BRB No. 05-0532 BLA

STEVEN D. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 02/22/2007
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6703) of Administrative Law Judge Thomas M. Burke awarding benefits 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). This case involves a claim filed on September 4, 2003. After crediting claimant with thirteen and one-half years of coal mine employment, the administrative law judge considered whether the evidence established the existence of pneumoconiosis. The administrative law judge found that while the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the medical opinion evidence established the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a)(4).[1] In weighing all of the relevant evidence together pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that claimant's entitlement to benefits is precluded as a matter of law because it was claimant's incarceration, not his pneumoconiosis, that prevented him from performing his coal mine employment. Alternatively, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that claimant's incarceration precludes his entitlement to benefits. In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[1] The administrative law judge properly found that x-ray and medical opinion evidence were the only means available to claimant to prove the existence of pneumoconiosis. Decision and Order at 7. Because there is no biopsy evidence of record, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3). Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Citing *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer contends that claimant's incarceration precludes an award of benefits.[2] Employer contends that the evidence demonstrates that claimant was "prevented" from working because he had to go to jail. Claimant's Brief at 12. Employer further notes that the record contains "uncontradicted evidence establishing that [claimant's] incarceration resulted in his termination from work before any doctor identified any respiratory or pulmonary impairment, let alone the existence of pneumoconiosis." *Id.*

We reject employer's contention that the administrative law judge erred in failing to consider whether claimant's incarceration precludes an award of benefits. In *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255 (2003), the Board declined to apply *Foster* and *Vigna* in cases such as this one, which arise outside the jurisdiction of the United States Court of Appeals for the Seventh Circuit. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not adopted the holding of the Seventh Circuit in *Foster* and *Vigna*, that a claimant is prohibited from establishing entitlement to benefits if he suffered from a pre-existing nonrespiratory disability. Moreover, even if *Foster and Vigna* were applicable, a period of incarceration does not constitute a "pre-existing nonrespiratory disability."

Alternatively, employer argues that the administrative law judge committed numerous errors in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[3] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In finding that the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge stated that he did "not find the opinions of Drs. Zaldivar and Tuteur sufficiently persuasive to outweigh the opinions of Drs. Eziri, Gaziano, Kingsley, and Forman." Decision and Order at 9.

---

[2] On his application for benefits, claimant indicated that his last day of coal mine employment was September 13, 1985. Director's Exhibit 2. Claimant indicated that he had been discharged due to absenteeism. *Id.* At the hearing claimant explained that his absenteeism was the result of a prison sentence. Transcript at 29-30.

[3] "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).

Employer initially argues that the administrative law judge erred in his consideration of the opinions of Drs. Foreman and Kingsley.[4] In his consideration of the opinions of Drs. Foreman and Kingsley, the administrative law judge stated:

> Dr. Foreman attributed Claimant's pulmonary problems to his coal mine employment (CX 6). Dr. Foreman, and his associate Dr. Kingsley, are Claimant's treating physicians. They have seen Claimant on several occasions and documented Claimant's multiple problems. They described Claimant as a non-smoker and noted his past coal mine employment.

Decision and Order at 7-8.

Employer argues that the administrative law judge erred in not considering whether the opinions of Drs. Foreman and Kingsley are sufficiently reasoned. We agree. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge erred in failing to address whether the opinions of Drs. Foreman and Kingsley are sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer also argues that the administrative law judge erred in his consideration of Dr. Gaziano's opinion. Dr. Gaziano examined claimant on April 8, 2004. In a report dated May 4, 2004, he diagnosed coal workers' pneumoconiosis. Claimant's Exhibit 1. Because Dr. Gaziano's only cardiopulmonary diagnosis was "coal workers' pneumoconiosis,"[5] his opinion supports a finding of "clinical pneumoconiosis," not

---

[4] In an Office Note dated November 11, 2003, Dr. Kingsley noted that claimant had a history of "black lung disease." Claimant's Exhibit 6. In an Office Note dated January 6, 2005, Dr. Foreman listed claimant's problems as: COPD, black lung, diabetes, exogenous obesity and hypertension. Claimant's Exhibit 6. In a January 28, 2005 letter addressed to "Whom It May Concern," Dr. Foreman stated:

> [Claimant] has severe underlying COPD related to black lung disease and does have a mining history. He has well documented obstructive and restrictive respiratory deficits and I think he will be unable to adequately use a breathalyzer and that is the reason he had trouble over the Christmas holiday. With his maximal effort he is unable to breath out air forcefully.

Claimant's Exhibit 5.

[5] Dr. Gaziano did not diagnose any other lung diseases. *See* Claimant's Exhibit 1.

"legal pneumoconiosis."[6] *See* 20 C.F.R. §718.201. Consequently, the administrative law judge erred in not separately considering whether Dr. Gaziano's opinion, when weighed against the conflicting evidence of record, established the existence of "clinical pneumoconiosis."

The administrative law judge properly noted that Dr. Gaziano's diagnosis of coal workers' pneumoconiosis was based upon the doctor's positive interpretation of claimant's April 8, 2004 x-ray and claimant's history of coal mine employment. Decision and Order at 7. Although the administrative law judge noted that the equally-qualified experts disagreed as to whether the x-ray evidence established the existence of pneumoconiosis, the administrative law judge did not address how this fact affected the weight accorded to Dr. Gaziano's opinion.[7] *See Compton*, 211 F.3d at 210-11, 22 BLR 2-173-74.

Employer next contends that the administrative law judge erred in his consideration of Dr. Eziri's opinion. Dr. Eziri examined claimant on October 21, 2003. In a report dated October 21, 2003, Dr. Eziri diagnosed, *inter alia*, obstructive airway disease. Director's Exhibit 12. Dr. Eziri attributed claimant's cardiopulmonary diagnosis to his occupational history since claimant "is a non-smoker." *Id.* In crediting Dr. Eziri's opinion, the administrative law judge noted that Drs. Gaziano, Kingsley, and Foreman each reported that claimant was a non-smoker. Decision and Order at 8. Employer, however, argues that that the administrative law judge erred in failing to address whether Dr. Eziri's basis for attributing claimant's obstructive airway disease to his coal mine employment is sufficiently reasoned. We agree. While claimant's lack of a smoking history supports a finding that claimant's lung disease was not due to cigarette smoking, the administrative law judge must determine whether Dr. Eziri's opinion attributing claimant's obstructive airway disease to his coal mine employment is reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

---

[6] The administrative law judge noted that Dr. Gaziano checked a box indicating that claimant suffered from an occupational lung disease which was caused by his coal mine employment. Decision and Order at 7. However, because Dr. Gaziano's only cardiopulmonary diagnosis was "coal workers' pneumoconiosis," Dr. Gaziano's checkmark reflects his opinion as to the cause of claimant's coal workers' pneumoconiosis, not a separate diagnosis of "legal pneumoconiosis."

[7] The administrative law judge also erred in finding that Dr. Gaziano's diagnosis of clinical pneumoconiosis supported the opinions of those physicians who diagnosed only legal pneumoconiosis. *See* 20 C.F.R. §718.201.

Employer further argues that the administrative law judge failed to properly weigh the evidence regarding claimant's smoking history. The record contains conflicting evidence regarding claimant's smoking history. The administrative law judge properly noted that Drs. Eziri, Gaziano, Foreman, and Kingsley each reported that claimant was a non-smoker.[8] Decision and Order at 8. However, both Drs. Zaldivar and Tuteur questioned claimant's reported smoking history in light of the results of claimant's carboxyhemoglobin tests.[9]

In weighing the conflicting smoking history evidence, the administrative law judge accurately noted that Dr. Tuteur suggested that there were other reasons, besides smoking, that could account for claimant's elevated carboxyhemoglobin test results. While Dr. Tuteur opined that there were other factors that could account for claimant's elevated carboxyhemoglobin test results, Dr. Tuteur, nevertheless, indicated that claimant's test results "were in the range of a current smoker." Employer's Exhibit 5. The opinions of Drs. Zaldivar and Tuteur indicate that claimant's self-reported history of non-smoking is questionable in light of claimant's elevated carboxyhemoglobin test results. The administrative law judge failed to address the significance of the fact that Drs. Eziri, Gaziano, Foreman, and Kingsley did not discuss claimant's elevated carboxyhemoglobin test results. Thus, on remand, the administrative law judge should address the effect of claimant's elevated carboxyhemoglobin test results on the weight accorded the medical opinion evidence.

---

[8] Dr. Eziri reported that claimant never smoked. Director's Exhibit 12. Dr. Gaziano reported no history of tobacco use. Claimant's Exhibit 1. In his Office Notes, Dr. Kingsley noted that claimant was a non-smoker. Claimant's Exhibit 6. Dr. Foreman also noted that claimant did not smoke. *Id.*

[9] Dr. Zaldivar stated that:

> The carbon monoxide level obtained by Dr. Gaziano on 04/08/2004 was 5.3% which is that of a smoker of at least three-quarters of a pack of cigarettes per day to one pack of cigarettes per day. This level is too high for secondhand smoke.

Employer's Exhibit 4. In reviewing claimant's smoking history, Dr. Tuteur noted that claimant's carboxyhemoglobin levels, when measured in December of 2003 and April of 2004, "were in the range of a current smoker." Employer's Exhibit 5. However, Dr. Tuteur acknowledged that "other exposures to products of combustion and/or abnormal hemoglobin metabolism may be responsible for such measurements." *Id.*

Employer finally argues that the administrative law judge erred in his consideration of Dr. Tuteur's opinion. In a report dated May 16, 2005, Dr. Tuteur stated:

> [Claimant] does not have classic medical coal workers' pneumoconiosis of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities, impairment of lung function, or most likely radiographic change. Yet, [claimant] does have a primary pulmonary process characterized by airflow obstruction and associated with breathlessness, cough and expectoration. This fits into the category of the COPD phenotype. Assigning etiology of the COPD phenotype in this case is not possible because of the conflicting data with respect to smoking cigarettes and the existence of multiple other factors that contribute to breathlessness including morbid obesity, uncontrolled hypertension, poorly controlled diabetes mellitus, and past history of alcohol use. When data that further clarifies these factors (measurement of serum or urine cotinine, control of hypertension, control of diabetes mellitus, and improvement of his obese status), reevaluation of the assignment of etiology for the COPD phenotype, if still present, could take place with greater accuracy.

Employer's Exhibit 5.

The administrative law judge discredited Dr. Tuteur's opinion because the doctor did not include coal mine employment as a possible cause of claimant's chronic obstructive pulmonary disease. The administrative law judge stated that coal mine dust exposure, like smoking, is a potentially damaging exposure "that would have to factor into [Dr. Tuteur's] reassessment of the etiology of [c]laimant's pulmonary disease." Decision and Order at 9. Dr. Tuteur, however, acknowledged that "the chronic obstructive pulmonary disease (COPD) phenotype regularly associated with chronic cigarette smoking may be the result of the chronic inhalation of coal mine dust." Employer's Exhibit 5. Dr. Tuteur, however, noted that "the latter occurs very infrequently while the former occurs in 20% of chronic cigarette smokers." *Id.* Dr. Tuteur ultimately concluded that the conflicting data in this case made the task of assigning an etiology to claimant's chronic obstructive pulmonary disease impossible. *Id.* The administrative law judge failed to consider the effect of Dr. Tuteur's opinion, that it is not possible to address the cause of claimant's chronic obstructive pulmonary disease in the absence of additional medical data, on the remaining medical opinion evidence of record. If Dr. Tuteur's opinion is credited, none of the physicians of record could accurately address the cause of claimant's chronic obstructive pulmonary disease in the absence of additional medical data. Consequently, the administrative law judge should address the significance of Dr. Tuteur's opinion in his weighing of the relevant medical opinion evidence.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge should separately consider whether the medical opinion evidence establishes the existence of "clinical pneumoconiosis" and "legal pneumoconiosis." On remand, should the administrative law judge find that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), before determining whether the evidence establishes the existence of pneumoconiosis. *Compton*, 211 F.3d at 210-11, 22 BLR 2-173-74.

Because the administrative law judge must reevaluate whether the medical evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c).

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

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge