BRB No. 06-0791 BLA

CAROL COOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, L.L.C.	)	
	)	
and	)	
	)	DATE ISSUED: 07/31/2007
U.S. STEEL MINING CORPORATION	)	
	)	
Employers/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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

James N. Nolan (Walston, Wells and Birchall), Birmingham, Alabama, for U.S. Steel Mining Company, L.L.C.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-6044) of Administrative Law Judge Paul H. Teitler rendered on a subsequent claim[1] filed pursuant

[1] Claimant's first filed a claim for benefits on November 10, 1997, which was denied on December 30, 1997 by reason of abandonment. The regulation at 20 C.F.R.

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). Claimant filed her subsequent claim on November 14, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on June 20, 2003 and a revised decision denying benefits on August 1, 2003. Director's Exhibits 20, 22. The district director determined in both decisions that the evidence was insufficient to establish a change in an applicable condition of entitlement as claimant was unable to establish the existence of pneumoconiosis, that her pneumoconiosis arose out of coal mine employment, and total disability due to pneumoconiosis. *Id*. On June 11, 2004, claimant requested reconsideration and the district director treated claimant's filing as a request for modification. Director's Exhibits 35, 36. On April 18, 2005, the district director issued a Proposed Decision and Order Denying Modification on the ground that claimant failed to establish a change in an applicable condition of entitlement since the denial of her prior claim. Director's Exhibit 38. Claimant requested a hearing, which was held on February 15, 2006. The administrative law judge credited claimant with seven years and eight months of coal mine employment based on the parties' stipulation, and determined that the newly submitted evidence was sufficient to establish that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, however, also found that the evidence of record did not establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis, and thus he denied claimant's request for modification. Accordingly, benefits were denied.

On appeal, claimant alleges that the administrative law judge erred in failing to find that she established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant asserts that the administrative law judge erred in crediting Dr. Rosenberg's "unreasoned" opinion as to the etiology of her chronic obstructive pulmonary disease." Claimant's Brief at 12. Claimant contends that the administrative law judge erred as a matter of law in requiring claimant to prove that her pulmonary obstruction was present at the time she left the mines, contrary to the regulation at 20 C.F.R. §718.201, which recognizes that "pneumoconiosis may first become detectable only after cessation of coal mine dust exposure." Claimant's Brief at 13, citing 20 C.F.R. §718.201(c). Claimant also maintains that the administrative law judge's findings under Section 718.202(a)(4) are irrational and fail to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C.

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§725.409(c) states that "[f]or purposes of [Section] 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c); Decision and Order Denying Benefits at 3.

§554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). Counsel for United States Steel Company, L.L.C., responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Claimant filed a reply brief, which reiterates her position in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Denying Benefits must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim and his subsequent claim were denied by the district director because claimant failed to establish any of the requisite elements of entitlement to benefits. The administrative law judge found the newly submitted evidence established a totally disabling respiratory impairment.[3] Decision and Order Denying Benefits at 11. However, the administrative law judge also stated that because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis she had not established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). *Id*. This was error. Total disability is on of four conditions a miner must establish to prove entitlement. 20 C.F.R. §§718.309(d); 725.202(d). Because the administrative law judge found that claimant

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as claimant's most recent coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2, 6.

[3] The administrative law judge found that while claimant had a totally disabling respiratory impairment, she failed to establish the existence of pneumoconiosis. He determined that all of the x-ray evidence was negative for pneumoconiosis, that there was no biopsy evidence for the disease, and that claimant was unable to avail herself of the presumptions set forth at 20 C.F.R. §718.202(a)(3) for establishing the existence of pneumoconiosis. Decision and Order Denying Benefits at 4-5 We affirm the administrative law judge's findings pursuant to 20 C.F.R §§718.202(a)(1)-(3) and 718.204(b)(2) as those findings are unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

established total disability, that finding was sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See U.S. Steel Mining Co. v. Director, OWCP*, [*Jones*], 42 F.3d 993, 23 BLR 2-213 (11th Cir. 2004) (holding under former provision that claimant must establish one of the elements of entitlement that was previously resolved against him). However, because the administrative law judge proceeded to consider all of the record evidence in finding that claimant failed to establish the existence of pneumoconiosis, we consider his error in failing to acknowledge that claimant satisfied his burden with respect to Section 725.309, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

At Section 718.202(a)(4), claimant contends that the administrative law judge erred in crediting Dr. Rosenberg's opinion as to the etiology of her chronic obstructive pulmonary disease (COPD). In the instant case, the administrative law judge determined that claimant failed to satisfy her burden of proving that she suffered from pneumoconiosis. The administrative law judge found that all of the physicians of record were in agreement that while claimant did not suffer from clinical pneumoconiosis, she did have a pulmonary condition manifested by obstructive respiratory impairment. Decision and Order Denying Benefits at 8. The question thus became whether claimant could establish the existence of legal pneumoconiosis.[4]

Dr. Cohen diagnosed that claimant had COPD and chronic bronchitis, both of which he attributed to a combination of smoking and coal dust exposure. Director's Exhibit 35. Claimant's treating physician, Dr. Patton, along with Dr. Hasson, diagnosed asthmatic bronchitis but did not address the etiology of that condition. Director's Exhibit 11, 12. Dr. Rosenberg noted that claimant had a history of treatment for asthmatic bronchitis, and diagnosed that she suffered from COPD, which he attributed entirely to her history of smoking cigarettes. Employer's Exhibit 3, Director's Exhibit 37. In support of his opinion that claimant's COPD was not due to coal dust exposure, Dr. Rosenberg noted that claimant's airflow obstruction developed between 2001 and 2004, "many years after she left her coal mine employment around 1985." Director's Exhibit

[4] The Act defines "pneumoconiosis" as "a chronic *dust* disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b) (emphasis added). The revised regulation at 20 C.F.R. 718.201(a) provides that this definition includes both clinical and legal pneumoconiosis, and further defines "legal" pneumoconiosis as including "any chronic lung disease or impairment or its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulations define a disease "arising out of coal mine employment" as including only those chronic pulmonary diseases or respiratory or pulmonary impairments significantly related to or substantially aggravated by, *dust exposure* in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

37. Dr. Rosenberg opined that claimant's COPD was not due to coal dust exposure. Dr. Rosenberg emphasized that "airways disease developing many years after cessation of coal dust exposure is not consistent with the presence of coal mine dust related obstruction." Director's Exhibit 37; *see also* Employer's Exhibit 3. Dr. Rosenberg also made the following statement, which is at issue in this appeal: "While without question, CWP can be progressive and latent, this applies to the *medical* form of CWP, and *not to legal* CWP (COPD)." Director's Exhibit 37 (emphasis added).

In weighing the conflicting medical opinions, the administrative law judge determined that Dr. Rosenberg's opinion, as to the etiology of claimant's COPD, was the most persuasive:

> Rosenberg's reference to studies which showed no progression of legal pneumoconiosis when the exposure ends provides a better support for Rosenberg's finding that, in this case, the exposure which ended in 1985 was too remote to have contributed to claimant's obstruction which was initially diagnosed in 2001…I find Dr. Rosenberg's opinion is more persuasive since it is supported by the medical studies which show *no progression for this type of legal pneumoconiosis* once coal mine dust exposure ends.

Decision and Order Denying Benefits at 8 (emphasis added). Although the administrative law judge found that the medical literature and the regulations support Dr. Cohen's finding that coal mine exposure can cause an obstruction, he stated that he found Dr. Rosenberg's opinion more persuasive because the studies that Dr. Rosenberg relied on showed no progression of legal pneumoconiosis when exposure ends. *Id.*

Claimant asserts that the administrative law judge erred in crediting Dr. Rosenberg's opinion because Dr. Rosenberg rejects that pneumoconiosis, clinical and or legal, may be a latent and progressive disease. We agree. In weighing the conflicting medical opinion evidence as to the etiology of claimant's obstructive respiratory condition, the administrative law judge failed to properly consider whether Dr. Rosenberg's opinion is in accordance with the medical studies relied upon by the Department of Labor in promulgating the revised regulations, and the well-recognized position of the Department of Labor, that coal dust exposure may cause an obstructive respiratory impairment, and that such a condition may be both latent and progressive in nature.[5] *See* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor,* 292 F.3d

[5] The administrative law judge should consider the medical literature relied upon by the experts in rendering their respective opinions. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001) (It was proper to discount a doctor's opinion based on medical science which the Department of

849 (D.C. Cir.2002) (NMA); *United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004); *Coleman v. Director, OWCP*, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003); *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d. 1478, 13 BLR 2-400 (11th Cir. 1990); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration *en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (Decision and Order on Reconsideration *en banc*) (McGranery, J., concurring and dissenting).

Moreover, we agree with claimant that when the administrative law judge stated that the medical studies relied by Dr. Rosenberg "show no progression for this *type of legal pneumoconiosis* once coal mine dust exposure ends," Decision and Order Denying Benefits at 8 (emphasis added), the administrative law judge applied the wrong inquiry. 20 C.F.R. §718.201(a)(2), (b), (c); *Workman*, 23 BLR at 1-22; *Sainz v. Kaiser Steel Corp.*, 5 BLR 1-758 (1983). As the Board recognized in *Workman*, "a miner is not required to separately prove that he [or she] suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that the disease actually progressed." *Workman*, 23 BLR at 1-26, citing *NMA*, 292 F.3d at 849. Rather, "[b]ecause the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis [COPD due in part to coal dust exposure] that was not manifest at the cessation of [her] coal mine employment, or who proves that [her] pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which [she] suffers is of a progressive nature." *Workman*, 23 BLR at 1-26-27. Because the administrative law judge has not properly considered whether the medical opinion of Dr. Rosenberg is reasoned with respect to whether claimant suffers from legal pneumoconiosis, and insofar as the administrative law judge required claimant to prove the progressivity and latency of her COPD in contravention of the regulations and the *NMA* decision, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

Because this case must be remanded for reconsideration of the medical opinion evidence as to the existence of pneumoconiosis, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.203, 718.204(c) that claimant failed to establish that she was totally disabled due to pneumoconiosis arising out of coal mine

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Labor has determined not to be "in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed Reg. 79,920, 79,939 (Dec. 20, 2000)).

employment. On remand the administrative law judge must reconsider Dr. Rosenberg's opinion, and resolve the conflict in the evidence as to whether claimant suffers from an obstructive respiratory condition due in part to coal dust exposure. *See NMA*, 292 F.3d at 849. The administrative law judge must determine whether claimant has established the existence of pneumoconiosis, and if so, whether claimant also established that her pneumoconiosis arose out of coal mine employment, and whether she has established total disability due to pneumoconiosis. *See* 20 C.F.R. §§728.202(a)(4), 718.203, 718.204(c); *Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). In consideration of these issues, the administrative law judge should explicitly address whether the physicians' opinions are reasoned and documented, and consider the impact of the physicians' comparative credentials in weighing the conflicting opinions of Drs. Cohen and Rosenberg.[6] *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*). The administrative law judge must also provide an explanation for the weight accorded the evidence, his findings of fact and conclusions of law, as required by the APA.

[6] Claimant argues that the administrative law judge erred by failing to discuss the impact of the physicians' comparative credentials on the weighing of the evidence. We agree that on remand, the administrative law judge should explicitly address this considerations.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge