

BRB No. 07-0838 BLA

J.A. (Deceased))
)
 Claimant-Respondent)
)
 v.)
)
 ELK RUN COAL COMPANY)
)
 Employer-Petitioner) DATE ISSUED: 07/24/2008
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.¹

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-5775) of Administrative Law Judge Linda S. Chapman 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 May 14, 2004.²

¹ Claimant died on October 12, 2006. Claimant's Exhibit 7. Claimant's 2004 claim is being pursued by his surviving spouse.

² Claimant initially filed a claim for benefits on April 14, 1999. In a Decision and Order dated January 25, 2002, Administrative Law Judge Richard A. Morgan found that

After crediting claimant with 28.21 years of coal mine employment,³ the administrative law judge found that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the merits of claimant's 2004 claim. In her consideration of all of the evidence of record, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.⁴

the evidence established (1) the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a); (2) that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b); and (3) total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 1. However, Judge Morgan found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Morgan denied benefits. *Id.* By Decision and Order dated October 30, 2002, the Board affirmed Judge Morgan's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and 718.204(b)(2)(i)-(iv) as unchallenged on appeal. [*J.A.*] *v. Elk Run Coal Co.*, BRB No. 02-0368 BLA (Oct. 30, 2002) (unpub.). The Board, however, held that the evidence was insufficient, as a matter of law, to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board, therefore, affirmed Judge Morgan's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1999 claim.

³ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Because it is unchallenged on appeal, we affirm the administrative law judge's finding of 28.21 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Collateral Estoppel

Employer contends that, because Administrative Law Judge Richard A. Morgan, in his adjudication of claimant's 1999 claim, found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), collateral estoppel precludes a finding of total disability due to pneumoconiosis in this claim. We disagree.

The regulations provide that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also 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). Claimant's prior claim was denied because claimant did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in order to obtain review of the merits of his 2004 claim. 20 C.F.R. §725.309(d)(2),(3). Consequently, the fact that Judge Morgan, in his adjudication of the prior claim, found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), does not preclude claimant from establishing this element of entitlement with new evidence in the subsequent claim.

We also reject employer's contention that the administrative law judge erred in not determining whether claimant's totally disabling respiratory impairment had become materially worse than it was during his prior claim. In amending 20 C.F.R. §725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), which does not require a qualitative comparison of the old and new evidence.

Total Disability Due to Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁵ In her consideration of whether the new evidence established that claimant's total disability was due to pneumoconiosis, the administrative law judge considered the opinions of Drs. Gaziano, Dahhan, and Castle.⁶ Director's Exhibits 15,

⁵ Section 718.204(c)(1) provides that:

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:

- (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).

⁶ Dr. Gaziano examined claimant on June 17, 2004. In a report dated June 20, 2004, Dr. Gaziano diagnosed coal workers' pneumoconiosis due to coal mining and chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 15. Dr. Gaziano attributed claimant's severe pulmonary impairment to his coal workers' pneumoconiosis and COPD. *Id.*

Dr. Dahhan examined claimant on November 23, 2004. In a report dated November 23, 2004, Dr. Dahhan diagnosed coal workers' pneumoconiosis, chronic bronchitis, and emphysema. Director's Exhibit 16. Dr. Dahhan opined that claimant's pulmonary disability was due to his chronic bronchitis and emphysema, which he attributed to claimant's smoking history. *Id.* Dr. Dahhan opined that claimant's pulmonary disability was not caused by his coal workers' pneumoconiosis. *Id.*

Dr. Castle reviewed the medical evidence. In a report dated December 2, 2005, Dr. Castle opined that claimant suffered from coal workers' pneumoconiosis. Employer's Exhibit 1. However, Dr. Castle opined that claimant's disabling respiratory impairment was due to tobacco smoke induced pulmonary emphysema rather than coal

16; Employer's Exhibits 1, 2. While Dr. Gaziano attributed claimant's total disability to his coal workers' pneumoconiosis and cigarette smoking, Drs. Dahhan and Castle opined that claimant's total disability was not due to pneumoconiosis, but was attributable instead to emphysema caused by cigarette smoking. The administrative law judge found that Dr. Gaziano's opinion was "well-documented and well-reasoned" and accorded it "full weight." Decision and Order at 14. Conversely, the administrative law judge found that the opinions of Drs. Dahhan and Castle were not well-reasoned and, therefore, were entitled to little, if any weight. *Id.* at 14-16. Consequently, the administrative law judge credited Dr. Gaziano's opinion, that claimant's total disability was due to pneumoconiosis, over the contrary opinions of Drs. Dahhan and Castle. *Id.* at 14-16. The administrative law judge, therefore, found that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Dr. Gaziano

Employer initially contends that the administrative law judge erred in her consideration of Dr. Gaziano's opinion. We agree. Employer accurately notes that the administrative law judge erred in failing to provide any basis for finding that Dr. Gaziano's opinion regarding the cause of claimant's totally disabling respiratory impairment was "well-reasoned."⁷ See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Dr. Dahhan

Employer also argues that the administrative law judge erred in her consideration of Dr. Dahhan's opinion. The record reflects that Dr. Dahhan relied upon a number of factors to support his opinion that claimant's pulmonary disability was not due to his pneumoconiosis. First, Dr. Dahhan explained that claimant's "pulmonary impairment is severe in degree, an amount that is rarely seen secondary to the inhalation of coal dust per

workers' pneumoconiosis. *Id.* Dr. Castle reiterated his opinions during a February 6, 2006 deposition. Employer's Exhibit 2.

⁷ The administrative law judge stated, without explanation, that Dr. Gaziano's opinion regarding the cause of claimant's pulmonary disability was "well-reasoned." Decision and Order at 14. As employer notes, by contrast, the administrative law judge subjected the contrary opinions of Drs. Castle and Dahhan to much greater scrutiny in finding that they were not well-reasoned. Decision and Order at 14-16; see *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*)(remanding for further consideration where the administrative law judge did not subject the conflicting medical opinions to the same scrutiny).

se.” Director’s Exhibit 16. The administrative law judge noted that Dr. Dahhan interpreted claimant’s November 20, 2004 x-ray as having opacities with a profusion of 2/3; an interpretation that the administrative law judge characterized as a “fairly advanced state” of coal workers’ pneumoconiosis. Decision and Order at 8. The administrative law judge, however, did not explain why this factor undermined Dr. Dahhan’s reliance upon the fact that claimant’s pulmonary impairment was of a severity that is only rarely caused by coal dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Second, Dr. Dahhan compared the objective test results from his examination on November 20, 2004 with those that Dr. Gaziano obtained five months earlier on June 17, 2004. Dr. Dahhan noted that the data from the two examinations was not fixed, but demonstrated “waxing and waning.”⁸ Director’s Exhibit 16. Dr. Dahhan opined that these “findings were inconsistent with the permanent fixed defects secondary to the inhalation of coal dust.” *Id.* Although the administrative law judge acknowledged that there was some difference in the objective test results obtained by Drs. Gaziano and Dahhan,⁹ she noted that both of the pulmonary function studies produced qualifying values. Decision and Order at 15. Dr. Dahhan, however, relied upon the fact that the values obtained during the two pulmonary function tests fluctuated, not upon the qualifying nature of the studies. The qualifying or non-qualifying nature of each study does not negate the existence of the divergent values obtained during the studies.

The administrative law judge also noted that Dr. Dahhan did not address the significance of the fact that claimant was administered oxygen during his November 20, 2004 arterial blood gas study. The interpretation of medical data is a medical determination, and an administrative law judge may not substitute her opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). There is no evidence in the record that addresses the effect of oxygen on the results of an arterial blood gas study. By hypothesizing as to the potential effect of oxygen on claimant’s arterial blood gas

⁸ The pulmonary function study conducted on June 17, 2004 revealed an FEV1 value of 0.97, an FVC value of 2.88, and an MVV value of 36. Director’s Exhibit 15. The pulmonary function study conducted on November 20, 2004 revealed an FEV1 value of 0.67, an FVC value of 1.47, and an MVV value of 26. Employer’s Exhibit 16. The post-bronchodilator portion of claimant’s November 20, 2004 pulmonary function study revealed an FEV1 value of 0.69 and an FVC value of 1.66. *Id.*

⁹ The arterial blood gas study conducted on June 17, 2004 revealed a pCO₂ value of 37 and a pO₂ value of 57. Director’s Exhibit 15. The arterial blood gas study conducted on November 20, 2004 revealed a pCO₂ value of 56.7 and a pO₂ value of 72.0. Director’s Exhibit 16.

study results, the administrative law judge improperly substituted her opinion for that of a medical expert. *See Marcum*, 11 BLR at 1-24.

Dr. Dahhan also based his opinion, that claimant's total disability was not attributable to his coal dust exposure, on the fact that claimant's pulmonary condition responded to bronchodilator therapy. Dr. Dahhan explained that this finding was "inconsistent with the abnormality being due to the inhalation of coal dust." Director's Exhibit 16. The administrative law judge noted that, while claimant's November 20, 2004 pulmonary function study values improved after the administration of a bronchodilator, the post-bronchodilator results remained qualifying, thereby showing that claimant's disability was "not completely reversible." Decision and Order at 15. The administrative law judge mischaracterized Dr. Dahhan's opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Dr. Dahhan did not base his finding on the fact that claimant's condition was completely "reversible." Dr. Dahhan merely noted that claimant's pulmonary condition improved after the administration of a bronchodilator. Dr. Dahhan explained that this factor, along with others, supported his finding that claimant's total disability was not due to his pneumoconiosis. Director's Exhibit 16.

Dr. Castle

Employer contends that the administrative law judge committed numerous errors in her consideration of Dr. Castle's opinion. First, employer argues that the administrative law judge misinterpreted Dr. Castle's opinion. The administrative law judge noted that Dr. Castle's opinion, that claimant did not have any consistent physical findings demonstrating the existence of an interstitial pulmonary disease, was contrary to the other evidence of record.¹⁰ Decision and Order at 16. The administrative law judge therefore found that Dr. Castle's conclusion, in particular his reliance on a lack of consistent findings of interstitial pulmonary disease, was not based on a complete review of the record. *Id.* Employer, however, contends that Dr. Castle, in noting that claimant did not have any consistent "physical findings" indicating the presence of an interstitial pulmonary process, was referring to the physical findings from the doctors' examinations, not to the radiographic evidence of pneumoconiosis. A review of Dr. Castle's report supports employer's characterization. The paragraph wherein Dr. Castle made the statement at issue referenced physical findings on examination:

¹⁰ The administrative law judge specifically noted that Dr. Castle's opinion was contrary to the findings of Dr. Miller, who noted "clearly extensive interstitial disease" in his interpretation of three CT scans. Decision and Order at 16. The administrative law judge further noted that Dr. Wheeler identified fibrosis in his interpretation of claimant's November 20, 2004 x-ray. *Id.*

[Claimant] did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process. He did have consistent findings indicating an increased AP diameter, diminished breath sounds, and wheezing. All these findings are consistent with a tobacco smoke induced lung disease such as pulmonary emphysema.

Employer's Exhibit 1.

Moreover, employer accurately notes that Dr. Castle was aware of x-ray findings of pneumoconiosis, and diagnosed pneumoconiosis based on the x-rays. *See* Employer's Exhibit 1. Thus, after reviewing Dr. Castle's report, we agree with employer that the administrative law judge misinterpreted Dr. Castle's findings. *See Tackett*, 7 BLR at 1-706.

The administrative law judge also questioned Dr. Castle's opinion because he did not explain why claimant's pneumoconiosis played absolutely no role in his impairment. Decision and Order at 16. Contrary to the administrative law judge's characterization, Dr. Castle provided a detailed explanation for his opinion that claimant's pulmonary disability was not attributable to his pneumoconiosis. *See* Employer's Exhibits 1, 2. In addition to his reliance upon the results of his physical examination, Dr. Castle noted several factors that supported his opinion. Dr. Castle noted a significant degree of variability between the objective test results obtained by Drs. Gaziano and Dahhan. Employer's Exhibit 1. Dr. Castle, like Dr. Dahhan, explained that this type of variability is not due to a fixed process such as that seen with coal workers' pneumoconiosis. *Id.* Dr. Castle also relied upon the fact that claimant's test results had previously demonstrated a significant degree of reversibility as well. *Id.* Dr. Castle also interpreted claimant's recent arterial blood gas studies as showing evidence of significant hypoxemia associated with hypercapnia and respiratory acidosis, findings he characterized as "typical of tobacco smoke induced pulmonary emphysema rather than coalworkers' pneumoconiosis." Employer's Exhibits 1, 2.

Moreover, as employer notes, it is not employer's burden to establish that pneumoconiosis played absolutely no role in causing claimant's disability.¹¹ Rather, it is claimant's burden to establish that his pneumoconiosis was a "substantially contributing cause" of his disability. 20 C.F.R. §718.204(c).

¹¹ During his deposition, Dr. Castle testified that he could, in fact, rule out coal workers' pneumoconiosis and coal dust exposure as causes of claimant's total disability. Employer's Exhibit 2 at 16.

The administrative law judge also questioned Dr. Castle's opinion because he did not provide "any support for his claim that respiratory acidosis is a condition that cannot be found in someone suffering from pneumoconiosis, or explain whether the fact that [claimant] was being administered oxygen at the time that the arterial blood gas study was performed had an effect on the results." Decision and Order at 16. As previously noted, the interpretation of medical data is a medical determination, and an administrative law judge may not substitute her opinion for that of a physician. *Marcum*, 11 BLR at 1-24. The record reflects that Dr. Castle is Board-certified in Pulmonary Medicine. There is no medical evidence contradicting Dr. Castle's opinion that arterial blood gas findings of significant hypoxemia associated with hypercapnia and respiratory acidosis are typical of pulmonary emphysema caused by cigarette smoking.¹² Moreover, there is no evidence in the record that addresses the effect of oxygen on the results of an arterial blood gas study.

The administrative law judge also accorded less weight to Dr. Castle's opinion because she found that it was contrary to the premise that pneumoconiosis can result in a purely obstructive condition. Decision and Order at 16. However, because Dr. Castle did not assume that coal dust exposure can never cause an obstructive lung disease,¹³ his opinion is not inconsistent with the regulations. *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

In light of the above-referenced errors, we must vacate the administrative law judge's finding that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration. On remand, when reconsidering whether the new medical opinion evidence establishes that claimant's total disability was due to pneumoconiosis, the administrative law judge should address the comparative credentials of the respective

¹² Contrary to the administrative law judge's characterization, Dr. Castle did not "claim that respiratory acidosis is a condition that cannot be found in someone suffering from pneumoconiosis." Decision and Order at 16. Rather, Dr. Castle explained that respiratory acidosis is "typical of someone with severe airway obstruction due to tobacco smoking" and is "not the expected finding that you would have with coal workers' pneumoconiosis." Employer's Exhibit 2 at 12.

¹³ Dr. Castle stated that when coal workers' pneumoconiosis causes an impairment, it generally does so by causing a mixed, irreversible, obstructive and restrictive ventilatory impairment. Employer's Exhibit 2 at 12. Dr. Castle also acknowledged that coal workers' pneumoconiosis can cause obstructive lung disease. *Id.* at 13.

physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In light of our decision to vacate the administrative law judge's finding that the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2004 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's 1999 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge