BRB No. 13-0209 BLA

ROY A. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAM COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/10/2014
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Sherman Ames III, Cleveland, Tennessee, for claimant.

Kathy R. Davis and Jordan D. Watson (Carr, Allison, Pugh, Howard, Oliver & Sisson, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05709) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on June 26, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that

[1] Claimant filed a claim for benefits on May 19, 1987 which was denied by the district director on November 25, 1987, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on June 8, 1995, which was denied by the district director on

claimant worked fourteen and one-half years in coal mine employment and adjudicated this subsequent claim under the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis[2] and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on his consideration of the claim on the merits, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that claimant has not satisfied the requirements of 20 C.F.R. §725.309. Employer further argues that the administrative law judge erred in relying on the opinion of Dr. Miller to find that claimant is totally disabled due to legal pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, reiterating its contentions on appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

Initially, we reject employer's contention that claimant is unable to satisfy the requirements of 20 C.F.R. §725.309, because the evidence submitted in conjunction with

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August 29, 1995, because claimant again did not establish any of the requisite elements of entitlement. Director's Exhibit 2. Claimant requested modification on January 30, 1996, which was denied by the district director on July 30, 1996. *Id*. Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibit 3.

[2] "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition 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)

[3] Because claimant's coal mine employment was in Kentucky and Tennessee, 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); Director's Exhibit 5.

the subsequent claim does not show a "material change" in claimant's condition since the denial of his prior claim. Employer's Memorandum Brief in Support of Petition for Review at 11. When 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."[4] 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Contrary to employer's assertion, the regulation makes clear that the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(2). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, also has specifically stated:

> We construe the term "change" to mean disproof of the continuing validity of the original denial . . . rather than the actual difference between the bodies of evidence presented at different times. Under this definition, the [administrative law judge] need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

Cumberland River Coal Co. v. Banks, 690 F.3d 477, 486, 25 BLR 2-135, 2-147 (6th Cir. 2012) (internal citations omitted); *see also Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759, BLR (6th Cir. 2013).

In this case, claimant's prior claim was denied because he did not establish any elements of entitlement.[5] Director's Exhibit 2. We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that the newly submitted evidence established that claimant is totally disabled by a respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[5] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

established total disability, an element of entitlement that he failed to prove in the prior claim, claimant has demonstrated, as a matter of law, a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309.

Turning to the merits, employer challenges the administrative law judge's determination that claimant established the existence of legal pneumoconiosis. Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge weighed four medical opinions. The administrative law judge assigned controlling weight to Dr. Miller's opinion, that claimant's disabling chronic obstructive pulmonary disease (COPD) is due to a combination of claimant's smoking habit and his coal dust exposure, over the contrary opinions of Drs. Toban, Patel and Goldstein, that claimant's respiratory disease is unrelated to his coal mine employment.[6] The administrative law judge explained:

> In sum, Dr. Toban's opinion that Claimant does not have clinical or legal pneumoconiosis is given less weight because it is based on older medical evidence. Dr. Patel's . . . findings are too equivocal to be given much weight. Dr. Goldstein's medical opinion is given less weight because, in failing to consider COPD as a form of legal pneumoconiosis, it is inconsistent with the regulations and preamble. Although one letter is insufficiently documented, Dr. Miller's medical report and other letters are sufficiently documented and well-reasoned. I also credit Dr. Miller's opinion because he is Claimant's treating physician, as discussed above. Moreover, I find that Dr. Miller's opinion is more reasonable than Dr. Goldstein's because Dr. Goldstein, unlike Dr. Miller, did not account for Claimant's 14-1/2 years of coal mine employment.

Decision and Order at 19. The administrative law judge specifically determined that Dr. Miller's opinion was reasoned and documented, and concluded that "given the objective testing and the logic, 14-1/2 years of coal mine employment, Claimant's smoking history, and [his] reliance on scientific journal articles, I find that Dr. Miller's rationale is better reasoned and is more consistent with the regulations." *Id*. The administrative law judge further noted that "Dr. Miller's reasoning that Claimant's smoking history and his coal mine employment together brought about his COPD is consistent with the Department of Labor's policy . . . [that] '[c]oal dust exposure is additive with smoking in causing

[6] The administrative law judge noted that claimant was treated at Vanderbilt University Medical Center by physicians who "synopsized that Claimant has [chronic obstructive pulmonary disease], is a former smoker, has had coal dust exposure and 'likely' has black lung." Decision and Order at 19, *quoting* Claimant's Exhibit 4. The administrative law judge, however, found that these statements are "too equivocal to be given much weight." Decision and Order at 19.

clinically significant airways obstruction and chronic bronchitis.'" *Id*., *quoting* 65 Fed. Reg. 79,940 (Dec. 20, 2000).

Employer also argues that Dr. Miller's opinion is equivocal and insufficient to establish the existence of legal pneumoconiosis, insofar as Dr. Miller conceded that it is "difficult to determine what percent of [claimant's] obstructive lung disease was due to smoking and what percent was due to coal mining" but stated that "[g]iven his significant exposure to coal dust, we have to assume that this plays a significant role in his obstructive lung disease." Claimant's Exhibit 2; *see* Employer's Memorandum Brief in Support of Petition for Review at 8-9. Employer maintains that Dr. Miller has no support for his "assumptions," which are based on "an incorrect premise" that claimant has a significant coal mine work history of twenty years, contrary to the administrative law judge's finding that claimant worked fourteen and one-half years in coal mine employment.[7]

Contrary to employer's contention, even though a physician cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal dust exposure, such exact findings are not required for claimant to establish that he has a chronic respiratory condition arising out of coal mine employment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). However, where a discrepancy exists between the administrative law judge's finding as to a miner's length of coal mine employment and the assumption by the physicians regarding that miner's length of coal mine employment, the administrative law judge must note the discrepancy, determine whether it is significant, and explain how it affects the credibility of the physicians' opinions. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). In this case, because the administrative law judge has not addressed whether Dr. Miller's reliance on a twenty-year coal mine work history has any impact on the credibility of his opinion that claimant has legal pneumoconiosis, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). *See Creech*, 841 F.2d at 709, 11 BLR at 2-91. Furthermore, to the extent that the administrative law judge also relied on Dr. Miller's opinion in finding that claimant is totally disabled due to legal

[7] Employer notes that alternate explanations for claimant's disabling respiratory condition have been provided by its medical experts. However, because employer does not raise specific error with regard to the administrative law judge's credibility determinations and the weight accorded the opinions of Drs. Toban, Patel and Goldstein, they are affirmed. *See Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis, we must vacate the administrative law judge's finding at 20 C.F.R. §718.204(c). *Id*.

We, therefore, vacate the award of benefits and remand the case for further consideration. On remand, the administrative law judge is instructed to reconsider whether Dr. Miller has provided a reasoned and documented opinion sufficient to establish that claimant is totally disabled due to legal pneumoconiosis. If so, the administrative law judge may reinstate the award of benefits.[8]

[8] Employer generally asserts that it has rebutted any presumption that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. However, in light of the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2), any analysis of whether claimant's pneumoconiosis arose from coal dust exposure is subsumed in the determination of whether claimant has legal pneumoconiosis. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). Therefore, the administrative law judge is not required on remand to render a specific finding pursuant to 20 C.F.R. §718.203.

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.

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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