BRB No. 01-0485 BLA

LEON S. CRIHFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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-Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0429) of Administrative Law Judge Robert J. Lesnick 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).[1] The administrative law judge found that the instant claim constituted

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

a duplicate claim[2] and that claimant established a coal mine employment history of at least nineteen years. Finding that the evidence established a material change in conditions, the administrative law judge considered the claim on the merits and found: that claimant established the existence of pneumoconiosis based upon the weight of the medical opinion evidence; that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment and that the presumption was not rebutted; and that claimant established the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were awarded.

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim for benefits on November 14, 1991, which was denied by the Department of Labor on April 30, 1992, on the basis of claimant failing to establish any of the elements of entitlement. Director's Exhibit 31. No further action was taken until claimant filed a second claim on November 22, 1996, and on March 21, 1997, the Department of Labor again found that claimant failed to establish any of the elements of entitlement. Director's Exhibit 32. Accordingly, the claim was denied on the basis of claimant having failed to establish a material change in conditions. Director's Exhibit 32. Claimant filed the instant claim on March 1, 1999. Director's Exhibit 1. After denial by the district director, Director's Exhibit 18, a hearing was held. On January 22, 2001, the administrative law judge issued the Decision and Order-Awarding Benefits from which employer now appeals.

On appeal, employer contends that the administrative law judge erred in failing to consider the newly submitted evidence, *i.e.*, that evidence submitted subsequent to the prior denial, in a manner consistent with the holding in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997).[3] Employer further asserts that the administrative law judge erred in finding that claimant established the presence of pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis. In response, claimant urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[4]

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

Employer first contends that the administrative law judge's finding of a material change of conditions is contrary to the holding of the Fourth Circuit in *Rutter, supra*, because the administrative law judge failed to weigh and discuss sufficiently the newly submitted evidence when he determined that it supported a finding of material change, and instead, made only a cursory determination that such evidence established a material change in conditions without sufficient explanation or rationale.

The determination of whether claimant has established a material change in conditions is a threshold issue and must be resolved by the administrative law judge before proceeding to a review of the merits of entitlement. *See Rutter, supra*. In considering whether a material change in conditions has been established, the administrative law judge must consider the

[3] Because the instant claim arises within the Fourth Circuit, the law of that circuit is controlling. *See* 33 U.S.C. §921(c); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entirety of the newly submitted evidence in order to determine whether claimant has established at least one of the elements of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(d)(2000); *Rutter, supra*.

In the instant case, the administrative law judge determined that the district director should have found a material change in conditions established because qualifying blood gas study evidence had been submitted in support of the present claim, Decision and Order at 6, and further concluded that "based upon [his] independent review of the new evidence,...such evidence clearly establishes a material change in condition (*i.e.*, the development of a totally disabling respiratory or pulmonary impairment)." Decision and Order at 6. As employer contends, however, this finding is conclusory because it fails to provide any explanation as to the weight accorded the relevant evidence. Further, while finding that qualifying blood gas study evidence supports a finding of total disability, the administrative law judge did not weigh or discuss the newly submitted evidence which was non-qualifying as is required by *Rutter, supra*. Accordingly, the administrative law judge's finding on material change does not meet the standard set forth in *Rutter* or the standard set forth by the Administrative Procedure Act (the 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), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Id.* We, therefore, vacate the administrative law judge's finding on material change and remand the case to the administrative law judge for further consideration of whether the newly submitted medical evidence establishes a material change in conditions pursuant to Section 725.309(d)(2000). If, on remand, the administrative law judge determines that claimant has established a material change in conditions he must again consider the merits of entitlement in a manner discussed, *infra*.

In order to avoid repetition of error on remand, we next address the other allegations of error made by employer. Employer asserts that, in considering the claim on the merits, the administrative law judge erred in finding that claimant established the existence of pneumoconiosis by: discounting the negative x-ray evidence; rejecting the opinion of Dr. Fino; rejecting the opinion of Dr. Zaldivar; relying on opinions of Drs. Rasmussen and Ranavaya; and failing to weigh all of the evidence relevant to the existence of pneumoconiosis in a manner consistent with the holding of the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), which requires that all evidence relevant to the existence of pneumoconiosis be weighed together before finding the existence of pneumoconiosis established at Section 718.202(a).

In considering the evidence of pneumoconiosis, the administrative law judge found that inasmuch as the x-ray evidence neither precluded nor established the existence of pneumoconiosis, pneumoconiosis was not established at Section 718.202(a)(1), and

inasmuch as there was no autopsy or biopsy evidence and claimant was not entitled to any of the presumptions found at Section 718.304-306, pneumoconiosis was not established pursuant to Section 718.202(a)(2)-(3). Turning to the medical opinion evidence at Section 718.202(a)(4), however, the administrative law judge found that the medical opinions of Drs. Rasmussen and Ranavaya established the existence of pneumoconiosis because they were better reasoned and documented than those of Drs. Zaldivar and Fino. Specifically, the administrative law judge found the opinions of Drs. Rasmussen and Ranavaya better reasoned and documented because they were:

> more consistent with claimant's complaints of worsening shortness of breath, as corroborated by the testimony of his wife and reported medical histories, claimant's history of significant coal dust exposure in 19 years of mining, abnormal physical findings reported on almost all of the physical examinations, the absence of bullous emphysema on almost all of the x-ray interpretations except for those made by Dr. Zaldivar, and the worsening clinical test results over time.

Decision and Order at 15.

Contrary to employer's argument, the administrative law judge reasonably found that the negative x-ray evidence did not preclude a finding of pneumoconiosis inasmuch as some of the x-rays were read positive for the existence of pneumoconiosis and the negative x-ray readings were inconsistent as to whether the x-ray films were completely negative, or showed some abnormalities, such as bullae and emphysema. *See* Decision and Order at 14. Likewise, we reject employer's argument that the administrative law judge erred in discounting the opinion of Dr. Zaldivar for the reasons given. Contrary to employer's argument, the administrative law judge could permissibly accord less weight to Dr. Zaldivar's opinion because he found that it unsupported by the objective testing of record and more weight to the opinions of Drs. Rasmussen and Ranavaya as he found them better supported by the evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(*en banc*); *Carpeta v. Mathies Co.*, 7 BLR 1-145, n.2 (1988); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1294 (1984).

Employer argues that the administrative law judge in the case at bar repeated the error of the administrative law judge in *Milburn Colliery v. Hicks*, 138 F.2d 524, 21 BLR 2-324 (4th Cir. 1998), when he credited the opinion of Dr. Rasmussen over that of Dr. Zaldivar, to find that claimant had established the existence of pneumoconiosis and total respiratory disability. Employer's reliance on *Hicks* is misplaced. The *Hicks* court held that the administrative law judge erred in finding total respiratory disability established by crediting Dr. Rasmussen's opinion over that of Dr. Zaldivar (claimant disabled by heart disease).

Unlike the evidence in *Hicks*, evidence in the case at bar included, *inter alia*, pulmonary function studies and diagnoses of a pulmonary impairment by both Drs. Rasmussen and Zaldivar. In addition, the administrative law judge in the case at bar, unlike the administrative law judge in *Hicks*, found "abnormal physical findings reported on almost all of the physical examinations," Decision and Order at 15 (emphasis added). Further, while the *Hicks* court held that the administrative law judge's reliance, in part, on x-ray evidence to judge the credibility of the physicians' opinions was misplaced because the issue involved was total disability, *Hicks* at 534, 2-337; the administrative law judge's reliance in the case at bar on the fact that Dr. Zaldivar's x-ray finding of bullous emphysema was at odds with the interpretations "on almost all of the [other] x-ray interpretations" Decision and Order at 15 (emphasis added), was relevant to a determination regarding the existence of pneumoconiosis. *See Compton*, *supra*; *Fuller*, *supra*; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 382 n.4 (1983). Thus, the *Hicks* court's concern, that there was no rational basis to find claimant's disabling breathing problems caused by a pulmonary impairment rather than heart disease is not present in the instant case.

The administrative law judge's reason for according less weight to the opinion of Dr. Fino, however, is not apparent from the record. Contrary to the administrative law judge's finding, it is not clear that Dr. Fino relied heavily on Dr. Zaldivar's opinion of no pneumoconiosis. Rather, as employer contends, Dr. Fino's opinion appears to be a complete and independent assessment of the evidence he reviewed. Employer's Exhibit 3. Accordingly, inasmuch as the basis of the administrative law judge's finding regarding Dr. Fino's opinion is unexplained and that finding affects the consideration of the medical opinion evidence, the administrative law judge's determination at Section 718.202(a)(4) must be vacated and the case remanded for the administrative law judge to reconsider the opinion of Dr. Fino along with the other evidence of record. *Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 706 (1985); *see also Compton*, *supra*. Likewise, because it is unclear as to whether the administrative law judge weighed all the relevant evidence on the existence of pneumoconiosis in this case, *i.e.*, x-ray evidence along with medical opinion evidence, in determining that the existence of pneumoconiosis was established and because he stated only that pneumoconiosis was established at Section 718.202(a)(4), we vacate the administrative law judge's finding at Section 718.202(a)(4) and remand for the administrative law judge to consider the x-ray evidence and the medical opinion evidence together in determining whether the existence of pneumoconiosis was established at Section 718.202(a). *Compton*, *supra*.

Employer next asserts that the administrative law judge erred in concluding that the medical opinion evidence supported a finding of total disability because the administrative law judge failed to make the necessary finding regarding the exertional requirements of claimant's usual coal mine employment and to compare such requirements with the

physicians' assessments of claimant's ability to do that work. We agree. While the administrative law judge concluded that claimant's last usual coal mine job was as a general inside laborer, he did not determine the exertional level requirements of that job and compare them to the physicians' assessments of claimant's ability to do that job. This error necessitates remand. *See Hvizdak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Daniel v. Westmoreland Coal Co.*, 5 BLR 1-196, 1-220 (1982); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988);*Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

Employer further argues that the administrative law judge erred in rejecting the opinion of Dr. Zaldivar because Dr. Zaldivar mistakenly characterized claimant's last employment as that of a "shot firer," while crediting the opinion of Dr. Rasmussen, who also characterized claimant's last coal mine employment as that of a "shot firer." Employer's Brief at 15; Employer's Exhibit 8; Director's Exhibit 13. We agree. This is error which requires remand. *Tackett, supra*. Since Dr. Zaldivar characterized claimant's last coal mine employment as requiring moderate exertion, while Dr. Rasmussen characterized it as requiring heavy manual labor, *see* Employer's Exhibit 8; Director's Exhibit 13, it is particularly important that the administrative law judge consider the physicians' knowledge of claimant's last, usual coal mine employment in conjunction with their knowledge of the exertional requirements of that employment in order to make a credibility assessment of the physicians' respective opinions. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). On remand, the administrative law judge must reconsider these physicians' opinions, together with any other relevant, physicians' opinions regarding claimant's ability to do his usual coal mine employment.

In reconsidering the medical opinion evidence, the administrative law judge must, of course, weigh it with "the majority of non-qualifying pulmonary function studies, and the mixed arterial blood gas studies," Decision and Order at 18, in determining whether total disability is established. 20 C.F.R. §718.204(b)(2)(iv); *see Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987).

Employer also argues that the administrative law judge erroneously relied upon an irrebuttable presumption that pneumoconiosis is progressive to find total disability established, *i.e.*, the administrative law judge relied on the more recent medical opinion evidence in view of the progressive nature of pneumoconiosis. Further, employer, while acknowledging that revised Section 718.201(c) provides that pneumoconiosis is progressive and latent, nonetheless argues that that regulation should not be applied as it is subject to the preliminary injunction order granted by the United States District Court in *National Mining*

Ass'n v. Chao, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, however, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). Accordingly, we reject employer's argument that the revised regulation defining pneumoconiosis as progressive and latent is invalid and that the Department of Labor lacked authority to promulgate such a presumption. *See Chao*, *supra*; *see also Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977); *see generally Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 258-59, 22 BLR 2-93 (4th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302 (4th Cir. 1998); *Hicks*, *supra*; *Adkins v. Director, OWCP*, 958 F.2d 49, 51, 12 BLR 2-313 (4th Cir. 1992); *Greer v. Director, OWCP*, 940 F.2d 88, 90, 15 BLR 2-167 (4th Cir. 1991); *Hamrick v. Schweiker*, 679 F.2d 1078, 1081, 4 BLR 2-110 (4th Cir. 1982); *Prater v. Harris*, 620 F.2d 1074, 1082 (4th Cir. 1980); *Barnes v. Mathews*, 562 F.2d 278, 279 (4th Cir. 1977).

Finally, employer contends that the administrative law judge erred in finding causation established for the same reasons he found pneumoconiosis established. Specifically, the errors alleged are: crediting the opinions of Drs. Rasmussen and Ranavaya that pneumoconiosis played a role in claimant's totally disabling respiratory impairment without providing any explanation as to why the opinions of these physicians were well-reasoned and documented when the physicians failed to explain the bases for their conclusions; rejecting the opinion of Dr. Zaldivar that pneumoconiosis played no role in claimant's totally disabling respiratory impairment because Dr. Zaldivar's findings were not supported by the record; and rejecting Dr. Fino's opinion because it relied on Dr. Zaldivar's opinion.

Because the administrative law judge's findings regarding the existence of pneumoconiosis have been vacated in part, and the case remand for reconsideration of that issue, if reached, we must also remand for reconsideration of the evidence on causation, if reached, pursuant to the standard set forth at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order- Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge