BRB No. 03-0655 BLA

JIMMY L. LITTLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 06/14/2004
Employer-Petitioner	)	
	)	
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 on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

Employer appeals the Decision and Order Awarding Benefits on Remand (2001-BLA-00172) of Associate Chief Administrative Law Judge Thomas M. Burke 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).[1] This case is

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

before the Board for the second time. Claimant's two prior applications for benefits, filed on November 12, 1985 and on August 21, 1992, were denied and administratively closed by the Department of Labor. Director's Exhibits 28, 57. The records of claimant's prior denied claims were transferred to a Federal Records Center for storage, where they were destroyed. Director's Exhibit 57. Consequently, the record does not reflect the dates of or bases for the prior claim denials.

On March 31, 1999, claimant filed his current application, which was treated as a duplicate claim for benefits filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000). The district director denied benefits based on findings that claimant did not establish any element of entitlement and did not establish a material change in conditions as required by Section 725.309(d)(2000). Director's Exhibit 26. Claimant requested modification and submitted additional medical evidence. Director's Exhibit 31. The district director found a material change in conditions and entitlement established, and awarded benefits. Director's Exhibit 53. Employer requested a hearing, Director's Exhibit 54, which was held before the administrative law judge on April 5, 2001.

In the administrative law judge's initial decision, he credited claimant with thirteen years of coal mine employment pursuant to the parties' stipulation and found that the duplicate claim was timely filed pursuant to 30 U.S.C. §932(f), 20 C.F.R. §725.308(a). The administrative law judge noted that the records of claimant's prior denied claims were unavailable for comparison with the newly-developed evidence. The administrative law judge found that the new evidence established the existence of pneumoconiosis arising out of coal mine employment, that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204. The administrative law judge concluded that claimant established a material change in conditions, and awarded benefits.

Employer appealed to the Board. Subsequent to the docketing of employer's appeal, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the three-year statute of limitations at 30 U.S.C. §932(f) is triggered "*the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and . . . the clock may only be turned back if the miner returns to the

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

mines after a denial of benefits." *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 BLR 2-288, 2-298 (6th Cir. 2001)(emphasis in original). Claimant ceased working in coal mine employment in 1983 and has not returned to the mines. Claimant's Exhibit 1. Consequently, employer argued on appeal that, with access to the prior claim records, it could attempt to rebut the presumption that claimant's duplicate claim was timely filed, but the loss of the records precluded employer from making its statute of limitations defense. Employer argued further that the loss of the prior claim records prevented a comparison between the new medical evidence and preexisting medical evidence to demonstrate that the evidentiary record in the duplicate claim differed qualitatively from the record on which the prior claim was denied. Employer therefore contended that the loss of the prior claim records violated employer's due process rights, and requested that liability for benefits be transferred to the Black Lung Disability Trust Fund (the Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), responded that employer waived any arguments arising from the loss of the prior claim records by failing to raise the arguments before the administrative law judge.

Upon review of employer's appeal, the Board held that employer did not waive its timeliness and transfer arguments because it would have been futile for employer to raise them under the law prior to *Kirk*. *Little v. Eastover Mining Co*., BRB No. 01-0929 BLA, slip op. at 4 (Sep. 30, 2002)(unpub.). The Board discussed *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), which held that transfer to the Trust Fund was proper where the Office of Workers' Compensation Programs (OWCP) lost evidence necessary for the employer's defense, in violation of OWCP's legal duty to maintain claim records and in violation of the employer's due process rights. *Little*, slip op. at 4 n.6. In light of *Holdman*, the Board vacated the award of benefits and remanded the case for the administrative law judge to consider "the impact of the loss of the prior evidentiary record on this case and determine if the parties' right[s] to due process have been denied and, if so, whether the transfer of liability to the Trust Fund is the appropriate remedy." *Little*, slip op. at 5. The Board affirmed as unchallenged the administrative law judge's findings of the existence of pneumoconiosis arising out of coal mine employment and total disability, but vacated his finding that claimant is totally disabled due to pneumoconiosis and instructed him to provide valid reasons for the weight he accorded to the opinions of Drs. Dahhan, Fino, and Branscomb. *Little*, slip op. at 3 n.3, 6-8. The Board summarily denied the Director's motion for reconsideration on December 13, 2002.

On remand, the administrative law judge found that the loss of the prior claim records did not violate employer's due process rights as to the statute of limitations defense because employer "has the ability to maintain its own copies of closed files" and could submit "its own copies of evidence [from] the prior claims that showed Claimant received a communication prior to three years of the instant claim that he was totally disabled due to pneumoconiosis." Decision and Order at 5-6. The administrative law

judge found that on the material change issue, the loss of the prior claim records did not violate employer's due process rights because "the inability to undertake a qualitative analysis between old and new evidence is *de minimus*, [sic] considering . . . that pneumoconiosis is a progressive disease." Decision and Order at 5. The administrative law judge therefore declined to transfer liability to the Trust Fund. Pursuant to Section 718.204(c), the administrative law judge gave less weight to the opinions of Drs. Dahhan, Fino, and Branscomb that claimant is totally disabled by smoking-related lung disease, and found that pneumoconiosis is a substantially contributing cause of claimant's total disability. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the destruction of the prior claim records did not violate employer's due process rights in the circumstances of this case. Employer further asserts that the administrative law judge again erred in his analysis of the opinions of Drs. Dahhan, Fino, and Branscomb when he found that claimant is totally disabled due to pneumoconiosis. Claimant has not responded to employer's appeal. The Director has filed a limited response, urging the Board to reject employer's contention that it should be dismissed as the responsible operator.

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).

The administrative law judge did not provide valid reasons for the weight he accorded to the opinions of Drs. Dahhan, Fino, and Branscomb when he considered the issue of disability causation. Because substantial evidence does not support the administrative law judge's finding pursuant to Section 718.204(c), we must remand this case for further consideration. We reverse the administrative law judge's finding that employer is the responsible operator liable for the payment of any benefits awarded in this case.

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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(c), employer contends that the administrative law judge provided invalid reasons for according less weight to the opinions of Drs. Dahhan,

Fino, and Branscomb. Employer's contentions have merit. Previously, the administrative law judge discounted the opinions of Drs. Dahhan and Fino that claimant's disabling obstructive impairment partially reverses with bronchodilators, suggesting a smoking-related condition. The administrative law judge discounted their opinions because the "post-bronchodilator [test] results were still qualifying." [2001] Decision and Order at 23. The Board held that the administrative law judge made an improper medical judgment as to the significance of qualifying post-bronchodilator test results regarding the source of claimant's impairment. *Little*, slip op. at 7.

On remand, the administrative law judge found that the opinions of Drs. Fino and Dahhan were "less sound than the contrary medical judgment of Dr. Sherman" because they "do not explain why the pulmonary function test values reverse to a level that still qualifies for disability *after* bronchodilator therapy, even though both doctors cite pulmonary function reversibility as a factor . . . ." Decision and Order at 7 (emphasis in original). However, review of Dr. Sherman's opinion reveals no discussion of the relation of post-bronchodilator pulmonary function values to the etiology of claimant's impairment. Director's Exhibit 52. While we express no view on the credibility of the opinions of Drs. Fino and Dahhan, we may not accept the administrative law judge's suggestion that the pulmonologists' diagnosis of a disabling, partially reversible, impairment due to smoking is "contradict[ed]" by "the underlying data" because "Claimant's pulmonary function test did not reverse to a level that equates to a non-disabling impairment." Decision and Order at 7; *see Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987)(holding that "the interpretation of objective data is a medical determination"). Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.204(c) and instruct him to reconsider the opinions of Drs. Dahhan and Fino.

The administrative law judge did not provide a valid rationale for discounting Dr. Branscomb's opinion that claimant is totally disabled due to smoking-related emphysema. Previously, the administrative law judge discounted Dr. Branscomb's opinion that claimant's coal workers' pneumoconiosis is localized to the lung apexes and is minimal, because the administrative law judge found that the disease was neither localized nor minimal. [2001] Decision and Order at 23. The Board held that because no physician contradicted Dr. Branscomb's medical assessment, the administrative law judge's rationale was insufficient. *Little*, slip op. at 7, citing *Marcum*.

On remand, the administrative law judge discounted Dr. Branscomb's assessment as to the extent of coal workers' pneumoconiosis because it was based on biopsy samples unrepresentative of the lungs as a whole, and because it was "contradicted" by Dr. Sherman's opinion. Decision and Order at 9. Review of Dr. Sherman's opinion reveals no analysis by him of the extent of coal workers' pneumoconiosis found on biopsies that were taken from the upper lobes of claimant's lungs. Director's Exhibits 31, 52. To the

extent the administrative law judge interprets Dr. Sherman's statement that there was "clear anatomic evidence of coal workers' pneumoconiosis" as an opinion that the disease was widespread, Director's Exhibit 52 at 3, the administrative law judge has not explained why he credits Dr. Sherman's opinion which, of necessity, must also be based on unrepresentative biopsy samples.[2] Claimant bears the burden of proving that his total disability is due to pneumoconiosis. Additionally, an administrative law judge must adequately explain the weighing of relevant evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-102-03 (6th Cir. 1983). Therefore, we instruct the administrative law judge on remand to reconsider Dr. Branscomb's opinion as to the cause of claimant's total disability.

Review of the record reflects that a critical issue in the physicians' conflicting opinions regarding the cause of claimant's total disability is whether claimant's severe emphysema is due solely to smoking or whether it is also related to coal mine dust exposure. Director's Exhibits 43, 52; Employer's Exhibits 3-5. When the administrative law judge previously found the existence of pneumoconiosis established by biopsy and medical opinion evidence, he did not resolve the question of whether claimant's emphysema constitutes pneumoconiosis as defined under the Act and regulations. [2001] Decision and Order at 19-20; *see* 20 C.F.R. §718.201(a)(2). Since this issue is critical to the physicians' opinions as to disability causation, the administrative law judge should explicitly address whether legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to Section 718.204(c)(1). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 517 n.20, 22 BLR 2-625, 2-656 n.20 (6th Cir. 2003)(emphasizing the need for clarity in administrative decisions). Because we vacate the award of benefits, we also vacate the administrative law judge's onset finding pursuant to 20 C.F.R. §725.503(b) and instruct him to reconsider the onset date, if reached.

In the event that the administrative law judge awards benefits on remand, we hold that the Trust Fund must bear liability in the circumstances of this case. As an initial matter, we again reject the Director's argument that employer waived any arguments arising from the destruction of the prior claim records, as the Director presents no reason to depart from the law of the case on this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

[2] If the representativeness of the biopsy samples remains relevant to the administrative law judge's analysis on remand, he should consider pathologist Dr. Naeye's opinion that the lung tissues removed for therapeutic purposes are unrepresentative of claimant's entire lungs. Director's Exhibit 40.

The administrative law judge found that the destruction of the prior claim records did not violate employer's due process rights with respect to employer's burden to rebut the Section 725.308(c) presumption that claimant's duplicate claim is timely, because employer could maintain its own copies of prior claim records. As employer contends, the administrative law judge's analysis is not in accordance with law. The duty to maintain claim records rests with OWCP, not employer.[3] 20 C.F.R. §725.102(a); *Holdman*, 202 F.3d at 883, 22 BLR at 2-43. The administrative law judge provided no authority for his additional finding that "the purpose of any policy directing the Director to maintain records of closed claims is not to enable employers to mount meaningful defenses to duplicate claims." Decision and Order at 5 n.5; *cf.* 44 U.S.C. §3101 (requiring agencies to "preserve records containing adequate and proper documentation of the . . . decisions . . . of the agency and designed to furnish the information necessary to protect the legal and financial rights . . . of persons directly affected by the agency's activities").

In this case, employer retained two medical opinions in its files from the 1992 claim. Employer's Exhibits 1, 2. Neither opinion is legally sufficient to rebut the Section 725.308 timeliness presumption because neither one diagnosed claimant as totally disabled due to pneumoconiosis. Employer's Exhibits 1, 2; *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-41-42 (1993). However, it is unknown what other medical evidence was contained in the destroyed records. Without the prior records, it is not possible to tell whether a medical determination of total disability due to pneumoconiosis was, or was not, communicated to claimant more than three years prior to March 31, 1999. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Because employer must rebut the Section 725.308(c) presumption that the duplicate claim is timely, employer "is in the difficult position of rebutting OWCP by proving the contents of . . . documents lost by OWCP." *Holdman*, 202 F.3d at 883, 22 BLR at 2-44. In such a situation, employer need not show actual prejudice; the lack of a fair opportunity to mount a meaningful defense is sufficient to demonstrate a due process violation justifying transfer of liability. *Holdman*, 202 F.3d at 883-84, 22 BLR at 2-44-45. Having reviewed the administrative law judge's findings under the applicable law, we conclude that only one result is possible on this record: "in light of the process due," employer may not be considered the responsible operator for the payment of benefits. *Holdman*, 202 F.3d at 884, 22 BLR at 2-45. Consequently, we reverse the administrative law judge's finding and hold that the Trust Fund must bear liability for any benefits awarded on remand. *See* 26 U.S.C. §9501(d)(1)(B).

[3] The duty to maintain the prior claim records remained with OWCP after it transferred the records to the National Archives & Records Administration (NARA) Federal Records Center. 36 C.F.R. §1228.168(a)(stating that "agency records transferred to a NARA records center remain in the legal custody of the agency").

Because employer may not be the responsible operator, we address the material change in conditions issue insofar as it relates to any award of benefits that may be directed against the Trust Fund. To establish a material change in conditions, claimant must go beyond merely establishing an element that was previously decided against him; he "must also demonstrate that this change rests upon a qualitatively different evidentiary record." *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, --- BLR --- (6th Cir. 2003)(Moore, J., concurring in the result). On remand, the administrative law judge suggested, incorrectly, that the progressive nature of pneumoconiosis essentially obviates the need for a showing of qualitative difference. Decision and Order at 5. The Director argues, however, that in the administrative law judge's first Decision and Order, "Judge Burke conducted the fullest material change inquiry possible" by comparing such preexisting medical evidence as was available with the new, duplicate claim evidence to find a material change in conditions established. Director's Brief at 5-6. In the administrative law judge's initial decision, he assumed that all elements of entitlement were previously decided against claimant, and found a qualitative difference in the new evidence for the pneumoconiosis and total disability elements, when compared to such prior evidence as was available. [2001] Decision and Order at 20-21, 24. Substantial evidence supports the administrative law judge's 2001 findings. Thus, we agree with the Director that in the initial decision, the administrative law judge conducted a qualitative comparison adequate to ensure that claimant carried his burden to prove a material change in conditions. *Flynn*, 353 F.3d at 479, --- BLR at ---, *Kirk*, 264 F.3d at 608-610, 22 BLR at 2-299-300. That holding does not alter our conclusion that employer is not the responsible operator for any benefits ultimately awarded, in the circumstances of this case.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is vacated in part and reversed in part, and the case is remanded 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