

BRB No. 08-0294 BLA

E.B.)
)
 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
) DATE ISSUED: 01/07/2009
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-5380) of Administrative Law Judge Michael P. Lesniak rendered 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). The administrative law judge credited the miner with at least seventeen years of coal mine employment, and adjudicated this claim, filed on February 4, 2005, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).¹ Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant's arguments and urging the Board to remand this case to the administrative law judge for further consideration.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and contends that the administrative law judge erred in discounting the opinion of Dr. Schaaf by assuming that pneumoconiosis always causes a fixed impairment. Claimant's Brief at 4. The Director agrees, and contends that the administrative law judge's assumption, that pneumoconiosis always causes a fixed impairment, is inconsistent with the regulatory definition of legal pneumoconiosis, which encompasses any type of chronic pulmonary disease that is related to coal mine dust exposure, and does not exclude diseases that may show reversibility. Director's Brief at 3; 20 C.F.R.

¹ Because no party challenges the administrative law judge's findings regarding the length of claimant's coal mine employment, or his finding that the evidence is sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2) but insufficient to 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, 1-711 (1983).

² The law of the United States Court of Appeals for the Third Circuit is applicable, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 9.

§718.201(a)(2). The Director further contends that even if the administrative law judge's assumption were correct, his criticism of Dr. Schaaf's opinion is unwarranted in light of the physician's statement that the miner's residual impairment after bronchodilator administration would still be disabling, and that the fixed portion of his impairment was due to coal dust exposure. Director's Brief at 3-4. The arguments of claimant and the Director have merit.

Dr. Schaaf performed an examination on March 2, 2006, and diagnosed moderate obstructive airways disease due to chronic industrial bronchitis resulting from coal mine employment. Claimant's Exhibit 1. Dr. Schaaf testified that claimant had a significant response to bronchodilators, but would still be significantly impaired post-bronchodilator, and would not be able to perform the duties of his last work position as a pump mechanic or utility supply man. The doctor further stated that the cause of the pulmonary disability, both pre-bronchodilation and post-bronchodilation, is claimant's coal mine dust exposure, and that reversibility in pulmonary function study testing is seen in almost all cases of people who have a lot of active inflammation. Employer's Exhibit 9.

In evaluating the medical opinions of record pursuant to Section 718.202(a)(4), the administrative law judge noted that all of the physicians agreed that claimant has some type of obstructive impairment, but disagreed with regard to the etiology of the condition. Decision and Order at 12. The administrative law judge concluded that the conflicting medical opinions were insufficient to establish the existence of pneumoconiosis,³ Decision and Order at 13, finding that although Dr. Schaaf's diagnosis of bronchitis was documented and reasoned, his determination that the condition was related to coal mine dust was not persuasive, particularly in light of the well reasoned and documented portions of the opinions of Drs. Renn and Fino, Employer's Exhibits 5, 6, 10, which discussed the reversibility of claimant's condition and explained how reversibility is not consistent with pneumoconiosis. Decision and Order at 13-14. Noting that reversibility "is inconsistent with pneumoconiosis, which causes a fixed impairment," Decision and Order at 13, the administrative law judge determined that Dr. Schaaf failed to adequately address the significant reversibility of claimant's condition. Decision and Order at 13. However, the administrative law judge did not cite any medical authority to support his finding that Dr. Schaaf's opinion is less than credible because the physician diagnosed legal pneumoconiosis despite acknowledging partial reversibility in claimant's pulmonary function study results. Further, if the administrative law judge is relying on

³ The administrative law judge accorded little weight to the opinion of Dr. Ewald, because his diagnosis of pneumoconiosis, based on the calcified pleural plaquing as seen on x-ray, was not fully explained and was contradicted by the other physicians, who provided adequate explanations for their opinions and agreed that the plaques were not due to pneumoconiosis. Director's Exhibit 19; Decision and Order at 12-13.

the opinions of Drs. Renn and Fino as support for discrediting Dr. Schaaf's opinion, he must explain why the views of those doctors are entitled to more weight than the contrary opinion of Dr. Schaaf. Accordingly, we vacate the administrative law judge's findings at Section 718.202(a)(4) with respect to the opinions of Drs. Renn, Fino, and Schaaf, and remand this case for further consideration thereunder.

The Director also contends that the administrative law judge erred in overlooking flaws in Dr. Renn's opinion on the issue of legal pneumoconiosis. Dr. Renn opined that claimant did not have legal pneumoconiosis, explaining that "[i]f he had industrial bronchitis, it would have begun early on in his exposure to coal mine dust and it would have continued throughout the time he was exposed and then disappeared completely within six months to a year after he was no longer exposed." Employer's Exhibit 10 at 20-22. The Director asserts that Dr. Renn's opinion is contrary to the established tenet that legal pneumoconiosis is recognized as a progressive condition that may become detectable only after exposure to coal dust has ceased,⁴ *see* 20 C.F.R. §718.201(c), and maintains that "a physician's opinion based on a premise fundamentally at odds with the statute and the regulations is flawed, and the factfinder must weight that physician's opinion accordingly." 65 Fed. Reg. 79944 (Dec. 20, 2000); Director's Brief at 4.

In view of the arguments raised on appeal by claimant and the Director, we remand this case for the administrative law judge to determine whether Dr. Schaaf's diagnosis of industrial bronchitis with partial reversibility is sufficient to established legal pneumoconiosis, as defined in the Act and regulations, and whether the opinion of Dr. Renn is contrary to the Act. In light of these findings, the administrative law judge must then reconsider the credibility of the opinions of Drs. Schaaf, Renn, and Fino, and determine if the weight of the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), *see Penn Allegheny Coal Co. v. Williams*, 114

⁴ In this regard, the Director notes that the Department of Labor has stated:

[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows x-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is significant.

65 Fed. Reg. 79971 (Dec. 20, 2000); Director's Brief at 4.

F.3d 22, 21 BLR 2-104 (3d Cir. 1997); disease causality at 20 C.F.R. §718.203(b); and disability causation at Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge