BRB No. 10-0314 BLA

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| DONALD E. GILBERT | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | DATE ISSUED: 02/18/2011 |
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| CONSOLIDATION COAL COMPANY | ) | |
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| and | ) | |
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| CONSOL ENERGY, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-<br>Petitioners | ) | |
| | ) | |
| 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (08-BLA-5982) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.§§921(c)(4) and 932(*l*)). The administrative law judge credited claimant with thirty years of coal mine employment, as stipulated by the parties.[2] The administrative law judge found that the new x-ray and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that the x-ray and medical opinion evidence established clinical pneumoconiosis under Section 718.202(a)(1),(4).[3] The administrative law judge further found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and, that claimant is totally disabled by a respiratory or pulmonary impairment, due to clinical pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that claimant established clinical pneumoconiosis pursuant to Section 718.202(a), both at Section 725.309(d), and on the merits. Employer further asserts that the administrative law judge did not consider all of the relevant evidence when he found that claimant's clinical pneumoconiosis arose out of coal mine employment, at Section 718.203(b).

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[1] Claimant's prior claim, filed on January 22, 2002, was denied on May 21, 2004 by an administrative law judge, who found that claimant established total disability, but did not establish the existence of pneumoconiosis. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Gilbert v. Consolidation Coal Co*., BRB Nos. 04-0672 BLA, 04-0672 BLA-A (May 31, 2005)(unpub.). Claimant filed his current claim on November 1, 2007. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Hearing Transcript at 16. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *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." 20 C.F.R. §718.201(a)(1).

Additionally, employer alleges error in the administrative law judge's findings that claimant is totally disabled, and that his total disability is due to clinical pneumoconiosis, pursuant to Section 718.204(b)(2),(c). Finally, employer indicates that this case is potentially affected by a recent amendment to the Act that was enacted by Section 1556 of Public Law No. 111-148. Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. Claimant, therefore, states that there is no need to remand this case for the administrative law judge to consider the claim under the recent amendment to the Act. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief addressing the merits of this case, but has submitted a brief asserting that, if the Board does not affirm the award of benefits, it must remand this case to the administrative law judge for consideration under the recent amendment to the Act.[4]

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).

Based on the parties' statements and our review, we conclude that this case is potentially affected by Section 1556. As will be discussed below, we cannot affirm the administrative law judge's award of benefits. Because we must remand this case for the administrative law judge to reconsider whether claimant has established a change in the applicable condition of entitlement, and his entitlement to benefits, we will also instruct the administrative law judge, on remand, to consider this case in light of the applicable amendment to the Act.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the

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[4] The recent amendments to the Act apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides, in relevant part, that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). 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 the existence of pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3). Under the law of the United States Court of Appeals for the Fourth Circuit, the administrative law judge had to weigh together all of the relevant new evidence presented under Section 718.202(a) to determine whether it established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

The administrative law judge first considered whether eleven interpretations of five new x-rays established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Dr. Schaaf, a B reader, read the September 27, 2007 x-ray as positive for pneumoconiosis, while Dr. Wiot, a Board-certified radiologist and B reader, read this x-ray as negative for pneumoconiosis. Director's Exhibit 18; Employer's Exhibit 7. Drs. Ahmed and Muchnok, both Board-certified radiologists and B readers, read the December 20, 2007 x-ray as positive for pneumoconiosis, while Dr. Wiot read the same x-ray as negative for pneumoconiosis.[5] Director's Exhibits 12, 22, 23. Dr. Ahmed read the August 5, 2008 x-ray as positive for pneumoconiosis, while Dr. Rosenberg, a B reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Ahmed, and Dr. Fino, a B reader, read the November 4, 2008 x-ray as positive for pneumoconiosis.[6] Claimant's Exhibit 4; Employer's Exhibit 5; Employer's Exhibit 9 at 28. Finally, Dr. Muchnok read the January 21, 2009 x-ray as positive for pneumoconiosis, while Dr. Meyer, a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 10.

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[5] Dr. Gaziano, a B reader, reviewed the December 20, 2007 x-ray to assess its film quality only. Director's Exhibit 12.

[6] The record reflects that, although Dr. Fino included comments as to the cause of the small opacities that he classified as "1/1" on the November 4, 2008 x-ray, he stated that his x-ray reading was a positive reading under the ILO classification system. Employer's Exhibit 9 at 28. Moreover, on appeal, employer does not challenge the administrative law judge's finding that Dr. Fino's x-ray reading was positive for pneumoconiosis under 20 C.F.R. §718.202(a)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Considering the x-ray readings and the readers' radiological qualifications, and according greater weight to the readings by dually-qualified readers, the administrative law judge found that the September 27, 2007 x-ray was "slightly negative" for pneumoconiosis, as it was read as negative for pneumoconiosis by a dually-qualified reader, and positive for pneumoconiosis by a B reader. Decision and Order at 9. He next found that the December 20, 2007 x-ray was positive for pneumoconiosis, because it was read as positive by two dually-qualified readers, but negative for pneumoconiosis by one such reader. The administrative law judge found that the August 5, 2008 x-ray was "slightly positive," as it was read as positive by a dually-qualified reader, but negative for pneumoconiosis by a B reader. *Id*. Further, the administrative law judge found that the November 4, 2008 x-ray was positive for pneumoconiosis, as it was read as positive by both a dually-qualified reader, and a B reader. Finally, he found that the January 21, 2009 x-ray was inconclusive for the existence of pneumoconiosis, as it was read as both positive and negative by equally qualified readers. Based on this analysis of the individual x-rays, the administrative law judge found that the overall weight of the new x-ray evidence is positive for pneumoconiosis.

Employer argues that the administrative law judge did not explain his analysis of the new x-ray evidence. Employer's Brief at 11. Employer further contends that claimant received an unfair advantage with respect to the December 20, 2007 x-ray, provided by the Department of Labor as part of claimant's complete pulmonary evaluation. *Id.* Specifically, employer alleges that claimant was allowed to submit Dr. Ahmed's positive reading in rebuttal to Dr. Muchnok's positive reading submitted by the Director, resulting in two positive readings for claimant. *Id.* Additionally, employer alleges that the administrative law judge failed to consider all of the relevant evidence. *Id.* Employer's contentions lack merit.

Contrary to employer's initial contention, the administrative law judge explained that he weighed the conflicting readings of each new x-ray, based on the readers' qualifications, and that he accorded greater weight to the readings by dually-qualified physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 9. Further, the Board has rejected the argument that allowing a claimant to submit a positive reading in rebuttal to the Department of Labor physician's positive reading necessarily places the employer at an unfair disadvantage. *J.V.S.* [*Stowers*] *v. Arch of W.Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 n.5 (2008). Therefore, we reject employer's identical argument regarding the December 20, 2007 x-ray. Additionally, employer incorrectly argues that the administrative law judge erred in failing to consider the negative x-ray readings from claimant's prior claim, along with the new x-ray evidence. At this stage of the administrative law judge's analysis, only new evidence developed since the denial of claimant's prior claim was relevant to whether claimant established a change in the applicable condition of entitlement. *See* 20 C.F.R.

§725.309(d)(3). Therefore, we reject employer's arguments, and affirm the administrative law judge's finding that the new x-ray evidence is positive for pneumoconiosis under Section 718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge considered new medical opinions from Drs. Knight, Saludes, Schaaf, Fino, and Rosenberg regarding whether claimant has pneumoconiosis. Drs. Knight, Saludes, and Schaaf diagnosed claimant with clinical coal workers' pneumoconiosis, based on his x-ray findings and coal mine employment history. Director's Exhibits 12, 18; Claimant's Exhibit 2. Drs. Fino and Rosenberg opined that claimant does not have clinical coal workers' pneumoconiosis. Employer's Exhibits 1, 5, 9, 12. More specifically, Dr. Fino opined that, although claimant's x-ray is abnormal and may reflect an "interstitial pulmonary process," it is not a process related to coal mine dust exposure. Employer's Exhibit 9 at 9-10. Dr. Fino explained that claimant's x-ray opacities are not consistent with those that are caused by coal mine dust, claimant lacks any ventilatory impairment and, although claimant has hypoxemia, Dr. Fino would expect the hypoxemia to be more severe if claimant had clinical pneumoconiosis. *Id*. at 13, 15-18. Dr. Rosenberg opined that claimant has no x-ray findings of clinical coal workers' pneumoconiosis or any interstitial lung disease, and suffers from hypoxemia that is due solely to obesity and heart disease. Employer's Exhibits 1, 12.

After summarizing the physicians' opinions, the administrative law judge found that, "[b]ased on the x-ray evidence and the majority of the physician's reports," claimant established the existence of clinical pneumoconiosis. Decision and Order at 10. Employer argues that the administrative law judge's finding is inadequately explained, as the administrative law judge did not analyze the documentation and reasoning of the physicians' opinions, or assess the physicians' credentials. Employer's Brief at 14. We agree.

An administrative law judge must resolve the conflicts in the medical evidence and must explain his reasons for both crediting and discrediting medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Hall v. Director, OWCP*, 12 BLR 1-80, 1-81-82 (1988). Here, the administrative law judge did not make any relevant findings regarding the comparative quality of the physicians' opinions. Therefore, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4), and remand this case to the administrative law judge for further consideration of whether the new medical opinions establish the existence of pneumoconiosis. On remand, the administrative law judge must resolve the conflict in the medical opinions, taking into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See*

*Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Because we have vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), we also vacate his finding that the new x-ray and medical opinion evidence establish the existence of pneumoconiosis, and a change in the applicable condition of entitlement, pursuant to Sections 718.202(a), 725.309(d). On remand, in determining whether the new evidence establishes the existence of pneumoconiosis and a change in the applicable condition of entitlement, the administrative law judge must weigh all of the new evidence together pursuant to Section 718.202(a), *see Compton*, 211 F.3d at 211, 22 BLR at 2-174, and explain his findings.

## Merits of Entitlement

Although we are remanding this case for the administrative law judge to reconsider the threshold issue of whether claimant has established a change in the applicable condition of entitlement, in the interest of judicial economy, we will briefly address certain issues raised by employer regarding the merits of entitlement. Initially, we reject employer's argument that the administrative law judge erred in his analysis of all of the x-ray evidence, old and new, when he found the existence of clinical pneumoconiosis established under Section 718.202(a)(1). Contrary to employer's contention, the administrative law judge reasonably found that the predominantly negative x-ray evidence associated with claimant's prior claim merited less weight, as it was five to nineteen years older than the new, positive x-ray evidence. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66.

We agree with employer, however, that when considering all of the medical opinion evidence under Section 718.202(a)(4) on the merits, the administrative law judge did not explain his basis for finding that the opinions of Drs. Schaaf and Saludes were the most probative, or explain his reasons for discrediting the medical opinions of Drs. Fino and Rosenberg. Further, he did not discuss and weigh Dr. Altmeyer's opinion diagnosing claimant with asbestosis unrelated to coal mine employment. Claimant's Exhibit 3; Director's Exhibit 1. If, on remand, the administrative law judge reaches the merits, he must discuss all relevant evidence and provide a sufficient rationale for his credibility determinations, when considering the medical opinions as to the existence of pneumoconiosis. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 275-76.

## 20 C.F.R. §718.203(b) – Causation of Clinical Pneumoconiosis

Employer challenges the administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Employer argues that the administrative law judge failed to address the

medical opinions of Drs. Fino, Rosenberg, and Altmeyer, stating that claimant's x-ray changes are due to diseases other than clinical pneumoconiosis. The administrative law judge's decision contains no discussion of whether employer rebutted the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment. Decision and Order at 12. If this issue is reached on remand, the administrative law judge must discuss and weigh all relevant evidence, including the opinions of Drs. Altmeyer, Fino, and Rosenberg, in determining whether employer has rebutted the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b).

**20 C.F.R. §718.204(b)(2) - Total Disability**

The administrative law judge found that all of the physicians who addressed the issue agree that claimant is totally disabled from a pulmonary standpoint. Decision and Order at 12. Employer's sole argument is that "[t]here is controversy as to whether or not [c]laimant has disabling pulmonary disease," based on the opinions of Drs. Fino and Rosenberg. Employer's Brief at 18, 19. This contention lacks merit. Drs. Fino and Rosenberg specifically opined that claimant suffers from a totally disabling respiratory impairment. Employer's Exhibit 1 at 10; Employer's Exhibit 9 at 22; Employer's Exhibit 12 at 22, 43. As employer raises no further arguments regarding the administrative law judge's finding, on the merits, that claimant is totally disabled pursuant to Section 718.204(b)(2), that finding is affirmed.

**20 C.F.R. §718.204(c) - Total Disability Due to Clinical Pneumoconiosis**

Employer further challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a), we also vacate the finding that claimant's total disability is due to pneumoconiosis. If the disability causation issue is reached, on remand, the administrative law judge must discuss and weigh all relevant evidence under Section 718.204(c). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990).

**Application of Section 411(c)(4)**

Because this claim was filed after January 1, 2005, and claimant was credited with thirty years of coal mine employment, the administrative law judge, on remand, must consider whether the evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine

whether the medical evidence rebuts the presumption. The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. We also deny employer's request to hold this case in abeyance.

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 proceedings 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