BRB No. 13-0149 BLA

EARLIE FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETTY B COAL COMPANY	)	
	)	DATE ISSUED: 12/05/2013
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 Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06010) of Administrative Law Judge Robert B. Rae, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim on September 8, 2010.[1] Director's Exhibit 4.

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on September 24, 2007, was

In his Decision and Order issued November 29, 2012, the administrative law judge credited claimant with 13.8 years of coal mine employment,[2] determined that he had a smoking history of fifty-one pack years, and found that the medical opinion evidence developed since the prior denial of benefits established that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. Considering the claim on its merits, the administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), (4), that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled by a respiratory impairment that is due to both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new medical opinion evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer further asserts that the administrative law judge erred in his analysis of the evidence when he found that claimant established the existence of pneumoconiosis, and that he is totally disabled due

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denied by the district director on April 29, 2008, for failure to establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc). Because the administrative law judge credited claimant with fewer than fifteen years of coal mine employment, he determined that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

to pneumoconiosis.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief reiterating its contentions on appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. 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(c);[5] *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(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 2. Therefore, to obtain review of the merits of his claim, he had to submit new evidence establishing the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(c)(3), (4).

Employer contends that the administrative law judge addressed the wrong element of entitlement when he found that the new medical opinion evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and demonstrated a change in an applicable condition under 20 C.F.R. §725.309. Decision and Order at 11-13. This contention has merit. The district director based the prior denial on claimant's failure to establish the existence of pneumoconiosis.[6]

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

[6] The district director also concluded that claimant failed to establish total disability due to pneumoconiosis, but stated that this conclusion flowed from claimant's

Director's Exhibit 2. Accordingly, claimant could obtain review of the merits of this claim only by submitting new evidence establishing that he has pneumoconiosis. 20 C.F.R. §725.309(c); Director's Exhibit 2. The administrative law judge therefore erred by failing to determine, as a threshold matter, whether the new evidence established the existence of pneumoconiosis.

When the administrative law judge turned to the merits of the claim, he relied on the new evidence submitted with the current claim to find the existence of pneumoconiosis established.[7] Decision and Order at 13-16. If we can affirm that finding, we can affirm the determination that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Therefore, we will consider whether substantial evidence supports the administrative law judge's finding that the new evidence established the existence of pneumoconiosis.

In finding the existence of pneumoconiosis established, the administrative law judge considered analog x-ray evidence, CT scan and digital x-ray evidence, claimant's medical treatment records, and medical opinions from Drs. Baker, Fino, and Rosenberg. Decision and Order at 3-10. The administrative law judge found that the analog x-ray evidence, claimant's treatment records, and Dr. Baker's medical opinion established the existence of clinical pneumoconiosis. *Id*. at 11-13, 15-16. The administrative law judge further found that Dr. Baker's opinion established the existence of legal pneumoconiosis. *Id*. at 11-13, 16. Employer raises several challenges to the administrative law judge's weighing of the evidence.

Existence of Clinical Pneumoconiosis

Analog X-ray Evidence

Employer argues that the administrative law judge erred in finding that the analog x-ray evidence supported a finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer's Brief at 4-5. The record contains five interpretations of two new x-rays taken on October 22, 2010, and September 20, 2011. Dr. Alexander, dually-

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failure to establish pneumoconiosis. Director's Exhibit 2, Proposed Decision and Order at 4 ("Because the presence of pneumoconiosis has not been established, the claimant is not considered disabled due to pneumoconiosis.").

[7] The administrative law judge discounted the evidence from claimant's 1997 and 2004 claims, as "less pertinent to" claimant's current condition. Decision and Order at 13. He discussed the x-ray and medical opinion evidence from claimant's 2007 claim, but accorded greater weight to the evidence in the current claim, as more reflective of claimant's condition. Decision and Order at 13-14.

qualified as a Board-certified radiologist and a B reader, and Dr. Baker, a B reader, both read the October 22, 2010 x-ray as positive for pneumoconiosis. Director's Exhibits 11, 26. Dr. Wheeler, who is also dually-qualified, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 28. Dr. Alexander read the September 20, 2011 x-ray as positive for pneumoconiosis; Dr. Scott, who is also dually-qualified, read it as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1.

With respect to the October 22, 2010 x-ray, the administrative law judge gave "equal weight to both dually qualified readers," but determined that "Dr. Baker's positive reading supports Dr. Alexander's positive finding," and therefore concluded that the October 22, 2010 x-ray was positive for the existence of pneumoconiosis. Decision and Order at 4. Because dually-qualified physicians disagreed as to the September 20, 2011 x-ray, the administrative law judge found the readings of that x-ray to be in equipoise. Decision and Order at 4. The administrative law judge concluded that "[t]he weight of the X-rays supports a finding of pneumoconiosis because one X-ray establishes pneumoconiosis and one X-ray is in equipoise." *Id*.

Employer argues that the administrative law judge impermissibly "counted heads" and found that the analog x-ray evidence supported a finding of pneumoconiosis only because three of the five interpretations were positive. Employer's Brief at 4-5. We disagree. Contrary to employer's contention, the administrative law judge did not merely count the x-ray interpretations, but considered the readers' radiological qualifications, and permissibly determined that Dr. Alexander's positive interpretation of the October 22, 2010 x-ray, as supported by the positive interpretation of Dr. Baker, a B reader, outweighed Dr. Wheeler's negative interpretation. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 4. In light of the administrative law judge's finding that one x-ray was positive and one x-ray was in equipoise, we affirm the administrative law judge's determination that the analog x-ray evidence supports a finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Digital X-Ray and CT-Scan Evidence

Dr. Scott, who the administrative law judge noted is a Board-certified radiologist and a B reader, interpreted new CT scans taken on July 13, 2009, November 16, 2009, and November 1, 2010, as negative for clinical pneumoconiosis, showing "[n]o small opacities to suggest silicosis/CWP." Employer's Exhibits 5-7. Dr. Scott also interpreted a new digital x-ray, taken on February 23, 2011, as negative for clinical pneumoconiosis.[8]

[8] In considering the CT scan and digital x-ray readings as other medical evidence under 20 C.F.R. §718.107, the administrative law judge cited Dr. Fino's opinion that "[d]igital x-rays and CT scans are accepted by the medical community and are relevant

Director's Exhibit 27. The administrative law judge determined that Dr. Scott's interpretations of the CT scans and the digital x-ray weighed against a finding of clinical pneumoconiosis. Decision and Order at 8.

Employer argues that the administrative law judge failed to weigh the negative CT scan and digital x-ray evidence against the analog x-ray evidence that he found supported the existence of clinical pneumoconiosis. Employer's Brief at 4, n.3. Employer's argument has merit.

The administrative law judge must weigh all of the relevant evidence together in determining whether claimant has established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). In finding the existence of clinical pneumoconiosis established, the administrative law judge did not weigh Dr. Scott's negative CT scan and digital x-ray interpretations against the positive analog x-ray evidence. Therefore, we must vacate the administrative law judge's finding of the existence of clinical pneumoconiosis, and remand this case for him to weigh the relevant evidence together.[9] *See Compton*; 211 F.3d at 208-11, 22 BLR at 2-169-74.

Medical Opinions and Treatment Records

Employer also challenges the administrative law judge's weighing of the medical opinion evidence regarding the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 8-14. The administrative law judge discounted the opinions of Drs. Fino and Rosenberg that claimant does not have clinical

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evidence in diagnosing lung disease, including coal workers' pneumoconiosis." Director's Exhibit 27 at 4; Decision and Order at 8; *see* 20 C.F.R. §718.107(b).

[9] Later in his decision, the administrative law judge stated that he gave Dr. Scott's CT scan and digital x-ray interpretations less weight than claimant's *treatment records*, because the CT scan and digital x-ray evidence was "less recent than Claimant's treatment records which also contain[ed] CT scans." Decision and Order at 15-16. As employer notes, however, none of the eight CT scan readings in claimant's treatment records contains a diagnosis of pneumoconiosis. Director's Exhibit 25; Claimant's Exhibits 3, 4. Further, review of the record reflects that the three CT scans that Dr. Scott interpreted as negative for pneumoconiosis were CT scans from claimant's treatment records, and that one of those scans, taken on November 1, 2010, is contemporaneous with the October 22, 2010 analog x-ray that the administrative law judge credited as positive for pneumoconiosis. Employer's Exhibits 5-7. Therefore, we conclude that substantial evidence does not support the administrative law judge's reason for generally discounting Dr. Scott's digital x-ray and CT scan readings.

pneumoconiosis, and gave "greatest weight" to Dr. Baker's opinion that claimant has clinical pneumoconiosis, because he found that Dr. Baker's opinion was consistent with the analog x-ray evidence and claimant's treatment records. Decision and Order at 11-13. Since we have vacated the administrative law judge's determination that the analog x-ray evidence, considered without reference to the conflicting digital x-ray and CT scan readings, establishes the existence of clinical pneumoconiosis, we must vacate the administrative law judge's decision to credit Dr. Baker's diagnosis of clinical pneumoconiosis because it was consistent with the analog x-ray evidence. *See Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. On remand, the administrative law judge must reconsider whether the medical opinion evidence supports a finding of clinical pneumoconiosis.

The administrative law judge also concluded that claimant's medical treatment records supported a finding of clinical pneumoconiosis, because a number of CT scan readings within the records "showed nodular changes in Claimant's lungs that Dr. Smiddy [one of claimant's treating physicians] found were probably pneumoconiosis," and because Dr. Smiddy and his nurse practitioner "continued to diagnose Claimant with pneumoconiosis and COPD." Decision and Order at 8. Employer argues that the administrative law judge erred in crediting the treatment records without addressing whether they contain a documented and reasoned diagnosis of pneumoconiosis. Employer further asserts that the administrative law judge did not address the fact that none of the CT scan readings within the treatment records contained a diagnosis of pneumoconiosis, and notes that the qualifications of claimant's treating physicians are unknown. Employer's Brief at 5-8. Employer's arguments have merit.

In this case, the administrative law judge did not determine whether the diagnoses of clinical pneumoconiosis in the treatment records were reasoned and documented. *See* 20 C.F.R. §718.202(a)(4); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); Director's Exhibits 25, 27; Claimant's Exhibits 3, 4. Further, to the extent the administrative law judge relied on Dr. Smiddy's opinion that nodules seen on claimant's treatment CT scans were probably pneumoconiosis, the administrative law judge did not address whether the physicians who read the scans diagnosed pneumoconiosis, or whether Dr. Smiddy possesses relevant qualifications.[10] We therefore vacate the administrative law judge's determination that claimant's treatment records support a finding of clinical pneumoconiosis, and instruct

[10] As was discussed earlier, Dr. Scott, who is Board-certified in Radiology and is a B reader, interpreted three of the treatment record CT scans as negative for pneumoconiosis.

him to reconsider that issue on remand, in light of all the relevant evidence. *See Hicks*, 138 F.3d at 533, 536, 21 BLR at 2-335, 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275.

Existence of Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Dr. Baker diagnosed claimant with chronic obstructive pulmonary disease (COPD), mild hypoxemia, and chronic bronchitis, and observed that all of those impairments can be caused by both coal dust exposure and smoking. Director's Exhibit 11. Assuming that claimant performed sixteen years of underground coal mine employment and had a smoking history of twenty-two or twenty-three pack years, Dr. Baker noted that "medical literature suggest[s] that the combination of coal dust exposure and cigarette smoking may be either synergistic or additive in terms of their effects on the lungs," and opined, "[o]n this basis," that claimant's condition "has been significantly contributed to and substantially aggravated by coal dust exposure in his coal mine employment." *Id.* According "greatest weight" to Dr. Baker's opinion, and less weight to the contrary opinions of Drs. Fino and Rosenberg, the administrative law judge found that claimant established the existence of legal pneumoconiosis. Decision and Order at 16.

Employer contends that the administrative law judge erred in crediting Dr. Baker's opinion without considering his reliance on inaccurate employment and smoking histories. Employer's Brief at 9. This argument has merit. The administrative law judge found that claimant had 13.8 years of coal mine employment, and a smoking history of fifty-one pack years. Decision and Order at 3. Dr. Baker relied on a history of sixteen years of coal mine employment, and twenty-two to twenty-three pack-years of smoking. In considering the bases of Dr. Baker's opinion, the administrative law judge noted that Dr. Baker's coal mine employment and smoking histories "are not the same as those that I found," Decision and Order at 8, n.6, but did not address the discrepancy or explain whether it affected the weight to be accorded Dr. Baker's opinion. Therefore, we vacate the administrative law judge's determination that Dr. Baker's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must reconsider the medical opinions in light of the coal mine employment and smoking histories he found established, and determine whether claimant has carried his burden to establish the existence of legal pneumoconiosis, on the basis of a documented and reasoned medical opinion. *See Hicks*, 138 F.3d at 533, 536, 21 BLR at 2-335, 2-341; *Akers*, 31 F.3d at 441, 21 BLR at 2-275; *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984).

Based on the foregoing discussion, we vacate the administrative law judge's finding that new evidence established the existence of clinical and legal pneumoconiosis,

pursuant to 20 C.F.R. §718.202(a). On remand, the administrative law judge must weigh the relevant evidence together, and determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. Because we have vacated the finding of the existence of pneumoconiosis, we also vacate the administrative law judge's findings, on the merits, that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Having vacated the administrative law judge's finding that the new evidence established the existence of pneumoconiosis, we vacate his determination that the new evidence established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c). On remand, the administrative law judge must first determine whether the new evidence establishes the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). If so, claimant will have established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge must then determine whether all of the evidence of record establishes claimant's entitlement to benefits. If the new evidence does not establish the existence of pneumoconiosis, the administrative law judge must deny benefits 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge