BRB No. 08-0376 BLA

W.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/19/2009
NATIONAL MINES CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

W.D., Adah, Pennsylvania, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (2006-BLA-05190) of Administrative Law Judge Thomas M. Burke rendered on a claim filed on April 8, 2004, 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] Director's Exhibit 2. The administrative law judge credited claimant with

[1] Because claimant's coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

sixteen years of coal mine employment and determined that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R §718.204(b). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by not crediting the opinion of Dr. Jaworski, that he suffers from pneumoconiosis, over the contrary opinions of the "Company Doctors." Claimant's Appeal Letter (Feb. 22, 2008). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless requested to do so by the Board.

In an appeal filed by a claimant, without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In this case, the administrative law judge denied benefits because he found that claimant failed to establish the existence of pneumoconiosis. The regulation at 20 C.F.R. §718.202 provides four alternative methods by which a claimant may establish the existence of pneumoconiosis. They are: 1) chest x-rays; 2) biopsy or autopsy; 3) the presumptions contained at 20 C.F.R. §§718.304, 718.305 or 718.306; or 4) a physician's reasoned medical judgment, notwithstanding a negative x-ray, that a claimant suffers from pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4). The United States Court of

[2] We affirm the administrative law judge's finding of sixteen years of coal mine employment and his finding that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), as those findings are not adverse to claimant and are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Appeals for the Third Circuit has held that all relevant evidence is to be considered together, rather than separately within discrete subsections of 20 C.F.R. §718.202(a)(1)-(4), in determining whether claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Initially, we hold that the administrative law judge properly found that the record contains no biopsy evidence as to the presence or absence of pneumoconiosis and that the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable to this claim.[3] *See* 20 C.F.R. §718.202(a)(2)-(3); Decision and Order at 8-9. Thus, we affirm the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3).

Under 20 C.F.R. §718.202(a)(1), administrative law judge properly found that the record consists of five readings of three x-rays dated December 2, 2004, March 9, 2005 and November 8, 2006. Decision and Order at 7. Of the five readings, there were four negative readings for pneumoconiosis and one reading for quality only. Director's Exhibits 18-20, 22; Employer's Exhibit 1. Because there are no positive readings for pneumoconiosis contained in the record, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4] *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon*.).

With respect to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Jaworski, Renn and Fino. The administrative law judge correctly

[3] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e). Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[4] Pursuant to 20 C.F.R. §718.107, claimant may establish the existence of pneumoconiosis based on other evidence not specifically provided for in 20 C.F.R. §718.202(a). We affirm the administrative law judge's finding at 20 C.F.R. §718.107 that the CT scan evidence is insufficient to establish the existence of pneumoconiosis since Dr. Hayes read a CT scan dated January 29, 2004, as showing advanced bullous emphysema with no parenchymal evidence for pneumoconiosis. Decision and Order at 7; Employer's Exhibit 3. Similarly, Dr. Wiot read a CT scan dated March 25, 2007 as showing severe emphysema but not pneumoconiosis. Decision and Order at 7; Employer's Exhibit 7.

found that none of these physicians diagnosed that claimant has clinical pneumoconiosis.[5] Decision and Order at 8; Director's Exhibits 15, 20, 21; Employer's Exhibits 1, 4, 8. In considering whether claimant was able to establish legal pneumoconiosis,[6] the administrative law judge assigned little weight to Dr. Jaworski's opinion that claimant suffers from chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure. The administrative law judge explained:

> Little weight is given to the opinion of Dr. Jaworski. Dr. Jaworski testified that he believed coal dust exposure contributed to the [c]laimant's emphysema because there was evidence of airway obstruction. Dr. Jaworski further stated, "there's evidence that shows coal dust exposure *may* cause airway obstruction similar to cigarette smoking." [Emphasis added] ([Employer's Exhibit] 4, p. 46]). Dr. Jaworski, however, was unable to identify anything about the *[c]laimant's* case, other than his exposure to coal mine dust, that would lead him to conclude that coal dust was a contributing factor ([Employer's Exhibit] 4, p. 47]). Dr. Jaworski uses the proposition that coal dust *may* cause airway obstruction to suggest that it *is* a contributing factor in [c]laimant's case. Dr. Jaworski's opinion is based on possibilities as he was unable to determine whether the *[c]laimant's* emphysema was caused by *hi*s coal dust exposure. Dr.

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[5] Under 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[6] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

> Jaworski also stated that [claimant's] "youth exposure" made coal dust exposure a contributing factor, but he failed to explain such reasoning. As such Dr. Jaworski's opinion is not well reasoned, and it is, therefore, entitled to little weight.

Decision and Order at 8 (emphasis in the original).

In contrast, the administrative law judge gave controlling weight to the opinions of Drs. Renn and Fino because he found that they were better reasoned and better supported by the objective evidence. *Id*. The administrative law judge determined that Dr. Renn's opinion was well-reasoned, noting that Dr. Renn based his diagnosis that claimant has COPD due to smoking, on his review of claimant's "exposure histories, the objective medical evidence of record, and his examination of [c]laimant." *Id*. With respect to Dr. Fino, the administrative law judge stated:

> Dr. Fino was also able to rule out coal dust as a causative factor in claimant's emphysema. Dr. Fino cited to extensive medical literature and applied the findings of the referenced studies to [claimant's] case. Dr. Fino explained that [c]laimant lost seven (7) percent more FEV1 than he would have had he not been exposed to coal dust. Dr. Fino further explained that the [c]laimant "would be as disabled even if you could give him back that 7 percent of FEV1 . . ." ([Employer's Exhibit] 8, p. 17). Thus, [c]laimant's loss of FEV1 due to smoking was so severe that even if he had never been exposed to coal dust, he would currently be disabled. Dr. Fino was also able to rule out coal dust exposure by examining the [c]laimant's exposure histories; sixteen (16) years of coal mine employment versus a forty (40) pack year smoking history. Thus, based on a review of the medical literature applied to [c]laimant and the objective evidence of record, Dr. Fino was able to conclude that the [c]laimant did not have legal pneumoconiosis.

Decision and Order at 8. Thus, because the administrative law judge credited the opinions of Drs. Renn and Fino, the administrative law judge determined that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Based on our review of the administrative law judge's Decision and Order, the evidence of record, and the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), we are compelled to vacate the denial of benefits. We conclude that the administrative law judge erred in failing to properly explain the weight he accorded the conflicting medical opinions, as required by the Administrative Procedure Act (APA), 5

U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

In considering whether claimant established the existence of legal pneumoconiosis, the administrative law judge failed to properly explain the basis for his finding that Dr. Renn's opinion is reasoned. Dr. Renn examined claimant on March 9, 2005 and prepared three reports dated April 18, 2005, June 17, 2005 and March 18, 2007. In each of these reports, after listing the objective evidence, Dr. Renn either summarily stated that, "it is within a reasonable degree of medical certainty" that claimant's emphysema is unrelated to coal dust exposure, or he indicated that his opinion has not changed. Director's Exhibits 20, 21; Employer's Exhibit 2.

The mere fact that an opinion is asserted to be based upon medical studies cannot, by itself, establish that it is documented and reasoned. To make that determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective findings upon which the medical opinion or conclusion is based. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In this case, the administrative law judge erred in finding Dr. Renn's opinion to be well-reasoned without first determining the rationale, if any, Dr. Renn provided for his conclusion that claimant's COPD (emphysema) is unrelated to coal dust exposure during more than sixteen years of coal mine employment. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields*, 10 BLR at 1-21.

Furthermore, the administrative law judge erred in his treatment of Dr. Jaworski's opinion that claimant's moderately severe COPD was caused by "cigarette smoking with significant contribution of coal dust exposure." Director's Exhibit 15 at 4. As grounds for assigning Dr. Jaworski's opinion less weight, the administrative law judge stated that Dr. Jaworski's opinion was "based on possibilities" and not on the record evidence because the doctor testified that his opinion was based on claimant's coal mine history and "evidence that shows that coal dust exposure may cause airway obstruction similar to cigarette smoking." Employer's Exhibit 4 at 46.

The administrative law judge has failed to recognize that Dr. Jaworski, like Dr. Renn, based his opinion, that claimant has legal pneumoconiosis, on his review of claimant's work and smoking histories, the objective evidence demonstrating an obstructive respiratory condition, and the results of his own physical examination of claimant. Director's Exhibit 15. Because the administrative law judge applied an inconsistent standard in assessing whether Dr. Jaworski's opinion was reasoned, in comparison to Dr. Renn's opinion, we vacate the administrative law judge's credibility findings as applied to both physicians at Section 718.202(a)(4).

Furthermore, although the administrative law judge found that Dr. Jaworski's opinion is "based on possibilities as he was unable to determine whether [claimant's] emphysema was due to coal dust exposure, the administrative law judge's analysis does not reflect consideration of Dr. Jaworski's complete deposition testimony. In attributing claimant's respiratory condition primarily to smoking, but with a contribution from coal dust exposure, Dr. Jaworski specifically explained that it is not medically feasible to distinguish between an obstructive respiratory condition due to either smoking or coal dust exposure. Employer's Exhibit 4 at 45. Dr. Jaworski further testified that "with a reasonable degree of medical certainty there [is] a contribution [from coal dust exposure[,]" to claimant's COPD, although "the exact degree of the contribution, I can't' really estimate." Employer's Exhibit 4 at 53. Comments to the revised regulations reveal that the Department of Labor agrees with the scientific evidence referenced by Dr. Jaworski that smoking and coal dust exposure can impair the lungs similarly, causing an obstructive impairment. *See* 65 Fed. Reg. 79943 (Dec. 20, 2000). They point out that courts have recognized that a claimant should not be denied benefits because a physician is unwilling or unable to state the exact degree of impairment caused by pneumoconiosis. *See* 65 Fed. Reg. 79946 (Dec. 20, 2000).[7]

On remand, the administrative law judge should consider the comments to the revised regulations in determining whether Dr. Jaworski's opinion is reasoned and sufficient to support a finding that claimant has legal pneumoconiosis. The administrative law judge is further instructed to consider Dr. Jaworski's credentials in assessing the weight to accord his opinion at 20 C.F.R. §718.202(a)(4).

Lastly, the administrative law judge erred in his consideration of whether Dr. Fino provided a reasoned opinion as to whether claimant suffers from legal pneumoconiosis. When asked to explain why he opined that claimant's COPD (emphysema) was due to smoking and not coal dust exposure, Dr. Fino explained that "the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." Employer's Exhibit 1. Dr. Fino further testified:

> I'm not ruling out coal dust-related pneumoconiosis on the basis of negative radiographic studies. However, when I see his work history versus his smoking history, when I know what the statistics say, and here's someone who has a negative chest x-ray and, in fact, even has a negative CT – and that's very significant since CT's will pick up pneumoconiosis

[7] The administrative law judge noted that Drs. Renn and Fino have "excellent qualifications to render an opinion[,]" as to the existence of legal pneumoconiosis, since both are Board-certified in internal and pulmonary medicine. Decision and Order at 8. The administrative law judge, however, did not discuss Dr. Jaworski's credentials.

> much earlier than chest x-rays, - [then] I would not expect this man to have any more than the average loss of FEV-1 that you could see in a miner.

Employer's Exhibit 1. Dr. Fino also referenced several articles in support of his opinion: an article by Dr. Banks, for the proposition that the relationship between dust exposure and emphysema is "stronger" if clinical pneumoconiosis is present; an article by Dr. Ruckley stating, that "in the absence of clinical coal workers' pneumoconiosis, there [is] no increased incidence of emphysema . . . [and] emphysema due to coal workers' pneumoconiosis [is] directly related to clinical coal workers' pneumoconiosis noted pathologically;" and an article by Dr. Leigh, suggesting that "it is very helpful to estimate the amount of clinical pneumoconiosis present" in order to assess the contribution of coal dust exposure to a miner's emphysema.[8] Employer's Exhibit 1 at 16.

The Department of Labor has recognized that coal mine dust exposure can cause obstructive lung disease, separate and distinct from clinical pneumoconiosis. *See* 65 Fed. Reg. 79938-45. (Dec. 20, 2000). The regulation at 20 C.F.R. §718.202(a)(4) provides that "[a] determination of the existence of pneumoconiosis may …be made if a physician, exercising sound medical judgment, *notwithstanding a negative x-ray*, finds that the miner suffers or suffered from pneumoconiosis as defined in Sec. 718.201." 20 C.F.R. §718.202(a)(4) (emphasis added). In addition, 20 C.F.R. §718.201(a)(2) defines legal pneumoconiosis as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment," which "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Because the administrative law judge failed to properly consider whether Dr. Fino's opinion is consistent with the prevailing view of the Department of Labor, that legal pneumoconiosis may be diagnosed, notwithstanding a negative x-ray for clinical pneumoconiosis, the administrative law judge's decision to credit Dr. Fino's opinion at 20 C.F.R. §718.202(a)(4) is vacated. On remand the administrative law judge must further consider whether Dr. Fino provided a reasoned opinion as to the existence of legal pneumoconiosis. *See generally Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 222 BLR 2-265 (7th Cir. 2001).

[8] Dr. Fino explained that the assessment of clinical pneumoconiosis is made by "standard medical testing procedures" such as x-rays and lung volume studies. Employer's Exhibit 1 at 16.

Additionally, we note that while Dr. Fino emphasized that claimant would still be +-disabled by smoking even if he had not been exposed to coal dust, the issue at 20 C.F.R. §718.202(a)(4) is whether claimant's respiratory condition is due, at least, in part, to coal dust exposure. The administrative law judge should address whether Dr. Fino's diagnosis of a seven percent decline in claimant's FEV1 from coal dust exposure is supportive of a finding that claimant has a chronic lung disease due to coal dust exposure, without regard to whether that condition is disabling.

Therefore, based on the administrative law judge's errors in weighing the conflicting medical opinions, and his failure to adequately explain the basis for his credibility determinations under the APA, we vacate the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must conduct a full and comparative weighing of all relevant evidence in order to determine whether the evidence of record is sufficient to establish the existence of legal pneumoconiosis. In so doing, the administrative law judge must reconsider the opinions of Drs. Jaworski, Fino and Renn and determine whether each opinion is reasoned and documented. *Kertesz v. Crescent Hills Coal Co*., 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). If the administrative law judge finds that the existence of legal pneumoconiosis has been demonstrated under 20 C.F.R. §718.202(a)(4), he must then determine whether the evidence, considered as a whole, is sufficient to establish the existence of the disease. *Williams*, 114 F.3d at 23, 21 BLR at 2-108. If necessary, the administrative law judge must also determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and whether claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See* 20 C.F.R. §718.204(c)(1). In addressing all of the issues of claimant's entitlement, the administrative law judge must set forth his findings of fact and the bases for his credibility determinations, in detail, as required by APA, taking into account the quality of the reasoning provided by each of the physicians. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order - Denying 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.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge