BRB No. 06-0445 BLA

RONNIE S. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARTON MINING, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6170) of Administrative Law Judge Alice M. 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). This case involves a subsequent claim filed on July 10, 2002.[1]

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on May 9, 1997. Director's Exhibit 1. The district director

After crediting claimant with twenty-three years of coal mine employment, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1997 claim became final. Consequently, the administrative law judge considered claimant's 2002 claim on the merits. The administrative law judge found that the medical opinion evidence was sufficient to establish the existence of "legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the relevant evidence together, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior 1997 claim became final. 20 C.F.R. §725.309. Employer also argues that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 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).

Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the

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denied benefits on July 15, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1997 claim.

Claimant filed a second claim on July 10, 2002. Director's Exhibit 3.

applicable conditions of entitlement[2] has changed since the date upon which the order denying the prior claim became final. *Id.* The district director denied benefits on claimant's 1997 claim because she found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis (black lung disease); (2) that the disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. Director's Exhibit 1.

Employer contends that the district director did not deny claimant's 1997 claim because she found the evidence insufficient to establish total disability. In denying claimant's 1997 claim, the district director checked a box indicating that the evidence was insufficient to establish that claimant was totally disabled by pneumoconiosis. However, the district director subsequently stated that while "the ventilatory studies meet the disability standards, the evidence in the file does not indicate that this is caused by black lung disease." Director's Exhibit 1. Moreover, as employer accurately notes, Dr. Iosif, the only physician to submit a medical report in connection with claimant's 1997 claim, opined that claimant was "completely disabled from a respiratory standpoint." *Id.* Given these facts, we agree with employer that the district director did not deny claimant's 1997 claim because she found the evidence insufficient to establish the existence of a totally disabling respiratory impairment, but rather because she found it insufficient to establish that claimant's total disability *was due to pneumoconiosis.* Consequently, we hold that the administrative law judge's finding that the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) does not satisfy claimant's burden of demonstrating that one of the applicable conditions of entitlement has changed since the date upon which his prior 1997 claim became final. Consequently, in order to establish that an applicable condition of entitlement has changed, claimant must submit new evidence sufficient to establish the existence of pneumoconiosis.

In this case, the administrative law judge addressed whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] A finding of either clinical pneumoconiosis, *see*

[2]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

[3]Because no party challenges the administrative law judge's findings that the newly submitted evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[4] is sufficient to support a finding of pneumoconiosis. Because no party challenges the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of "clinical" pneumoconiosis, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer argues that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rasmussen, Sutherland, Rosenberg and Fino. While Drs. Rasmussen and Sutherland opined that claimant suffered from a lung disease attributable to his coal dust exposure,[5] Drs. Fino and Rosenberg opined that claimant did not suffer from any lung disease attributable to his coal dust exposure.[6]

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[4]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5]Dr. Rasmussen diagnosed chronic obstructive pulmonary disease/emphysema attributable to coal mine dust exposure and cigarette smoking. Director's Exhibit 9. Dr. Rasmussen explained that:

> [Claimant] has two known risk factors for his disabling lung disease. These include his cigarette smoking and his coal mine dust exposure. Both contribute. He seems unusually susceptible to the toxic effects of both substances. Both cigarette smoking and coal mine dust exposure damage lung tissue and share some of the same cellular and biochemical methods. Thus, the patient's coal mine dust exposure is a significant contributing factor.

Director's Exhibit 9.

Dr. Sutherland, claimant's treating physician, opined that claimant was totally and permanently disabled as a direct result of chronic obstructive pulmonary disease associated with exposure to coal dust. Director's Exhibit 32. Dr. Sutherland opined that claimant's condition was a direct result of aggravation with occupational coal dust exposure. *Id.*

[6]Dr. Fino diagnosed "severe pulmonary emphysema and chronic bronchitis related to cigarette smoking." Employer's Exhibit 2. Dr. Fino found no evidence that coal mine dust inhalation played a significant role in the emphysema. *Id.*

In considering whether the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis, the administrative law judge found that while Dr. Sutherland's opinion was entitled to "some weight" because he had treated claimant since 1994, the administrative law judge found that his opinion was not entitled to "controlling weight" due to a "lack of adequate reasoning." Decision and Order at 26. The administrative law judge found that Dr. Sutherland's statement that claimant suffers from a coal dust induced disease was "cursory." *Id.*

The administrative law judge further found that Dr. Rosenberg's premise, that end-stage chronic obstructive pulmonary disease is only due to coal dust exposure if complicated pneumoconiosis is present, is "contrary to the Department's findings based on available studies." Decision and Order at 27. Consequently, the administrative law judge found that Dr. Rosenberg's opinion "loses probative value." *Id.*

The administrative law judge also found that Dr. Fino failed to explain why claimant's emphysema was due solely to claimant's smoking history. Decision and Order at 27. The administrative law judge found that Dr. Fino's lack of reasoning with regard to the etiology of claimant's emphysema rendered his opinion "of little probative value." *Id.*

The administrative law judge found that Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease/emphysema was attributable to coal mine dust exposure and cigarette smoking, was "based on views consistent with those held by the Department." Decision and Order at 27. The administrative law judge, therefore, found that Dr. Rasmussen's opinion was well-reasoned. *Id.* The administrative law judge also found that Dr. Rasmussen's opinion was entitled to additional weight based upon his superior qualifications. *Id.* The administrative law judge further found that Dr. Rasmussen's opinion was supported by the data and conclusions of Drs. Sutherland and Smiddy, as well as that of Kellie Brooks, a nurse practitioner. The administrative law judge, therefore, found that Dr. Rasmussen's diagnosis of chronic obstructive pulmonary disease/emphysema attributable to coal mine dust exposure and cigarette smoking was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge committed numerous errors in finding that the newly submitted medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer

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Dr. Rosenberg opined that claimant suffered from chronic obstructive pulmonary disease related to his smoking history. Director's Exhibit 33.

initially argues that the administrative law judge erred by summarily dismissing the opinions of Drs. Rosenberg and Fino. We disagree. The administrative law judge reviewed the opinions of Drs. Rosenberg and Fino and fully explained her reasons for finding that they are entitled to little probative value.[7] *See* Decision and Order at 15-18, 26-27.

Employer also argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion was well-reasoned.[8] A reasoned medical opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge, as the trier-of-fact, is charged with determining whether medical opinions are well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge failed to identify the basis for her finding that Dr. Rasmussen's opinion regarding the etiology of claimant's lung disease was well-reasoned. Consequently, the administrative law judge's analysis in this regard does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be

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[7]The administrative law judge found that Dr. Rosenberg's opinion loses probative force as he appears to focus on clinical pneumoconiosis and because the physician's general premise regarding end stage chronic obstructive pulmonary disease is contrary to the Department of Labor's findings in the comments to the regulations. Decision and Order at 26-27. The administrative law judge found that Dr. Fino's opinion, that claimant's emphysema was due solely to tobacco abuse, was not sufficiently reasoned. *Id.* at 27.

[8]Employer contends that the administrative law judge erred in according greater weight to Dr. Rasmussen's opinion because his reasoning was consistent with the conclusions drawn by the Department of Labor in its comments accompanying the revised regulations. Employer asserts that the language quoted by the administrative law judge is not a declaration by the Department of Labor, but is a notation by the Department that there is "growing evidence" of this "theory." *See* 65 Fed. Reg. 79943 (Dec. 20, 2000). Because the amended version of Section 718.202(a) applies to this claim, the administrative law judge's consideration of the comments considered during the promulgation of the regulations was appropriate. *See e.g., Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 156, n.29, 11 BLR 2-1, 2- 12, n.29 (1987), *reh'g denied*, 484 U.S. 1047 (1988). However, on remand, the administrative law judge must consider the entirety of the comment containing the language she quoted, Decision and Order at 26, so that the comment is not taken out of context.

accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, the administrative law judge, on remand, must reconsider whether Dr. Rasmussen's opinion is sufficiently reasoned.

We also agree with the employer that the administrative law judge erred by finding that Dr. Rasmussen's opinion is supported by the opinions of Drs. Sutherland and Smiddy. Although the administrative law judge found that Dr. Sutherland's opinion was entitled to "some weight" because he had treated claimant since 1994, she found that it was not entitled to "controlling weight" due to a "lack of adequate reasoning." Decision and Order at 26. Given the administrative law judge's finding that Dr. Sutherland's opinion lacked adequate reasoning, she failed to explain why Dr. Rasmussen's opinion was supported by that of Dr. Sutherland.

The administrative law judge also failed to explain her basis for finding that Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease was due to smoking and coal dust exposure, was supported by Dr. Smiddy's opinion. Although Dr. Smiddy, in a report dated March 2, 2004, diagnosed chronic obstructive pulmonary disease, he did not address the etiology of the disease. Claimant's Exhibit 2. Moreover, we agree with employer that the administrative law judge erred in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was supported by the opinion of Kellie Brooks, a nurse practitioner. Although Ms. Brooks, in a report dated November 25, 2002, noted a history of chronic obstructive pulmonary disease, she did not address the etiology of the disease. *See* Claimant's Exhibit 5.

Employer also contends that the administrative law judge mischaracterized Dr. Rosenberg's qualifications. The administrative law judge indicated that Dr. Rosenberg is Board-certified in Internal Medicine and Preventative Medicine. Decision and Order at 17, 27. However, the record reveals that Dr. Rosenberg is Board-certified in Internal Medicine, *Pulmonary Disease*, and *Occupational Medicine*. *See* Director's Exhibit 33. Moreover, the record does not support the administrative law judge's finding that Dr. Rasmussen is Board-certified in Internal Medicine and *Forensic Medicine*. Decision and Order at 13, 27. The record reveals that Dr. Rasmussen is Board-certified solely in Internal Medicine. Director's Exhibit 12. In light of the administrative law judge's mischaracterization of the qualifications of Drs. Rosenberg and Rasmussen, the administrative law judge's finding that Dr. Rasmussen's opinion is entitled to additional weight based upon his superior qualifications cannot stand. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also argues that the administrative law judge erred in finding that Dr. Rasmussen's opinion, that claimant's respiratory impairment was attributable to both coal dust exposure and cigarette smoking, was supported by "the progressive worsening nature of [c]laimant's impairment on pulmonary function and blood gas testing." Decision and Order at 28. We agree. The interpretation of medical data is a medical determination, and an administrative law judge may not substitute his opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

On remand, should the administrative law judge find the newly submitted medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh the newly submitted x-ray evidence with the newly submitted medical opinion evidence to determine whether claimant has established the existence of pneumoconiosis by a preponderance of the newly submitted evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

On remand, should the administrative law judge find the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), *see Compton*, *supra*, claimant will have established a change in an applicable condition of entitlement. 20 C.F.R. §725.309. Under these circumstances, the administrative law judge is required to consider claimant's 2002 claim on the merits, based on a weighing of all of the evidence of record.[9] *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

[9]Dr. Iosif, the only physician to submit a medical report in connection with claimant's 1997 claim, opined that claimant's chronic obstructive pulmonary disease was "the likely result of long-lasting and ongoing cigarette smoking in an individual who appears to have a genetic or familial susceptibility to such conditions ? alpha 1 antitrypsin serum deficiency." Director's Exhibit 1. Although the administrative law judge found that Dr. Iosif's conclusion was unpersuasive because it was "conclusory," the administrative law judge failed to identify which aspects of Dr. Iosif's opinion he found conclusory. Consequently, we hold that the administrative law judge's analysis of Dr.

Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. In finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge stated that:

> In this case, because (1) all of the physicians agree that the miner suffers from a totally disabling lung impairment; and (2) I have determined that this lung disease stemmed, at least in part, from coal dust exposure, then it reasonably follows that coal dust exposure was a "substantially contributing cause" of the miner's total disability. Indeed, Dr. Rasmussen opined that the miner's totally disabling lung impairment stems, in part, from coal dust exposure and, as previously noted, this is supported by the opinions of Drs. Sutherland and Smiddy and Nurse Practitioner Brooks.

Decision and Order at 30. The administrative law judge also found that Dr. Fino's opinion that pneumoconiosis did not contribute to claimant's disability was entitled to less weight. Decision and Order at 31.

We vacate the administrative law judge's finding that, because the existence of pneumoconiosis and total disability are established, "it reasonably follows that coal dust exposure was a 'substantially contributing cause' of the miner's total disability," Decision and Order at 31, as the administrative law judge has not explained her weighing of the evidence regarding this element of entitlement, in violation of the APA. *See Wojtowicz, supra*.

On remand, should the administrative law judge find that the evidence is sufficient to establish that an applicable condition of entitlement has changed since the date upon which claimant's prior 1997 claim became final, 20 C.F.R. §725.309, and sufficient to establish the existence of pneumoconiosis on the merits, pursuant to 20 C.F.R. §718.202(a), she must reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204)(c).[10] *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th

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Iosif's opinion does not comport with the requirements of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[10]Section 718.204(c)(1) provides that:

Cir. 1990), citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).