BRB No. 03-0368 BLA

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| RAYMOND M. GARNEY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 02/06/2004 |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Michael J. Rutledge (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-5031) of Administrative Law Judge Robert D. Kaplan 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] After crediting claimant with eight and one-half years of coal mine employment based upon the parties' stipulation, the administrative law judge considered this claim, a duplicate claim which was filed on April 3, 2001, pursuant to the applicable regulations at 20 C.F.R. Part 718.[2] The administrative law judge found that the parties stipulated that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the Director conceded that claimant established total disability pursuant to 20 C.F.R. §718.204(b), and that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Based upon a review of all of the evidence of record, the

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[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 on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed an initial claim on July 12, 1974. Director's Exhibit 14. The claim was denied on May 12, 1980 by the district director, who found that claimant failed to establish the existence of pneumoconiosis, total disability and total disability due to pneumoconiosis. *Id*. Claimant filed a second claim on May 17, 1993, which the district director denied on January 13, 1994 upon determining that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. *Id*. Claimant filed a third claim on January 26, 1995. *Id*. In a Decision and Order dated December 12, 1996, the administrative law judge found that the Director, Office of Workers' Compensation Programs, conceded that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge found that claimant established, therefore, a material change in conditions under 20 C.F.R. §725.309 (2000). The administrative law judge further found the evidence of record insufficient to establish, however, total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, the administrative law judge denied benefits. *Id*. The Board affirmed the administrative law judge's decision denying benefits. *Garney v. Director, OWCP*, BRB No. 97-0576 BLA (Jan. 6, 1998)(unpublished). Subsequently, the United States Court of Appeals for the Third Circuit summarily affirmed the Board's Decision and Order. *Garney v. Director, OWCP*, No. 98-3059 (3d Cir. July 10, 1998)(unpublished). On May 14, 1999, claimant filed a request for modification. Director's Exhibit 14. By letter dated June 8, 2000, claimant advised the administrative law judge that he wished to withdraw his claim. *Id.* By Order dated June 20, 2000, the administrative law judge granted claimant's motion to withdraw his claim. *Id*. Claimant thereafter filed the instant duplicate claim on April 3, 2001. Director's Exhibit 1.

administrative law judge further found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge then determined that the evidence of record was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits. On appeal, claimant argues that the administrative law judge erred in discounting Dr. Levinson's opinion with regard to disability causation at Section 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to vacate the administrative law judge's finding pursuant to Section 718.204(c), and to reconsider Dr. Levinson's opinion thereunder on remand.[3]

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).

On appeal, claimant contends that the administrative law judge improperly discounted, as unreasoned, Dr. Levinson's medical opinion that claimant's totally disabling pulmonary impairment was caused by his pneumoconiosis. The Director states that claimant's contention on appeal has merit, and contends that the Board should remand the case for the administrative law judge to reconsider Dr. Levinson's opinion. We agree. Dr. Levinson examined claimant on November 9, 2000, diagnosed claimant with pneumoconiosis, and opined that claimant's pulmonary impairment is totally disabling. Director's Exhibit 10. Dr. Levinson further opined that claimant's impairment was caused by his underlying coal workers' pneumoconiosis. *Id.* Sixteen months later, in a biopsy report prepared by Dr. Rostock, dated April 9, 2002, claimant was first diagnosed with lung cancer. Claimant's Exhibit 1. Stating that claimant's lung cancer was likely present but undetected at the time of Dr. Levinson's November 2000 examination, the administrative law judge determined that there was a "gap in [Dr. Levinson's] knowledge about [c]laimant's condition." Decision and Order at 8. The administrative law judge rejected Dr. Levinson's opinion as "unreasoned" solely on this ground. *Id*. We agree with claimant and the Director that it was irrational for the administrative law judge to reject Dr. Levinson's opinion as unreasoned on

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[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings under 20 C.F.R. §§718.202(a), 718.203(c), 718.204(b), 718.304 and 725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2, 4-6.

the basis that Dr. Levinson was unaware of a lung cancer diagnosis which had not yet been made. The record does not include evidence that claimant's cancer was present at the time of Dr. Levinson's examination, and the administrative law judge's determination that claimant's cancer was "likely present" at that time amounts to speculation, unsupported by substantial evidence in the record. We vacate, therefore, the administrative law judge's basis for rejecting Dr. Levinson's opinion under Section 718.204(c),[4] and remand the case for the administrative law judge to reconsider whether Dr. Levinson's opinion is sufficient to establish that claimant's pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary impairment pursuant to Section 718.204(c).[5]

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[4]With regard to the other medical opinion evidence of record, the administrative law judge found that the medical opinions of Drs. Carozza, Cali, Talati, Aquilina, Myers and Potoski do not support a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 7-10; Director's Exhibits 5, 14, 16. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5]Revised Section 718.204(c) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Accordingly, the administrative law judge=s Decision and Order Denying 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

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge