BRB No. 07-0274 BLA

V.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AGIPCOAL USA, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 12/21/2007
	)	
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.

V.S., Elkins, West Virginia, *pro se*.

William S. Mattingly (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 (05-BLA-5582) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) awarding benefits on a subsequent 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).[1] The administrative law judge accepted the parties' stipulation that claimant has ten 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 evidence developed since the prior denial established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant, without the assistance of counsel, responds by letter, generally urging the Board to affirm the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Claimant filed his first claim on January 31, 2001. Director's Exhibit 1. It was finally denied on January 17, 2002, because the evidence did not establish total disability. *Id*. Claimant filed this claim on April 15, 2004. Director's Exhibit 3.

[2] Because the administrative law judge's findings that the evidence developed since the prior denial established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

At Section 718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Ghamande, Bellotte, Fino, and Renn. Dr. Ghamande opined that claimant has silicosis. Claimant's Exhibit 1. Similarly, Drs. Bellotte and Fino opined that claimant has simple coal workers' pneumoconiosis or silicosis. Director's Exhibit 18; Employer's Exhibits 3, 6. By contrast, Dr. Renn opined that claimant does not have pneumoconiosis. Employer's Exhibits 1, 8.

The administrative law judge initially found that Dr. Ghamande's opinion was well-reasoned and entitled to substantial weight. Decision and Order at 12. The administrative law judge also found that Dr. Bellotte's opinion was well-reasoned. *Id*. Further, the administrative law judge found that Dr. Fino's opinion was well-reasoned and entitled to some weight. *Id*. at 12-13. However, the administrative law judge found that Dr. Renn's opinion was not well-reasoned. *Id*. at 13. The administrative law judge then concluded that the preponderance of the medical opinion evidence established the presence of silicosis. *Id*.

Employer argues that the administrative law judge erred in discounting Dr. Renn's opinion that claimant does not have pneumoconiosis, because it was not well-reasoned. The administrative law judge noted that Dr. Renn attributed claimant's lung condition to sarcoidosis and adult respiratory distress syndrome (ARDS). Decision and Order at 13. The administrative law judge additionally stated:

> [Dr. Renn] discounted a diagnosis of pneumoconiosis because he did not see abnormalities in the upper lung zones on [x]-ray. Even presuming that Dr. Renn is correct in that pneumoconiosis manifests first in the upper lung zones, Dr. Renn failed to consider the fact that the [c]laimant might have the disease, notwithstanding his conclusion that there was a lack of radiological evidence of upper lung zone involvement.

Id. Contrary to the administrative law judge's finding, Dr. Renn provided other bases besides x-ray evidence for his opinion that claimant does not have pneumoconiosis. Employer's Exhibit 8. Dr. Renn explained that he disagreed with Dr. Ghamande's opinion that a mediastinal lymph node biopsy was suggestive of silicosis, because silicosis cannot be diagnosed from a lymph node biopsy. Employer's Exhibit 8 at 18-19. Dr. Renn also explained that claimant's CT scans showed changes more consistent with sarcoidosis than silicosis or coal workers' pneumoconiosis. *Id*. at 20. In addition, Dr.

Renn explained that coal workers' pneumoconiosis and/or silicosis creates both a restrictive and an obstructive disease, unlike claimant's relative restrictive disease. *Id*. at 14-15. Thus, because the administrative law judge's finding Dr. Renn's opinion was not well-reasoned focused on only one aspect of Dr. Renn's report, rather than the entire report, we hold that the administrative law judge erred in selectively analyzing Dr. Renn's opinion. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91, 1-93 (1988). We therefore vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of all the medical opinion evidence thereunder.[3]

Employer also argues that, because Dr. Renn's opinion that claimant has sarcoidosis and ARDS was supported by the medical treatment records, the administrative law judge erred in failing to explain how these records affected her consideration of Dr. Renn's opinion. Specifically, employer argues that, according to the medical treatment records, sarcoidosis and ARDS, not coal dust exposure, explain claimant's impairment. The diagnoses of sarcoidosis, ARDS, and silicosis were listed in the medical treatment records.[4] Director's Exhibits 15-17. The administrative law judge noted that the opinions of Drs. Ghamande and Renn were based in part on the medical treatment records. Decision and Order at 4. The administrative law judge also considered Dr. Ghamande's treating records, and the fact that "Dr. Ghamande had the opportunity to review the [c]laimant's existing medical records, including records reflecting the [c]laimant's pulmonary condition." *Id*. However, as argued by employer, the administrative law judge did not consider Dr. Renn's opinion in light of these same medical treatment records. Thus, because the administrative law judge's consideration of Dr. Ghamande's opinion was inconsistent with her consideration of Dr. Renn's opinion regarding the medical treatment records, we instruct the administrative law judge, on remand, to also consider Dr. Renn's opinion in light of the medical treatment records. *See Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-139-40 (1999)(*en banc*).

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[3] The administrative law judge must weigh the old and new evidence together on the merits. *See* 20 C.F.R. §725.309; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

[4] The administrative law judge stated that "[t]he record in this matter includes more than two hundred pages of hospitalization and medical treatment records relating to the [c]laimant's August 2003 heart bypass surgery and its aftermath (DX 13, 14, 15, 16, 17)." Decision and Order at 4. Specifically, the administrative law judge noted that claimant immediately developed adult respiratory distress syndrome (ARDS). *Id*. at 3. In addition, the administrative law judge noted that claimant was diagnosed with sarcoidosis in October 2004. *Id*.

Employer next argues that the administrative law judge erred in crediting Dr. Ghamande's opinion because Dr. Ghamande mistakenly stated in his deposition testimony that claimant worked for twenty-eight years in coal mine employment, instead of ten years. During a May 3, 2006 deposition, Dr. Ghamande stated that his diagnosis of clinical pneumoconiosis was based, in part, on a "history of exposure which I think totals almost [twenty-eight] years going by the records." Claimant's Exhibit 2 at 31. However, Dr. Ghamande subsequently stated that claimant worked in and around the coal mines for ten years. *Id*. at 34. The administrative law judge noted that, in his report, Dr. Ghamande accurately summarized claimant's years of coal mine employment. Decision and Order at 11 n.17. The administrative law judge also noted that, in his deposition, Dr. Ghamande corrected his statement of claimant's coal mine employment history from twenty-eight years to ten years. *Id*. Because the administrative law judge reasonably considered the inconsistencies in Dr. Ghamande's statements regarding the length of claimant's coal mine employment, we reject employer's assertion that the administrative law judge could not rely on Dr. Ghamande's opinion, because Dr. Ghamande at one point misstated the length of claimant's coal mine employment. *See Fitch v. Director, OWCP*, 9 BLR 1-45 (1986).

However, there is merit in employer's contention that the administrative law judge erred in failing to explain how Dr. Ghamande's opinion was affected by Dr. Ghamande's reliance on a lymph node biopsy, the reliability of which was disputed, to diagnose silicosis. The administrative law judge noted that Dr. Ghamande diagnosed silicosis, based on CT scans and lymph node biopsy evidence.[5] Decision and Order at 11. The administrative law judge additionally noted that "Dr. Renn also testified that it was impossible to diagnose silicosis based on a lymph node biopsy." *Id*. at 12. However, the administrative law judge ignored the dispute by the physicians regarding the diagnosis of silicosis, based on the lymph node biopsy evidence. Rather, the administrative law judge determined that Dr. Ghamande's opinion was well-reasoned, because it was based on objective medical tests, and his observation of claimant over a significant period of time, without addressing Dr. Renn's opinion. *Id*.; *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Consequently, the administrative law judge, on remand, must consider the credibility of the biopsy evidence with regard to Dr. Ghamande's opinion at 20 C.F.R. §718.202(a)(4). *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989).

Further, on remand, the administrative law judge should explain the weight she accords to Dr. Ghamande's opinion in light of Dr. Ghamande's reliance on non-

[5] In a report, Dr. Ghamande stated that "a level 7 mediastinal lymph node biopsy had shown small birefringent substances in the sclerotic areas, highly suggestive of silicosis." Claimant's Exhibit 1 (emphasis in original).

conforming pulmonary function studies to support his diagnosis of pneumoconiosis. Dr. Ghamande administered the March 24, 2004 pulmonary function study. In his report, Dr. Ghamande observed that "[claimant's] FVC had improved considerably from 1.2 liters in 12/2003 in Elkins up to 1.8 liters on 3/2004; however, this still was severely impaired, at 46% of predicted." Claimant's Exhibit 1. In his report and deposition, Dr. Ghamande opined that claimant had silicosis prior to his surgery on August 15, 2003 for a coronary artery bypass graft, based in part on pulmonary function studies that were performed before the surgery, indicating that claimant had a restrictive lung disease.[6] Claimant's Exhibits 1, 2. The administrative law judge found that these pulmonary function studies were not in substantial compliance with the technical requirements for validity. Decision and Order at 15-16. As noted above, the administrative law judge also determined that Dr. Ghamande's opinion was well-reasoned, because it was based on objective medical tests. Decision and Order at 12. On remand, the administrative law judge should consider the pulmonary function study documentation underlying Dr. Ghamande's diagnosis of silicosis and explain the weight accorded to his opinion. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Employer additionally argues that Dr. Ghamande's opinion is too equivocal to constitute substantial evidence in support of claimant's burden of proof. We disagree. During the May 3, 2006 deposition, Dr. Ghamande was asked whether it was clear to him that there was evidence of pneumoconiosis in this case. Employer's Exhibit 5 at 29. Dr. Ghamande opined that from a clinical perspective claimant has coal workers' pneumoconiosis. *Id*. However, Dr. Ghamande also opined that from a radiographic perspective, claimant did not have the disease. *Id*. at 29-30. Dr. Ghamande explained that "[i]t may have been present but [it was] not obviously seen on the chest x-ray." *Id*. The administrative law judge noted that "Dr. Ghamande remarked that the [c]laimant had clinical evidence of pneumoconiosis, but the radiographic evidence was not so clear (CX 2 at 29)." Decision and Order at 11. The administrative law judge also noted that "Dr. Ghamande testified that a portion of the [c]laimant's current impairment was due to ARDS, but that a significant amount was also due to the [c]laimant's pre-existing silicosis (CX 2 at 11, 14, 30, 36, 41)." *Id*. The administrative law judge ultimately determined that "Dr. Ghamande's conclusion regarding the role that the [c]laimant's underlying pneumoconiosis played in the [c]laimant's current state is not equivocal." *Id*. at 22 n.29. Based on the foregoing, we conclude that substantial evidence supports the administrative law judge's discretionary finding that Dr. Ghamande's overall opinion was

[6] While Dr. Ghamande acknowledged that claimant has sarcoidosis, ARDS, and heart disease, Dr. Ghamande opined that claimant also has silicosis, because a lymph node biopsy suggested silicosis and because an August 2003 pulmonary function study showed that claimant had an impairment before his heart surgery and the resulting complications of ARDS. Claimant's Exhibits 1, 2.

not equivocal as to the existence of pneumoconiosis. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 23 BLR 2-374, 2-386 (4th Cir. 2006)(recognizing that a doctor's refusal to express a diagnosis in categorical terms is not necessarily equivocation); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). We therefore reject employer's assertion that Dr. Ghamande's opinion is too equivocal to constitute substantial evidence of pneumoconiosis.

On remand, after the administrative law judge has considered whether the medical opinion evidence supports a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), she should weigh together all of the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a).[7] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If, on remand, the administrative law judge again finds that the evidence establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge must then consider whether the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b).

Finally, employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of all the evidence thereunder, if reached.

[7] The administrative law judge found that the x-ray and biopsy evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(2).

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