BRB No. 03-0291 BLA

GARLAND STREET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/30/ 2004
	)	
APACHE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 Alice Craft, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-393) of Administrative Law Judge Alice Craft awarding benefits 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).[1] Based on the date of filing, the administrative law judge adjudicated this duplicate claim pursuant to 20 C.F.R Part 718.[2] The administrative law judge credited claimant with thirteen years of coal mine employment and found that the arterial blood gas studies established the presence of a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b)(2)(ii), which thus established a material change in conditions, *see* 20 C.F.R. §725.309(d)(1999). On the merits, based on her review of all of the evidence in the record, the administrative law judge found that the x-ray and biopsy evidence established the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2), 718.203(b), that the recent blood gas study evidence established total disability, *see* 20 C.F.R. §718.204(b)(2)(ii), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, benefits were awarded.

On appeal, employer contends that this claim is barred by the principles of *res judicata*. Employer further contends that the administrative law judge erred in finding total disability and causation established pursuant to Section 718.204(b), (c), and in her determination that claimant demonstrated a material change in conditions since the denial of the prior claim pursuant to Section 725.309(d). Employer also argues that the Old Republic Insurance Company was improperly designated as the carrier and that the Black Lung Disability Trust Fund should be liable for the payment of benefits. Claimant has not responded to this appeal. The

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

[2] Claimant filed his initial claim for benefits on April 29, 1993. This claim was denied by Administrative Law Judge Frederick D. Neusner on February 13, 1997. Decision and Order at 2; Director's Exhibit 29-65. No further action was taken on this claim. The instant claim was filed on March 12, 1999. Decision and Order at 2; Director’s Exhibit 1.

Director, Office of Workers' Compensation Programs (the Director), has filed a letter disagreeing with employer's assertions regarding *res judicata*, the progressivity of pneumoconiosis and the transfer of liability. Employer has filed a reply brief reiterating its contentions.

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. 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).

Employer initially maintains that claims filed under the Act are subject to the usual constraints of the doctrine of *res judicata*, *see Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), and further asserts that claimant's duplicate claim is barred since claimant's prior claim was denied and claimant had no further exposure to coal mine dust in coal mine employment. The Director asserts that employer misstates the holding of *Sebben* since the Supreme Court did not consider whether *res judicata* barred a new claim based on a material change in the miner's condition since the denial of the previous claim. We agree. The Board held in *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993), that the doctrine of *res judicata* generally is not applicable in the context of a duplicate claim under Section 725.309(d) because it was promulgated to provide relief from the principles of *res judicata* to miners whose physical condition has worsened over time. The regulations provide that once a party has lost a case on the merits, the party may appeal the denial, seek modification within a year pursuant to Section 725.310, or in the case of a miner, thereafter file a subsequent claim under Section 725.309, alleging a material change in conditions.[3] In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert denied*, 519 U.S. 1090 (1997), the United States Court of Appeals for the Fourth Circuit held that in order for claimant to establish a material change in conditions, claimant must prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him.[4] If a material change in conditions is established, the administrative law judge must adjudicate the merits of the claim and consider whether all of the

[3] The amendments to 20 C.F.R. §725.309 do not apply to cases, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Director's Exhibit 2.

evidence establishes entitlement to benefits. Thus, the administrative law judge properly adjudicated the merits of this duplicate claim.

On the merits, employer initially contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) as the administrative law judge erroneously found that recent blood gas studies, standing alone, established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). Employer's argument has merit. In finding a material change in conditions established since the previous denial, the administrative law judge noted that Administrative Law Judge Frederick D. Neusner previously determined that the existence of pneumoconiosis was established, as well as total disability due to lung cancer, but that the evidence failed to establish a totally disabling respiratory or pulmonary impairment or that the disability was caused by pneumoconiosis. Decision and Order at 6-7; Director's Exhibit 29-65. The administrative law judge then summarily concluded that since the arterial blood gas studies now show a respiratory disability as defined in the regulations, an element of entitlement which defeated entitlement in the prior case, she would consider all of the medical evidence of record. Decision and Order at 7. Employer correctly argues that while the qualifying blood gas studies suggest that claimant is totally disabled, these studies must also be considered along with the other relevant and probative evidence, such as the pulmonary function study evidence and medical opinions evidence in order to establish total disability. Employer's Brief at 21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). The administrative law judge, in this case, did not render a finding based upon a consideration of all of the relevant newly submitted evidence. Consequently, we vacate the administrative law judge's finding of total disability, as well as a material change in conditions, and remand this case to the administrative law judge to reconsider the medical evidence and determine if claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(i)-(iv) by a preponderance of the evidence. *Rutter*, 86 F.3d 1358, 20 BLR 2-227.

Employer also argues that the administrative law judge did not properly address the issue of whether the medical opinion evidence was sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge determined that the evidence established that there has been a progression in claimant's pneumoconiosis based on the x-ray evidence. She gave diminished weight to the opinions of Drs. Castle and Renn, who attributed claimant's impairment solely to smoking, because neither physician acknowledged the apparent progression nor explained, in other than conclusory

terms, why pneumoconiosis did not contribute to claimant's impairment. Decision and Order at 17. The administrative law judge then found that the opinions of Drs. Rasmussen and Forehand, that pneumoconiosis contributes to claimant's disability, are in better accord with the "evidence underlying their opinions" and the "overall weight of medical evidence in the record." Decision and Order at 18. The administrative law judge thus found that the preponderance of the medical opinion evidence was sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c). *Id*.

Employer argues that in finding total disability due to pneumoconiosis established, the administrative law judge provided invalid reasons for rejecting the opinions of Drs. Castle and Renn. Employer also contends that the administrative law judge mischaracterized Dr. Forehand's opinion. Employer's contentions have merit.

Pursuant to Section 718.204(c), the administrative law judge erroneously accorded less weight to Dr. Castle's opinion because "he has entirely disregarded the positive x-ray readings now in the record" and "there is no indication that he has changed his view that simple pneumoconiosis is unlikely to cause disability." Decision and Order at 17. Dr. Castle stated in his July 12, 2000, report that:

> It was my opinion and the opinion of the majority of radiologists and B-readers that there was no evidence of coal workers' pneumoconiosis radiographically. Although he has evidence of increased irregular markings in the lower lung zones, these are not consistent with a diagnosis of coal workers' pneumoconiosis. They are consistent with the development of bullous emphysema associated with tobacco abuse. He did have evidence of pathologic changes consistent with coal workers' pneumoconiosis in the nodular lesion resected from the upper lobe. Nevertheless, there were no significant abnormalities seen on x-ray, indicating that these changes were quite minimal pathologically.

Employer's Exhibit 4.

The administrative law judge in this instance has made a factual determination that is not supported by the evidence. Contrary to the administrative law judge's statement, Dr. Castle's report indicates that he considered the x-ray evidence, both positive and negative, in concluding that the cause of claimant's impairment is smoking and not pneumoconiosis, in spite of the presence of pneumoconiosis. Moreover, the administrative law judge does not indicate the basis for her conclusion that Dr. Castle, in his more recent report, maintains that simple pneumoconiosis is unlikely to cause total disability.

Because the administrative law judge has mischaracterized Dr. Castle's opinion, her rationale for according the opinion less weight can not be affirmed. *See Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

In addition, employer asserts that the administrative law judge erred in discrediting Dr. Renn's opinion regarding whether claimant's disability was due to pneumoconiosis based on Dr. Renn's failure to diagnose a totally disabling respiratory impairment when the administrative law judge determined that such an impairment was present. Employer argues that Dr. Renn relied on the pattern of the impairment disclosed on blood gas studies in claimant's case to find that the respiratory impairment, whether or not disabling, was due to smoking and not caused by claimant's pneumoconiosis. Employer's Brief at 23-24. Although the administrative law judge acknowledged that Dr. Renn concluded that claimant has pneumoconiosis, the administrative law judge gave Dr. Renn's opinion "little weight" because Dr. Renn did not agree with the other physicians or the administrative law judge's own conclusion that claimant is disabled from coal mine employment. Decision and Order at 18. Because we have concluded that the administrative law judge's determination that claimant was totally disabled was flawed and we vacated that finding, the administrative law judge's credibility finding with respect to Dr. Renn's opinion cannot be affirmed. As such, the administrative law judge is instructed to reweigh this evidence on remand.

Additionally, employer argues that the opinions of Drs. Rasmussen and Forehand are not well-reasoned and documented, and that the administrative law judge erred in failing to adequately explain his reasons for crediting these opinions over the contrary opinions as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), and the decision of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Employer asserts that the administrative law judge must consider all relevant evidence in light of the decision of the Fourth Circuit in *Hicks*. In *Hicks*, as well as *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit held that in evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Akers*, 131 F.3d 438, 21 BLR 2-269; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). In this case, the administrative law judge did not consider and discuss the weight he accorded the various credentials of the physicians of record nor did she address the other factors identified by the Fourth Circuit. We vacate, therefore, the administrative law judge's findings that disability causation was established, and remand this case to the administrative law judge for a full review of the opinions

in light of these authorities. The administrative law judge must set forth the findings she has made upon applying the factors identified by the Fourth Circuit in *Hicks* and *Akers* to the medical opinions relevant to Section 718.204(b) and (c) and must also set forth the bases for these findings.

Lastly, employer/carrier objects to being identified as liable for the payment of benefits in the event of an award, and asserts that liability is the responsibility of the Black Lung Disability Trust Fund.[5] The record reflects that claimant repeatedly stated on his applications for benefits and at the hearings that he was last employed in coal mining on June 30, 1987. Director's Exhibits 1, 2, 3, 29-1, 29-2, 29-3, 29-64; Hearing Transcript at 27. Claimant's Social Security Administration (SSA) records reflect earnings from coal mine employment from 1974 to 1986. Claimant's Exhibits 4, 29-6. The record does not contain any employment records from employer.

Employer notes that Old Republic Insurance Company's coverage of Apache Coal Company began on July 3, 1986. Employer's Brief at 32; *see* Director's Exhibits 16, 29-27. Employer further acknowledges that although claimant stated he was last employed in coal mine employment with employer on June 30, 1987, his total earnings for 1986, as represented in the SSA records, were substantially less than in the previous years. Employer therefore suggests that claimant may have misstated the correct year of his last coal mine employment with Apache and that his last coal mine employment was June 30, 1986. As a result, employer argues that Old Republic's insurance policy commencing July 1986, would not have been in effect at the time of claimant's last exposure in June 1986 and Old Republic should be dismissed as the liable carrier. Contrary to employer's assertion, there is no basis in the record to conclusively establish that claimant's substantially reduced earnings in 1986 resulted from employment for only the first six months of that year. The administrative law judge reasonably credited claimant with thirteen years of coal mine employment based on claimant's statements that he worked in the mines from 1974 to 1987 along with the Social Security Administration records showing coal mine earnings from 1974 to 1986 and the evidence of record supports the administrative law judge's finding that claimant was engaged in coal mine employment until 1987. Decision and Order at 6; Director's Exhibits 1, 2, 3, 4, 29-1, 29-2, 29-3, 29-6, 29-64; *see Tacket v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7

[5] Although employer contested the issue of responsible operator to the extent that claimant engaged in coal mine employment subsequent to his work with Apache Coal Company, none of the parties contested whether the proper carrier was named at the hearing, and the administrative law judge was not called upon to consider it. Hearing Transcript at 6.

(1985). Thus substantial evidence supports the administrative law judge's finding that claimant worked for employer until 1987 and this finding is affirmed and we reject employer's assertion that benefits liability must be imposed on the Trust Fund.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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PETER GABAUER, Jr.
Administrative Appeals Judge