BRB No. 02-0351 BLA

SCOTT A. WOODS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CLINCHFIELD 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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-BLA-0518) of Administrative Law Judge Daniel F. Solomon rendered 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] Claimant's initial application for benefits filed on October 26, 1983 was denied

by an administrative law judge because the evidence did not establish that claimant was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 22-1, 22-119.

The Board affirmed the denial of benefits on July 23, 1997. *Woods v. Clinchfield Coal Co.*, BRB No. 96-1653 BLA (Jul. 23, 1997)(unpub.); Director's Exhibit 22-121. On March 28, 2000, claimant filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000).

The administrative law judge credited claimant with nineteen years of coal mine employment pursuant to the parties' stipulation and found that the medical evidence developed since the denial of claimant's first claim established that claimant is totally disabled by a respiratory or pulmonary impairment. Consequently, the administrative law judge found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). *See 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). Considering the merits of the claim, the administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis, but that the medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge further found that claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. The administrative law judge ordered employer to pay benefits augmented for two dependents, claimant's wife and daughter.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established. Employer further asserts that the administrative law judge made several errors in weighing the medical opinions regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and did not weigh all the relevant evidence together to determine whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a). Additionally, employer contends that the administrative law judge erred in his analysis of the evidence regarding disability causation pursuant to 20 C.F.R. §718.204(c), and erred in augmenting benefits for two dependents. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this 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 supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Rutter, supra*. If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Claimant's first claim was denied because the record did not establish a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge had to consider whether the evidence developed since the prior denial established that claimant is totally disabled.

Employer contends that the administrative law judge erred in finding a material change in conditions established because he did not accept the previous administrative law judge's finding regarding the physical requirements of claimant's usual coal mine employment when he evaluated the new medical opinions. Employer's Brief at 2-5. This contention has merit. Under the "one-element" standard, the final denial and "its necessary factual underpinning" must be accepted as correct for purposes of assessing the new evidence for a material change in conditions. *Rutter*, 86 F.3d at 1361, 20 BLR at 2-232. In the first claim, the administrative law judge weighed conflicting evidence regarding the requirements of claimant's coal mine work as a shuttle car operator and found that it required "predominately [sic] light to sedentary work with only very limited somewhat heavy exertion." Director's Exhibit 22-119 at 2. Comparing those requirements to the limitations set forth in the medical opinions, the previous administrative law judge found that claimant was not totally disabled. *Id*. at 3. Upon consideration of claimant's appeal, the Board affirmed the administrative law judge's finding as to the nature of claimant's coal mine work and the finding that total disability was not

established. Director's Exhibit 22-121 at 4-5. Because claimant did not appeal or request modification, the denial became final. *See* 20 C.F.R. §§725.309(d); 725.310.

In the duplicate claim, Judge Solomon reconsidered the exertional evidence that was weighed by the first administrative law judge in the first claim. Judge Solomon credited claimant's May 5, 1993 hearing testimony, discounted by the first administrative law judge, that he frequently had to lift and carry oil drums, roof bolt bundles, and bags of rock dust. Decision and Order at 20-21. Judge Solomon then compared those exertional requirements with the physical limitations contained in the new medical opinions of Drs. Hippensteel and Rasmussen and found that "claimant has established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). . . ." Decision and Order at 21.

Contrary to the administrative law judge's analysis, the prior decision denying benefits became final and therefore, that decision and "its necessary factual underpinning" are presumed to be correct for purposes of considering a material change in conditions. *Rutter,* 86 F.3d at 1361, 20 BLR at 2-232. Consequently, the current administrative law judge was not free to disregard the prior finding as to the nature of claimant's coal mine work. *Rutter, supra*; *cf*. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-29 (4th Cir. 1993)(within the one-year modification period, administrative law judge may rethink prior factual findings). Because the material change in conditions finding was based on the administrative law judge's improper reconsideration of the exertional requirements finding made in the prior decision, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d)(2000) and remand this case for further consideration. For purposes of assessing the new evidence for a material change in conditions, the administrative law judge must accept the correctness of the prior finding of the specific requirements of claimant's job as a shuttle car operator. *See Rutter, supra*. However, we reject employer's contention that a finding of a material change in conditions is precluded because Drs. Hippensteel and Rasmussen relied on descriptions of claimant's coal mine work that the previous administrative law judge rejected. Employer's Brief at 4. On remand, the administrative law judge may compare their opinions with the exertional requirements of claimant's coal mine employment as found by the first administrative law judge to determine whether total disability, and thus a material change in conditions, is established. *See Scott v. Mason Coal Co*., 14 BLR 1-37, 1-41 (1990)(*en banc*); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, 1-51-52 (*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). If so, the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Rutter, supra*.

On the merits of entitlement pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge did not provide a valid reason for

discrediting Dr. Hippensteel's opinion that claimant does not have pneumoconiosis. Employer's Brief at 7-18. Upon review of the administrative law judge's Decision and Order, we agree with employer that the administrative law judge mischaracterized Dr. Hippensteel's opinion and misapplied *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) to discount his opinion.

Dr. Hippensteel, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader of chest x-rays, examined and tested claimant and reviewed most of the medical evidence of record. Employer's Exhibits 1, 27. He concluded that claimant does not have pneumoconiosis but has a severe pulmonary impairment due to the effects of heavy, ongoing cigarette smoking and the partial destruction of his lung tissue by a necrotizing pneumonia. Employer's Exhibit 1 at 3, 14; Employer's Exhibit 27 at 7-23.

Citing *Warth*, the administrative law judge discounted Dr. Hippensteel's opinion as based on the assumption that a miner must have restrictive lung disease in order to have pneumoconiosis. Decision and Order at 30. Review of Dr. Hippensteel's testimony, however, reflects his statements that coal mine dust exposure can cause a purely obstructive lung impairment and that pneumoconiosis may occur even absent a restrictive lung disease. Employer's Exhibit 27 at 15, 32-34. Because Dr. Hippensteel did not assume that coal mine dust exposure cannot cause <u>obstructive</u> disorders, and based his opinion regarding the etiology of claimant's lung disease only in part on the absence of a restrictive impairment, his opinion should not have been discredited under *Warth*. *See Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 341, 20 BLR 2-246, 2-254-55 (4th Cir. 1996).

Additionally, as employer contends, the administrative law judge discredited Dr. Hippensteel's opinion on the ground that he assumed that the presence of smoking-related lung disease and fungal infection precluded any impact by coal dust on claimant's lungs, when in fact Dr. Hippensteel acknowledged that these diagnoses did not automatically exclude pneumoconiosis. Employer's Exhibit at 34, 37. Further, substantial evidence does not support the administrative law judge's finding that Dr. Hippensteel "admit[ted] that it is possible that all of his opinions are incorrect." Decision and Order at 31. Dr. Hippensteel was unequivocal in stating that, "with a reasonable degree of medical certainty," based on "all of [the] factors put together in this case," claimant's lung disease is unrelated to coal mine dust exposure. Employer's Exhibit 27 at 22. Finally, as employer argues, the administrative law judge improperly discounted Dr. Hippensteel's opinion because Dr. Hippensteel relied in part on a diffusing capacity test. Decision and Order at 29 n.35; *see Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-24-25 (4th Cir. 1991)(the results of a diffusing capacity test properly reported and validated by a qualified physician may form the basis for a physician's opinion). Because the

administrative law judge mischaracterized Dr. Hippensteel's opinion when discrediting it as "undermined by false assumptions," Decision and Order at 31, and discounted his opinion for reasons that are not in accordance with law, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and instruct him to reconsider Dr. Hippensteel's opinion on remand. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998)(administrative law judge must give valid reasons both for crediting certain medical opinions and for discrediting others).

Employer argues that the administrative law judge did not weigh together all relevant evidence of pneumoconiosis. Employer's Brief at 22. Pursuant to 20 C.F.R. §718.202(a), the different categories of medical evidence must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 186, --- BLR --- (4th Cir. 2002); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Here, the administrative law judge found the existence of pneumoconiosis established based on the medical opinions alone without weighing the chest x-rays and medical opinions together. Therefore, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a) and remand this case for him to weigh all of the relevant evidence together. *See Held, supra*; *Compton, supra*.

Employer also challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). It is apparent from the Decision and Order that the administrative law judge's mischaracterization of Dr. Hippensteel's opinion at 20 C.F.R. §718.202(a)(4) affected his analysis of Dr. Hippensteel's and Dr. Rasmussen's conflicting opinions at disability causation. Decision and Order at 34-35. Additionally, as employer contends, substantial evidence does not support the administrative law judge's findings that Dr. Hippensteel "fail[ed] to set forth any legitimate reasons for ruling out coal dust exposure as a cause or aggravation" of claimant's total disability , and "offer[ed] no medical findings to justify" his disability causation opinion. Decision and Order at 34. Review of Dr. Hippensteel's report and deposition testimony reflects that he set forth medical rationales for his conclusion that claimant's respiratory impairment is unrelated to his coal mine employment. Employer's Exhibits 1, 27. Because the administrative law judge did not provide a valid rationale for discrediting Dr. Hippensteel's opinion, *see Hicks, supra*, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Finally, employer contends that the administrative law judge erred in augmenting benefits for two dependents. Employer's Brief at 29. If on remand the administrative law judge finds entitlement established, he must reconsider whether

or not benefits should be augmented for dependents.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge