BRB No. 13-0208 BLA

PAUL W. HEPLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/10/2014
	)	
GILBERTON COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5196) of Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant

to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a subsequent claim filed on January 21, 2009.[2]

After crediting claimant with no more than eleven years of coal mine employment,[3] the administrative law judge found that claimant could not invoke the rebuttable presumption, under Section 411(c)(4) of the Act, that he is totally disabled due to pneumoconiosis.[4] However, the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(c).[5] Consequently, the administrative law judge considered

[1] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[2] Claimant's three previous claims, filed on August 4, 1978, July 3, 1990, and April 19, 2004, were each denied because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2, 61.

[3] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 5, 7. Accordingly, 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).

[4] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a claimant is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The implementing regulation is set forth at 20 C.F.R. §718.305.

[5] After the administrative law judge issued his decision, the Department of Labor revised 20 C.F.R. §725.309. The provisions that were applied by the administrative law judge at 20 C.F.R. §718.309(d) are now set forth in identical form, at 20 C.F.R.

claimant's 2009 claim on the merits. The administrative law judge further found that the evidence as a whole established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2013), the administrative law judge found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c) (2013). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013). Employer also argues that the administrative law judge erred in finding that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2013). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

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. §§718.202, 718.203, 718.204 (2013). 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(c); *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(c)(3). Claimant's prior claim was denied because he did not establish any element of entitlement. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his 2009 claim. 20 C.F.R. §725.309(c).

Employer argues that the administrative law judge erred in finding that the

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§725.309(c). 78 Fed. Reg. 59,102, 59, 118 (Sept. 25, 3013) (to be codified at 20 C.F.R. §725.309(c)).

evidence established the existence of clinical pneumoconiosis.[6] The administrative law judge found that new x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2013).[7] Decision and Order at 6-7. The administrative law judge next considered the three new medical opinions from Drs. Talati, Kraynak, and Hertz. Drs. Talati and Kraynak diagnosed clinical pneumoconiosis, Director's Exhibit 12; Claimant's Exhibits 11, 14, while Dr. Hertz opined that claimant does not suffer from the disease. Employer's Exhibits 4, 6. The administrative law judge found that the opinions of all three physicians were entitled to "little weight."[8] *Id.* at 11.

[6] "Clinical pneumoconiosis" consists of "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] The record contains one new x-ray taken on May 12, 2009. While Drs. Scott and Wheeler, both of whom are B readers and Board-certified radiologists, interpreted the x-ray as negative for pneumoconiosis, Employer's Exhibits 2, 3, three equally qualified physicians, Drs. Smith, Ahmed, and Groten, interpreted the x-ray as positive for the disease. Claimant's Exhibits 1, 4, 6. In addition, Dr. Gaia, a Board-certified radiologist, interpreted the x-ray as positive for pneumoconiosis. Director's Exhibit 12. Because a majority of the best-qualified physicians interpreted the May 12, 2009 x-ray as positive for pneumoconiosis, the administrative law judge found that the x-ray supported a finding of pneumoconiosis. Decision and Order at 7. Because employer does not challenge the administrative law judge's finding that the new x-ray evidence established the existence of clinical pneumoconiosis, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] The administrative law judge accorded Dr. Talati's diagnosis of clinical pneumoconiosis little weight because it was based solely upon a positive x-ray interpretation and an employment history. Decision and Order at 10; Director's Exhibit 12. The administrative law judge also accorded little weight to Dr. Kraynak's diagnosis of clinical pneumoconiosis, finding that the doctor failed to adequately explain the basis for his diagnosis. Decision and Order at 11; Claimant's Exhibits 11, 14. The administrative law judge accurately noted that Dr. Hertz's opinion, that claimant does not suffer from clinical pneumoconiosis, was based, in part, upon a negative x-ray interpretation. Because the administrative law judge found that the x-ray evidence was positive for clinical pneumoconiosis, she questioned the documentation underlying Dr. Hertz's opinion. Decision and Order at 11; Employer's Exhibits 4, 6.

Weighing all of the new evidence together pursuant to 20 C.F.R. §718.202(a) (2013),[9] the administrative law judge found that the new x-ray evidence was the most probative evidence of record, and outweighed the contrary evidence. *Id.* at 12. The administrative law judge, therefore, found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013). *Id.*

Employer argues that the administrative law judge erred in her consideration of Dr. Wheeler's negative interpretation of a July 29, 2010 digital x-ray. We disagree. Digital x-rays constitute "other medical evidence," the admissibility of which is governed by 20 C.F.R. §718.107 (2013). *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007) (en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-112 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery and Hall, JJ., concurring and dissenting). Pursuant to 20 C.F.R. §718.107(b) (2013), an administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. *See Webber*, 23 BLR at 1-133. In considering the digital x-ray evidence, the administrative law judge accurately noted that employer, who submitted Dr. Wheeler's digital x-ray reading, provided no evidence about the medical acceptability of digital x-ray evidence. Decision and Order at 12. The administrative law judge, therefore, permissibly found that Dr. Wheeler's negative interpretation of the digital x-ray was outweighed by the positive analog x-ray evidence of record. *See Webber*, 23 BLR at 1-133.

Employer's remaining statements regarding the administrative law judge's finding that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013) amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In light of our affirmance of this finding, we also affirm the administrative law

[9] Because there is no biopsy evidence of record, the administrative law judge found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7. Moreover, the administrative law judge found that claimant is not entitled to the presumptions set forth at 20 C.F.R. §718.202(a)(3). *Id.*

judge's finding that claimant established that an applicable condition of entitlement has changed since the date of the denial of his prior claim.[10] 20 C.F.R. §725.309(c).

Employer next contends that the administrative law judge erred in finding that the pulmonary function study evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013). The administrative law judge considered seven pulmonary function studies conducted on July 6, 2004, April 7, 2005, November 22, 2005, April 15, 2009, April 22, 2010, July 29, 2010, and September 13, 2010. The administrative law judge accorded the pulmonary function studies conducted on July 6, 2004, April 7, 2005, and November 22, 2005 little weight, because she found that they were not probative of claimant's present condition. Decision and Order at 18. Furthermore, the administrative law judge accorded no weight to the pulmonary function studies conducted on April 15, 2009, April 22, 2010, and September 13, 2010 because the tests were invalidated by Dr. Levinson, a Board-certified pulmonologist.[11] *Id.* at 17-18. The administrative law judge found that the remaining pulmonary function study, a qualifying study[12] conducted on July 29, 2010, was valid,[13] and sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013). *Id.*

[10] Because they are unchallenged on appeal, we affirm the administrative law judge's finding that the evidence as a whole established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), and her finding that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2013). *Skrack*, 6 BLR at 1-711.

[11] Dr. Levinson invalidated the April 15, 2009 pulmonary function study because of "excessive variability." Employer's Exhibit 8. Dr. Levinson invalidated the April 22, 2010 pulmonary function study because there was evidence that claimant was exhaling when he should have been inhaling, and because the MVV values showed inconsistent effort. Employer's Exhibit 1. Dr. Levinson invalidated the September 13, 2010 pulmonary function study due to unacceptable effort, noting that the FVC curves showed submaximal effort. Employer's Exhibit 7.

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i) (2013).

[13] The administrative law judge noted that Dr. Simelaro, a Board-certified pulmonologist, validated the results of the July 29, 2010 pulmonary function study. Decision and Order at 17; Claimant's Exhibit 18.

Employer asserts that, because the table values listed at 20 C.F.R. Part 718, Appendix B, end at age 71, and claimant was 83 years old at the time of the July 29, 2010 pulmonary function study, the administrative law judge erred in relying upon the results of this study. We disagree. The Board has held that pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). In the case of older miners, an opposing party may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Id.* Under this standard, the administrative law judge properly characterized claimant's July 29, 2010 pulmonary function study as a qualifying study. Decision and Order at 17. As employer submitted no evidence to show that the July 29, 2010 pulmonary function study, which produced qualifying values for a miner of age 71, were actually normal or otherwise did not demonstrate a totally disabling pulmonary impairment, we affirm the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013).

Employer further contends that the administrative law judge erred in relying on the qualifying July 29, 2010 pulmonary function study, because the physician who administered that study, Dr. Hertz, opined that claimant does not suffer from a totally disabling pulmonary impairment. Employer's Exhibits 4, 6. We disagree. Dr. Hertz's interpretation of the results of the July 29, 2010 pulmonary function study does not render it non-qualifying, or otherwise insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013). Moreover, employer does not challenge the administrative law judge's finding that Dr. Hertz's opinion, that claimant is not totally disabled, was entitled to little weight as it was vague and equivocal.[14] Decision and Order at 21. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013).

[14] The administrative law judge found Dr. Hertz's statement, that claimant's moderate restrictive defect would "[n]ot necessarily by itself" prevent claimant from returning to work, to be vague and equivocal. Decision and Order at 21; Employer's Exhibit 6. She also found his statements that claimant could return to "work in the coal mining business" and "in the coal working industry" to be vague, as Dr. Hertz did not indicate the specific requirements of claimant's prior coal mine employment. *Id.* In light of the above, the administrative law judge found Dr. Hertz's disability opinion "inadequately supported," and therefore entitled to "little weight." *Id.*

After finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii) (2013), the administrative law judge considered the medical opinions of Drs. Kraynak, Talati, and Hertz.[15] Dr. Kraynak opined that claimant is totally disabled due to clinical pneumoconiosis. Claimant's Exhibits 11, 14. However, Dr. Talati opined that claimant does not suffer from any significant pulmonary impairment. Director's Exhibit 12. Although Dr. Hertz diagnosed a moderate restrictive ventilatory defect, he opined that claimant's pulmonary function was "satisfactory" enough to allow him to work as a coal miner. Employer's Exhibit 6 at 26. The administrative law judge found that the opinions of all three physicians were entitled to "little weight."[16] *Id.* at 21-22.

Although the administrative law judge accorded "little weight" to the medical opinion evidence, she found that the pulmonary function study evidence was sufficient to establish that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b) (2013). Decision and Order at 22. Because employer does not challenge the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer finally argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2013). Section 718.204(c) provides that "the cause or causes of a miner's disability shall be established by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2) (2013). In considering whether the evidence established that claimant is totally disabled due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Hertz, Talati, and Kraynak. Dr. Hertz opined that claimant does not suffer from pneumoconiosis, and that

[15] The administrative law judge noted that the record contains evidence submitted in connection with claimant's previous 2004 claim. However, the administrative law judge reasonably relied upon the more recent evidence, which she found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 21.

[16] As previously discussed, the administrative law judge found that Dr. Hertz's disability opinion was "inadequately supported," and therefore entitled to "little weight." *See* n.13, *supra.* The administrative law judge found that Dr. Talati's opinion regarding the extent of claimant's pulmonary impairment was not well-reasoned. Decision and Order at 21. The administrative law judge accorded "only limited weight" to Dr. Kraynak's opinion, that claimant is totally disabled, because much of the medical evidence upon which he relied to support his opinion was invalid. *Id.*

claimant's "pulmonary function is satisfactory . . . to allow him to work in the coal mining business." Employer's Exhibit 6 at 26. While Dr. Talati diagnosed clinical pneumoconiosis, he opined that there is "no significant pulmonary impairment that precludes [claimant from] performing his last coal mine job." Director's Exhibit 12. Dr. Kraynak, in contrast, opined that claimant is totally disabled due to clinical pneumoconiosis. Claimant's Exhibits 11, 14.

The administrative law judge discounted the opinions of Drs. Hertz and Talati, because Dr. Hertz did not diagnose clinical pneumoconiosis, and because Dr. Talati did not diagnose a totally disabling pulmonary impairment, contrary to the administrative law judge's findings. Decision and Order at 22. The administrative next addressed Dr. Kraynak's opinion, stating that "[a]lthough I accorded Dr. Kraynak's opinion on pneumoconiosis little weight because it was not well-documented, his opinion on causation is entitled to more weight than those of Drs. Hertz or Talati because his conclusions are more in accord with my findings." *Id.* The administrative law judge, therefore, found that the evidence established that claimant's total disability was due to pneumoconiosis.

Employer contends that the administrative law judge erred in according less weight to the opinion of Dr. Hertz, who opined that claimant is not totally disabled due to pneumoconiosis. We disagree. Contrary to employer's contention, the administrative law judge rationally discounted the opinion of Dr. Hertz, as his opinion that claimant does not suffer from clinical pneumoconiosis is contrary to the administrative law judge's finding, and central to his reason for finding that claimant's respiratory impairment is unrelated to his coal mine dust exposure. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-85, 2-99 (3d Cir. 2004); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 22. We, therefore, affirm the administrative law judge's decision to discount Dr. Hertz's disability causation opinion.

Employer also argues that the administrative law judge erred in finding Dr. Kraynak's opinion sufficient to support a finding that claimant's total disability is due to pneumoconiosis. We agree. The administrative law judge has failed to adequately address and explain how Dr. Kraynak's opinion constitutes a well-reasoned and documented opinion that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c)(2) (2013). Consequently, the administrative law judge's finding does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v.*

Duquesne Light Co., 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2013), and remand the case for further consideration. On remand, when reconsidering whether the medical opinion evidence establishes that claimant's total disability is due to clinical pneumoconiosis, the administrative law judge should address Dr. Kraynak's explanation for his conclusion, the documentation underlying his medical judgment, and the sophistication of, and basis for, his opinion. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge