BRB No. 06-0379 BLA

DANNY J. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUDE ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/30/2007
	)	
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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6198) of Administrative Law Judge Daniel L. Leland on a subsequent claim[1] 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). The administrative law judge credited claimant with twenty-one years of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §725.309. Turning to the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded, commencing as of October 1, 2002, the month in which the claim was filed. Subsequent to employer's motion requesting reconsideration, the administrative law judge issued a Decision on Motion for Reconsideration modifying the prior decision to hold that employer shall not pay Federal black lung benefits to claimant until claimant no longer receives benefits from the State of West Virginia, or until the amount that claimant receives from the State of West Virginia no longer exceeds the amount to which claimant is entitled in accordance with 20 C.F.R. §725.535(b).

Employer argues that the administrative law judge erred in finding that claimant is entitled to benefits based on the administrative law judge's failure to adequately evaluate the newly submitted medical evidence and to review the evidence of record in its entirety on the merits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter, indicating that he will not participate in this appeal.[2]

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[1] Claimant filed an application for benefits on November 8, 1993, which was denied by Administrative Law Judge Edward J. Murty, Jr. on November 27, 1995 and affirmed by the Board on appeal. *Miller v. Jude Energy, Inc.*, BRB No. 96-0566 BLA (Aug. 23, 1999) (unpub.); Director's Exhibit 1. Claimant filed a petition for modification and submitted additional evidence. Administrative Law Judge Lawrence P. Donnelly denied modification on January 23, 1999. Claimant filed an appeal with the Board and the Board affirmed the denial. *Miller v. Jude Energy, Inc.*, BRB No. 99-0457 BLA (Feb. 29, 2000) (unpub.); Director's Exhibit 1. Claimant did not appeal the Board's decision or further pursue the November 1993 claim. Claimant filed a subsequent claim on October 22, 2002, which is the subject of this appeal. Director's Exhibit 3.

[2] We affirm the administrative law judge's determinations of twenty-one years of coal mine employment; that the newly submitted evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §725.309; that claimant was entitled to the rebuttable presumption that pneumoconiosis arose out of coal mine employment pursuant

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that, in considering the newly submitted medical opinion evidence, the administrative law judge discounted Dr. Zaldivar's opinion without adequate explanation. Additionally employer argues that, after the administrative law judge made his threshold determination that claimant established that one of the applicable conditions of entitlement had changed based on his finding of pneumoconiosis, the administrative law judge failed to adequately review the evidence of record in its entirety, particularly the medical evidence from the prior November 1993 claim when he addressed the merits of entitlement, as he is required to do. 20 C.F.R. §725.309; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Employer submits that while the administrative law judge noted that the record contained chest x-ray interpretations dating from 1991 to 1998, he failed to indicate whether the interpretations were positive or negative for the existence of pneumoconiosis. Likewise, employer notes that when addressing the issue of disability causation, the administrative law judge failed to mention the reports of the physicians from the prior claim. Hence, employer asserts that the administrative law judge's mere reference to the previously submitted medical evidence was cursory and his resultant review of the evidence on the merits of entitlement was inadequate and violative of 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).

Pursuant to Section 725.309, the administrative law judge determined that because the newly submitted x-ray and medical opinion evidence was sufficient to establish the presence of clinical and legal pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4), claimant affirmatively demonstrated that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final.[3] Consequently, because claimant affirmatively established the threshold

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to 20 C.F.R. §718.203(b); and that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 5, 6.

[3] Because claimant filed his application for benefits on October 22, 2002, which is after January 19, 2001, the effective date for application of the amended regulations regarding "subsequent claims," the regulations set forth in Section 725.309 (2002) are

requirement for further review of subsequent claims, the administrative law judge cited the standard articulated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, that " [t]he evidence from both claims must be evaluated to determine if claimant is entitled to benefits." *Rutter*, 86 F.3d 1358, 20 BLR 2-227; Decision and Order at 5. Addressing the merits of entitlement, the administrative law judge found that even though Administrative Law Judge Lawrence P. Donnelly determined that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis when he adjudicated the November 1993 claim, the more recent x-ray and medical opinion evidence associated with the instant claim filed in October 2002 was more reliable and probative as it was five to twelve years more recent than the previously submitted evidence. Decision and Order at 5.

A review of the record reveals that the previously submitted evidence was conflicting as there were eighteen x-ray interpretations of six chest films and six physicians' opinions filed with the November 1993 claim. Director's Exhibit 1. Similarly, the evidence of record filed in the October 2002 claim was contradictory as there were three conflicting x-ray readings of two chest films and two contrary physicians' opinions. Director's Exhibits 9-11.[4]

It is critical to the appellate review process that the administrative law judge clearly set forth the rationale for his findings of fact and conclusions of law. *See Director, OWCP v. Congleton*, 743 F.2d 428, 429-230, 7 BLR 2-12, 2-15 (6th Cir. 1984). The administrative law judge, when adjudicating the claim on the merits, erred in failing to specifically assess and weigh all the x-ray interpretations and medical reports of record, which, if fully credited, may be sufficient to establish either the presence or absence of pneumoconiosis. *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Further, the administrative law judge failed to thoroughly review all of the reasons given by Dr. Zaldivar for finding that claimant's respiratory disease was due

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applicable to the instant case and the instant claim is properly construed as a "subsequent claim" rather than a "duplicate claim." Hence, it is claimant's burden to demonstrate 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 (2000), 725.309 (2002); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) (defining prior material change in conditions standard for duplicate claims).

[4] One x-ray reading of the January 7, 2003 was for quality of film only. Director's Exhibit 9.

solely to cigarette smoking and to explain the bases on which he found Dr. Zaldivar's opinion was not well reasoned and was unconvincing.

Because the administrative law judge's Decision and Order does not encompass a discussion of all of the evidence, his resolution of the issue of pneumoconiosis fails to satisfy the requisite standard, therefore, we vacate the administrative law judge's Decision and Order and remand the case for a complete analysis, including his weighing of the entirety of the evidence on the merits. Accordingly, we vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis on the merits under Section 718.202(a)(1) and (a)(4) and remand the case to him to reconsider all the x-ray and medical opinion evidence of record. *See Rutter*, 86 F.3d 1358, 20 BLR 2-227.

The administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a) is, therefore, vacated and the case is remanded for the administrative law judge to reconsider all the medical evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a), he must reconsider his finding on disability causation pursuant to Section 718.204(c) since that finding is directly impacted by his finding relevant to the existence of pneumoconiosis.

Based on the foregoing, we vacate the administrative law judge's determinations that the medical evidence of record was sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a) and 718.204(c) and that claimant is entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with the decision to affirm the administrative law judge's determinations pursuant to 20 C.F.R. §§725.309, 718.203(b), and 718.204(b) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 5, 6.

However, I respectfully dissent from my colleagues' decision to vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Instead, I would affirm the administrative law judge's determinations under Sections 718.202(a) and 718.204(c), hold that claimant's entitlement to benefits was affirmatively established, and award benefits.

I would affirm the administrative law judge's determination that the more recent x-ray and medical opinion evidence associated with the instant claim, filed on October 22, 2002, was more reliable and probative because this evidence was five to twelve years more recent than the evidence associated with the November 1993 claim and was consistent with the latent and progressive nature of pneumoconiosis. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Based on his reference to *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20

BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), (articulating the standard for the adjudication of subsequent claims where a change in conditions is demonstrated), the administrative law judge acknowledged his duty to examine and evaluate "the evidence from both claims" to determine whether claimant is entitled to benefits. Decision and Order at 5. Consequently, the administrative law judge, within a permissible exercise of his discretion, determined that the earlier evidence in existence at the time of the prior claim was extremely remote in time and therefore, less credible and reliable as to whether claimant suffers from pneumoconiosis. There is no apparent reason from a review of the record, nor has employer provided any, necessitating that the administrative law judge should have analyzed the earlier evidence with specificity. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-65 (4th Cir. 1992); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997) (*en banc*) (noting that progressivity is inherent in the duplicate claims regulation itself); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) (pneumoconiosis is a progressive and degenerative disease). I would, therefore, reject employer's argument that the administrative law judge's analysis of the evidence of record with respect to the issues of pneumoconiosis and disability causation on the merits fails to comport 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).

Likewise, I would reject employer's argument that the administrative law judge abdicated his responsibility, as the trier-of-fact, to sufficiently assess the credibility of the well-reasoned and documented opinion of Dr. Zaldivar and impermissibly rejected this opinion. The administrative law judge determined that Dr. Zaldivar's opinion was entitled to diminished weight because the physician relied on his negative x-ray interpretation, contrary to the weight of the credible x-ray evidence that was positive for the existence of pneumoconiosis, and failed to provide a compelling, persuasive rationale for his opinion that claimant's pulmonary impairment was due solely to cigarette smoking with absolutely no contribution from his coal dust exposure during his employment in the coal mines for twenty-one years. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge properly concluded that Dr. Rasmussen's opinion was entitled to determinative weight: because it was consistent with the credible x-ray evidence that was positive for the existence of pneumoconiosis; and because it contained a valid rationale supporting his conclusion that claimant's chronic obstructive pulmonary disease was due to both coal dust exposure and cigarette smoking. *See Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-5 (4th Cir. 1993) ("While this court must review the entire record, we may neither redetermine the facts nor substitute our own judgment for that of the ALJ."); *see also Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Clark*, 12 BLR at 1-155; *King v.*

Consolidation Coal Co., 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Accordingly, I would hold that the evidence of record is sufficient to establish the existence of pneumoconiosis under Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Therefore, I would hold that claimant satisfied his burden of establishing entitlement to benefits in this case. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*). Accordingly, I would affirm the award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge