BRB No. 08-0426 BLA

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<tr><td>D.H.

Claimant-Respondent

v.

COASTAL COAL COMPANY, LLC

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 02/12/2009

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-5355) of Administrative Law Judge Ralph A. Romano 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). Claimant's prior application for benefits, filed on May 21, 1991, was finally denied on October 31, 1991, because claimant failed to establish any element of entitlement. Director's Exhibit 1. On November 21, 2005, claimant filed his current application, which is considered a "subsequent claim for

benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order dated February 22, 2008, the administrative law judge credited claimant with thirty-two years of coal mine employment,[1] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the new medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(4), 725.309(d). On the merits of entitlement, employer further asserts that the administrative law judge erred in his evaluation of the pulmonary function study and medical opinion evidence relevant to the existence of total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). Finally, employer challenges the administrative law judge's findings regarding the cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer filed a reply to claimant's response. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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).

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[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's finding of thirty years of coal mine employment is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Initially, we address employer's contention that the administrative law judge erred in his evaluation of the new medical opinion evidence in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4). Employer contends that the administrative law judge's determination to accord greater weight to the opinion of Dr. Rasmussen, that claimant has pneumoconiosis, than to the contrary opinion of Dr. Jarboe, fails to comply with 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). Employer's Brief at 8-23. In addition, employer contends that the administrative law judge failed to properly consider the physicians' relevant qualifications, and failed to consider their opinions in light of the predominantly negative x-ray evidence and the medical treatment notes that are largely devoid of diagnoses of pneumoconiosis. Some of employer's contentions have merit.

The administrative law judge considered the reports of Drs. Rasmussen and Jarboe. Dr. Rasmussen diagnosed pneumoconiosis by x-ray, due to coal dust exposure, and chronic obstructive pulmonary disease (COPD) and emphysema due to a combination of coal dust exposure and smoking. Director's Exhibits 15, 19; Claimant's Exhibit 2. Dr. Jarboe diagnosed chronic bronchitis related to cigarette smoking, and possible intrinsic asthma, and opined that claimant does not have coal workers' pneumoconiosis or any coal dust-related pulmonary disease or impairment. Director's Exhibit 20; Employer's Exhibit 2. Based on his review of the medical opinions, the administrative law judge stated:

> I find Dr. Rasmussen's opinion is not [sic] reasoned and not [sic] well-documented. An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. Dr. Rasmussen based his opinion on Claimant's coal mine employment and smoking histories, the physical examinations, Claimant's symptoms, and objective medical

> testing. The physician also provided a thorough discussion of his reasoning and conclusions. Therefore, I find Dr. Rasmussen's opinion that Claimant has pneumoconiosis is entitled to substantial weight.
>
> I find Dr. Jarboe's opinion is not reasoned and not documented. A medical opinion that is undocumented or unreasoned may be given little or no weight. Dr. Jarboe did not adequately explain [why] Claimant's pulmonary condition was not significantly related to, or substantially aggravated by, dust exposure during Claimant's [thirty-two] years in coal mine employment. Therefore, I find Dr. Jarboe's opinion that Claimant does not have pneumoconiosis is entitled to no weight.

Decision and Order at 9-10 (citations omitted). Consequently, the administrative law judge concluded that the medical opinion evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 10.

Employer specifically contends that the administrative law judge erred in discrediting the opinion of Dr. Jarboe, that claimant does not suffer from any coal mine dust-related disease or impairment. Employer asserts that Dr. Jarboe fully explained why claimant's objective test results supported his conclusions that claimant's impairment was due to smoking, and not coal dust exposure, and the administrative law judge failed to set forth why he found Dr. Jarboe's explanation to be inadequate. Moreover, employer contends, the administrative law judge failed to consider Dr. Jarboe's August 10, 2006 deposition testimony, in which the physician further explained his conclusions. We agree.

First, as employer argues, the administrative law judge failed to consider Dr. Jarboe's deposition testimony, which was identified on employer's Evidence Summary Form, in accordance with the evidentiary limitations at 20 C.F.R. §725.414(c),[3] and

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[3] Contrary to claimant's contention, Dr. Jarboe's deposition does not constitute a third, inadmissible, medical report. The regulation at 20 C.F.R. §725.414(c) provides that "a physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing . . . or by deposition." Because employer has submitted Dr. Jarboe's written reports as its affirmative evidence, Dr. Jarboe's deposition testimony is properly of record. Moreover, the regulations further provide that "a physician whose testimony is permitted . . . may testify as to any other [admissible] medical evidence of record . . . ." 20 C.F.R. §725.457(d). Thus, contrary to claimant's contention, the administrative law judge may consider Dr. Jarboe's testimony regarding the medical studies obtained by Dr. Rasmussen.

admitted into evidence at the hearing.[4] Hearing Transcript at 5. Thus, the administrative law judge's Decision and Order fails to comport with the requirement of 30 U.S.C. §923(b) that the administrative law judge consider all of the relevant evidence of record. *See Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). As the administrative law judge failed to consider Dr. Jarboe's deposition testimony, we must vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and thereby established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and remand this case for further consideration and discussion of all the relevant new medical opinion evidence.

On remand, although the administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In discussing Dr. Jarboe's report, the administrative law judge acknowledged that Dr. Jarboe based his opinion, that claimant does not have pneumoconiosis, on the pulmonary function testing demonstrating a well-preserved forced vital capacity, significant reversible airway disease, and a very large residual volume, results that Dr. Jarboe opined are not characteristic of coal dust exposure. However, in discrediting Dr. Jarboe's conclusions, the administrative law judge did not explain why he found Dr. Jarboe's reasoning to be inadequate. Therefore, the administrative law judge, on remand, must explain his findings as to Dr. Jarboe's opinion. *See Wojtowicz*, 12 BLR at 1-165.

In addition, the administrative law judge must reconsider the opinion of Dr. Rasmussen. We initially reject employer's contention that Dr. Rasmussen's opinion, that both smoking and coal dust contributed to claimant's pulmonary impairment, is not legally sufficient to meet claimant's burden of proof. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). In addition, a determination of whether Dr. Rasmussen's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). However, we agree with employer that the administrative law judge's crediting of Dr. Rasmussen is inadequately explained. First, as employer contends, the administrative law judge began his analysis

[4] Dr. Jarboe's deposition is contained in Director's Exhibit 23.

of Dr. Rasmussen's opinion by stating that his opinion was "not reasoned and not well-documented." Decision and Order at 9. While, as claimant contends, the context of the administrative law judge's decision supports the conclusion that this was an editorial error, on remand, the administrative law judge should rectify this error. Claimant's Brief at 12. In addition, while the administrative law judge correctly found that Dr. Rasmussen diagnosed both clinical and legal pneumoconiosis, in finding that Dr. Rasmussen's opinion "establishe[d] the presence of pneumoconiosis," the administrative law judge did not identify whether he was crediting Dr. Rasmussen's opinion as to the existence of clinical pneumoconiosis, legal pneumoconiosis, or both. *See* 20 C.F.R. §718.201(a)(1), (2).

Thus, on remand, the administrative law judge should reconsider all of the relevant new medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4), address the explanations provided by the physicians, and fully set forth his reasons for crediting or discrediting their opinions as to the existence of clinical and legal pneumoconiosis. *See McCune*, 6 BLR at 1-988. In so doing, the administrative law judge should consider the physicians' credentials, the quality of their reasoning, and whether their reports are supported by the remaining evidence of record, including the negative x-ray evidence and medical treatment notes.[5] *See* 30 U.S.C. §923(b); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)*; Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002)*; Rowe*, 710 at 255 n.6, 5 BLR at 2-103 n.6. If the administrative law judge on remand finds that the new evidence establishes pneumoconiosis and a change in an applicable condition of entitlement, he must then consider all of the evidence on the merits to determine whether claimant has established entitlement to benefits.

Should the administrative law judge again reach the merits of entitlement, in the interest of judicial economy, we briefly address employer's arguments regarding the issue of whether claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). First, regarding the administrative law judge's evaluation of the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i), on remand, the administrative law judge must explain his determination that "the weight of the pulmonary function study evidence may support a finding of total disability," in light of

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[5] The administrative law judge found that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge summarized the medical treatment notes of record, but he did not state what weight, if any, he accorded to the diagnoses contained therein. Contrary to employer's contention, however, the administrative law judge is not required to accord significant probative value to the medical treatment notes. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

the fact that the record contains one qualifying[6] pre-bronchodilator study, and two studies that produced non-qualifying results both pre-bronchodilator and post-bronchodilator. *See Rowe*, 710 at 255 n.6, 5 BLR at 2-103 n.6; Employer's Brief at 23-26. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), and instruct him to reconsider the pulmonary function studies and explain his finding.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), we reject employer's assertion that the administrative law judge erred in finding that claimant's usual coal mine work involved heavy manual labor. Employer's Brief at 26. Contrary to employer's assertion, the administrative law judge did not rely on the statement of exertional requirements provided by Dr. Rasmussen, but rationally determined that claimant's coal mine employment constituted heavy work based on claimant's written statement and his deposition testimony. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 3; Director's Exhibits 5, 32. The administrative law judge also permissibly determined that the newly submitted opinion of Dr. Rasmussen was better reasoned, based on the administrative law judge's finding that claimant's coal mine employment required heavy work, and Dr. Rasmussen's assessment that claimant's mild respiratory impairment would prevent him from performing heavy manual labor. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath*, 12 BLR 1-6; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry*, 9 BLR 1-1; Decision and Order at 14; Director's Exhibits 15, 18; Claimant's Exhibit 2. In addition, the administrative law judge permissibly discredited the opinion of Dr. Jarboe, that claimant's mild impairment is not totally disabling, in part because he based his opinion on an inaccurate account of the exertional requirements of claimant's last coal mine employment. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; Decision and Order at 14-15.

Because the administrative law judge on remand must reconsider the pulmonary function study evidence, we vacate the administrative law judge's overall finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). On remand, after reconsidering the pulmonary function study evidence, the administrative law judge must weigh the contrary probative evidence together, including the pulmonary function studies, blood gas studies, and the medical opinions of Drs. Jarboe and Rasmussen, to determine whether claimant has established the existence of a totally disabling respiratory

[6] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

impairment. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR at 1-113; Decision and Order at 15; Employer's Brief at 25. Moreover, because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his determination that claimant's total disability is due to pneumoconiosis, and instruct the administrative law judge to reconsider this issue on remand, 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 to the administrative law judge 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