BRB No. 07-0774 BLA

T. R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRATT MINING COMPANY	)	DATE ISSUED: 06/27/2008
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 - Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Christopher M. Hunter (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2005-BLA-05136) of Administrative Law Judge Ralph A. Romano rendered on a miner's 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 claimant with sixteen years of qualifying coal mine employment, as stipulated by

the parties, and adjudicated this claim, filed on January 27, 2004, as a subsequent claim subject to the provisions at 20 C.F.R. §725.309(d).[1] The administrative law judge found that the newly submitted evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. Thus, claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). With respect to the merits of entitlement, the administrative law judge found that the blood gas study and medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv), and that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's determination to credit the opinions of Drs. Rasmussen and Gaziano over those of Drs. Zaldivar and Crisalli, in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Employer asserts that the administrative law judge mischaracterized and improperly evaluated the evidence, and applied an incorrect burden of proof. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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.[3] 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[1] The miner filed a claim on December 21, 1994, which was denied for failure to establish any of the elements of entitlement. Decision and Order at 3-4; Director's Exhibit 1.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2-4.

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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 "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing any of the elements of entitlement in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

At Section 718.202(a)(4), employer first contends that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Gaziano to find the existence of pneumoconiosis established, when both physicians relied primarily on positive x-rays and the administrative law judge found that the x-ray evidence was negative for pneumoconiosis. Employer maintains that Dr. Rasmussen's diagnosis of pneumoconiosis, based upon a positive x-ray reading and claimant's history of coal dust exposure, does not constitute a reasoned medical opinion under Section 718.202(a)(4), but is merely a restatement of an x-ray. Employer also asserts that Dr. Gaziano's report does not reflect the basis for his diagnosis of pneumoconiosis, and that Dr. Gaziano's opinion cannot be credited as a matter of law over the opinions of Drs. Zaldivar and Crisalli, who reviewed more evidence, provided more reasoning, and were subject to cross-examination regarding their view that claimant's impairment is unrelated to coal dust exposure. Employer's Brief at 3-5.

Employer's initial contentions are without merit. Both Dr. Gaziano and Dr. Rasmussen provided medical evaluations based on examination and objective testing as well as positive x-rays.[4] Decision and Order at 8-10; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987). Moreover, while an administrative law judge may credit a medical opinion that is based in part on a discredited x-ray or where the x-ray evidence is found to be negative for the existence of pneumoconiosis, *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1986), an opinion may not be rejected solely because it partially relied on a discredited x-ray. *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1986). Further, contrary to employer's argument, the opinions of Drs. Rasmussen and Gaziano need not be discounted because they were not deposed or because they did not

[4] Later in his Decision and Order, in his analysis under 20 C.F.R. §718.204, the administrative law judge specified that all four medical opinions were documented and reasoned. Decision and Order at 14.

review all of the medical evidence of record. *See generally Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). Finally, we reject employer's assertion that Dr. Gaziano's opinion is insufficient as a matter of law to establish the existence of pneumoconiosis, as the administrative law judge reasonably inferred that Dr. Gaziano's opinion was based on his underlying documentation and testing. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985).

However, employer's challenge to the administrative law judge's determination that Drs. Rasmussen and Gaziano provided more complete and thorough reasoning and explanation in support of their conclusions, than did Drs. Zaldivar and Crisalli, has merit. Specifically, employer maintains that, in fact, Dr. Gaziano failed to provide any explanation for his conclusions,[5] and argues that the administrative law judge did not subject the opinions of Drs. Rasmussen and Gaziano to the same scrutiny as those of Drs. Zaldivar and Crisalli. We agree. In this connection, we note that Dr. Gaziano's reasoning, albeit brief, could rationally be credited to support a finding of the existence of pneumoconiosis. However, we are unable to discern the "complete and thorough" reasoning and explanation cited by the administrative law judge as supporting Dr. Gaziano's opinion. Decision and Order at 10. Additionally, the administrative law judge found that Dr. Crisalli failed to "fully explain" or provide "supporting rationale, which results in his report being less than well reasoned and entitled to less weight than that of Drs. Rasmussen and Gaziano." *Id*. In so finding, however, the administrative law judge failed to delineate his consideration of the extensive evidence supplied by Drs. Zaldivar and Crisalli supporting their conclusions that claimant does not have pneumoconiosis, and indicate why the evidence was found unpersuasive. *See* Employer's Exhibits 3, 7, 8; Director's Exhibit 10; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Consequently, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), and remand this case for the administrative law judge to reassess the conflicting medical opinions of record and provide a valid rationale for his credibility determinations, in compliance with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Next, we are persuaded, in part, by employer's challenges to the administrative law judge's evaluation of the remaining elements of entitlement. Concerning the finding of total disability pursuant to Section 718.204(b)(2)(ii) and (b)(2)(iv), Decision and Order

[5] Dr. Gaziano stated: "It is my opinion, to a reasonable degree of medical certainty, that [claimant] has coal workers' pneumoconiosis with a moderately severe degree of pulmonary functional impairment," and "It is my opinion, to a reasonable degree of medical certainty, that [claimant] could not perform the last coal mine work he did and that his pulmonary impairment is due to occupational pneumoconiosis." Claimant's Exhibits 3, 4.

at 13-15, employer correctly argues that the administrative law judge mischaracterized the blood gas evidence, because he erred in evaluating the number of qualifying *versus* non-qualifying blood gas studies.[6] Specifically, the administrative law judge inaccurately labeled two of the non-qualifying studies as qualifying, namely, the April 5, 2004 exercise study, and the March 20, 2006 study. Consequently, he erred in finding that only one value out of the six values obtained from the four studies was non-qualifying. Decision and Order at 12-13. Continuing with his evaluation of total disability under 20 C.F.R. §718.204(b)(2)(iv), however, the administrative law judge accurately found that all four physicians agreed that claimant lacks the respiratory or pulmonary capacity to perform his last coal mine employment.[7] Decision and Order at 14; *see* Employer's Exhibit 7 at 24.[8] Nevertheless, because Section 718.204(b)(2) requires that contrary probative evidence be considered, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-196 (1986), and the administrative law judge explicitly based his finding of total disability upon both the blood gas study evidence and the medical opinions of record, we conclude that the administrative law judge's evaluation relies at least in part on an inaccurate assessment of the relevant evidence. Consequently, we vacate the administrative law judge's finding of total respiratory disability at Section 718.204(b)(2) for a reconsideration of the evidence thereunder on remand.

Because the administrative law judge's findings on the issue of pneumoconiosis may affect his weighing of the medical opinions on the issue of disability causation, we also vacate his findings at Section 718.204(c) for a reassessment of the conflicting medical opinions on remand. With regard to employer's specific allegations of error, however, we reject employer's assertion that, by failing to distinguish the effects of claimant's smoking from those of coal dust exposure, Dr. Rasmussen inappropriately

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[6] A "qualifying" blood gas study yields values that are equal to, or less than the applicable values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[7] "[A]ll of the physicians opined that claimant does suffer from a pulmonary impairment and is unable to work as a coal miner or similar employment. Based on the arterial blood gas studies and the medical opinion evidence, I find there is evidence of pulmonary impairment and claimant is unable to work in the capacity of a coal miner, therefore claimant is totally disabled pursuant to §718.204(b)(1)." Decision and Order at 14.

[8] Section 718.204(b) requires that "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, [prevents the miner from performing his usual coal mine employment or comparable employment]." 20 C.F.R §718.204(b)(1)(i), (b)(1)(ii).

presumed that coal dust exposure was a contributing cause of claimant's disability.[9] In this connection, Dr. Rasmussen found claimant's impairment was due to both smoking and coal mine dust exposure, and specified that the coal mine dust exposure was a major contributing factor. Decision and Order at 13, 14; Director's Exhibit 9. Whether a physician's apportionment of the causes for claimant's disability is sufficiently reasoned is a determination for the administrative law judge, *see Underwood*,105 F.3d at 949, 951, 21 BLR 2-23, 2-31-32; moreover, a physician need not necessarily specify relative degrees of causal contribution to a lung impairment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-351, 2-372-373 (4th Cir. 2006); *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). We also reject employer's assertion that the administrative law judge was required to discuss whether Dr. Rasmussen's opinion was hostile to the Act and regulations because the physician "includ[ed] coal dust exposure as a major contributing factor [to claimant's disability] precisely because of the lack of obstruction in this case." Employer's Brief at 11. Although the amended regulations state that pneumoconiosis may be "obstructive" in nature, 20 C.F.R. §718.201 (2001), there is no requirement that a medical opinion diagnose an obstructive impairment to be credited on the issue of disability causation.

However, we agree with employer that the administrative law judge's evaluation of the conflicting evidence on the issue of disability causation at Section 718.204(c) is flawed. Employer notes that the administrative law judge stated incorrectly that Dr. Crisalli "found claimant's disability was due to his smoking history." Decision and Order at 15. In fact, Dr. Crisalli testified in his deposition that "[c]laimant is disabled on the basis of cardiac disease primarily [and there is] some disability related to pulmonary impairment secondary to his cigarette smoking history as well." Employer's Exhibit 7 at 24. Dr. Crisalli additionally testified to claimant's heart surgery, and interpreted the blood gas study results as "indicative of cardiac limitation as opposed to pulmonary limitation." *See* Employer's Exhibits 3, 9. As the administrative law judge's consideration of Dr. Crisalli's opinion on the issue of disability causation was incomplete, he must reassess the opinion on remand.

Employer also argues that the administrative law judge's flawed evaluation of the blood gas study evidence "undercut an essential component of the opinions of Drs. Zaldivar and Crisalli: the claimant's impairment was variable," indicating a smoking or cardiac etiology. *See* Employer's Brief at 5-6, 8; Employer's Exhibits 3, 7, 8. Employer reiterates his objection that the administrative law judge failed to subject the opinions of

[9] Dr. Rasmussen concluded: "The two risk factors for [claimant's] impaired function are his cigarette smoking and his coal mine dust exposure. Both contribute. Both cause lung tissue destruction. His coal mine dust exposure is a major contributing factor since he exhibits impairment in oxygen transfer, *i.e.*, reduced diffusing capacity and impairment in oxygen transfer during exercise absent airway obstruction." Director's Exhibit 9; *see* Decision and Order at 8, 13-14.

Drs. Rasmussen and Gaziano to the same scrutiny as those of Drs. Zaldivar and Crisalli. In particular, employer asserts that although characterized as "credible and highly persuasive," Dr. Gaziano failed to account for claimant's lengthy smoking history, or provide any explanation or reasoning in support of his conclusions. Decision and Order at 15. Finally, employer urges that the administrative law judge failed to fully consider the supporting reasoning provided by Drs. Zaldivar and Crisalli for ruling out pneumoconiosis as a contributing factor in claimant's total disability. Employer's Exhibits 7, 8. Employer's arguments have merit. In crediting the opinions of Drs. Rasmussen and Gaziano over those of Drs. Zaldivar and Crisalli, the administrative law judge's evaluation of the issue of disability causation is based, in part, on an inaccurate and incomplete assessment of the medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.2d 524, 21 BLR 2-324 (4th Cir. 1998); *see generally Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Thus, on remand, the administrative law judge must reassess the conflicting medical opinions and provide valid reasons for his credibility determinations in compliance with the APA.

As we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis, total respiratory disability and disability causation, the administrative law judge is also instructed to initially determine, on remand, whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). If the administrative law judge finds that a change in an applicable condition of entitlement has been demonstrated, he must weigh all of the relevant evidence of record, old and new, in determining whether claimant has established every element of entitlement.

Accordingly, the administrative law judge's Decision and Order- Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings 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