying results on all of his post-bronchodilator tests performed in conjunction with this claim. Therefore, the bronchodilators that treat cigarette-induced bronchoreversible lung disease are not treating all of his pulmonary impairments, as an underlying impairment that qualifies the Claimant as disabled continues to exist.

Decision and Order at 16.

We agree with employer that the administrative law judge's interpretation of claimant's pulmonary function studies was improper. The interpretation of medical data is a medical determination, and an administrative law judge may not substitute her opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). By independently assessing the significance of the pulmonary function study results, the administrative law judge improperly substituted her opinion for that of the medical expert.[6]

[6] Dr. Renn also opined that claimant's chronic bronchitis was not related to his coal dust exposure, a finding based in part upon the fact that claimant's condition persisted after he stopped working in the mines. The administrative law judge found that Dr. Renn's opinion was inconsistent with 20 C.F.R. §718.201(c), which provides that pneumoconiosis is a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. *See* Decision and Order at 17. The administrative law judge erred in finding that Dr. Renn's opinion was inconsistent with the regulations. The fact that the regulations recognize that pneumoconiosis is a latent and progressive disease does not mean that all lung diseases are attributable to coal dust exposure. Moreover, Dr. Renn provided other reasons for attributing claimant's chronic bronchitis to his cigarette smoking. Employer's Exhibits 1, 7 at 22-25. On remand, the administrative law judge should address the reasons that Dr. Renn provided for his

Dr. Spagnolo's Opinion

Employer also argues that the administrative law judge erred in her consideration of Dr. Spagnolo's opinion. Dr. Spagnolo opined that claimant's breathing impairment was caused by his long use of cigarettes and was further exacerbated by his underlying cardiac dysfunction. Employer's Exhibit 5. Dr. Spagnolo also opined that none of claimant's symptoms, complaints, medical conditions, and disability was related to his coal dust exposure. *Id.* The administrative law judge discredited Dr. Spagnolo's opinion because she found that it was not supported by a sufficient rationale. Decision and Order at 15. The administrative law judge found that Dr. Spagnolo provided little rationale for his finding that claimant's lung function and blood gas values were more consistent with an impairment caused by cigarette smoking. Decision and Order at 15. The administrative law judge also found that Dr. Spagnolo did not discuss how he concluded that claimant's coal mine dust exposure was not a contributing cause of his pulmonary impairment. *Id.* Because the administrative law judge's finding is supported by substantial evidence, we affirm her discrediting of Dr. Spagnolo's opinion.[7] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 ("In weighing opinions, the [administrative law judge] is called upon to consider their quality," taking into account, among other things, "the opinions' reasoning" and "detail of analysis.").

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the new medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76

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opinion that claimant's chronic bronchitis was related to cigarette smoking and not coal dust exposure.

[7] Because the administrative law judge provided a proper basis for discrediting Dr. Spagnolo's opinion, *i.e.*, that his opinion was not sufficiently reasoned, the administrative law judge's error, if any, in discrediting Dr. Spagnolo's opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We, therefore, need not address employer's remaining arguments regarding the weight accorded to Dr. Spagnolo's opinion.

(4th Cir. 1997).

Because the administrative law judge must reevaluate whether the new medical opinion evidence establishes the existence of legal pneumoconiosis, an analysis that could affect her weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Further, because the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) was the basis for her determination that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order awarding 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.

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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