BRB No. 07-0793 BLA

G.M.B., JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	DATE ISSUED: 06/30/2008
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2006-BLA-05963) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) with

respect to 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 accepted the stipulation of the parties that claimant had fifteen years of qualifying coal mine employment, and determined that this claim, filed on October 20, 2005, was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge then found the medical evidence 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(b). In addition, he found the medical evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits, commencing as of October 1, 2005.

On appeal, employer contends that the administrative law judge erred in finding that the miner's claim was timely filed, arguing that the claim should be time barred because claimant received a medical determination of total disability due to pneumoconiosis in 1993, more than twelve years prior to the filing of this claim in 2005. Employer also contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and disability causation pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not be filing a substantive response in this appeal.[1]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] The parties do not challenge the administrative law judge's decision to credit claimant with fifteen years of coal mine employment, or his finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). In addition, the parties do not challenge the administrative law judge's finding that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

Timeliness of Claim

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. *See* 20 C.F.R. §725.308(a). The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Employer contends that, based on the record in this case, the administrative law judge should have found that claimant's October 2005 claim was not filed within three years of the 1993 medical report of Dr. Clarke, wherein he diagnosed pneumoconiosis and indicated that claimant was totally disabled, from a pulmonary standpoint, from returning to his usual coal mine work. Employer's Brief at 9-10; Director's Exhibit 20. In addition, employer contends that it is clear that Dr. Clarke's 1993 medical report was communicated to claimant at the time of his state black lung claim, as claimant testified to this fact at the hearing. Employer's Brief at 10-11; Hearing Transcript at 21-22. Consequently, employer contends that claimant's federal black lung claim is time barred and this case should be dismissed.

Noting employer's contention that this claim was untimely filed, the administrative law judge stated that claimant "knew the consequences" of Dr. Clarke's 1993 opinion and, therefore, found that "it was properly communicated." Decision and Order at 4. However, upon weighing the opinion of Dr. Clarke, the administrative law judge found that it was not well-reasoned because Dr. Clarke's finding of pneumoconiosis was based on a positive x-ray reading, which was against the weight of the x-ray evidence of record, and Dr. Clarke did not address the issue of legal pneumoconiosis. Decision and Order at 5. Consequently, the administrative law judge determined that the evidence cited by employer was insufficient to rebut the presumption that the claim was timely filed. Decision and Order at 5.

In defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit, in *Kirk*, specifically stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *see also Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (*en banc*). In considering whether Dr. Clarke's opinion met the dictates of *Kirk*, however, the administrative law judge did not properly consider whether

Dr. Clarke's 1993 opinion was a reasoned opinion, *i.e.*, whether the documentation and data underlying that specific report is adequate to support the physician's conclusions regarding the miner's health. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Rather, the administrative law judge considered whether the opinion was a "well-reasoned opinion," in comparison to the other, more recent medical evidence of record. Decision and Order at 5. Consequently, we vacate the administrative law judge's finding that Dr. Clarke's medical opinion was not well-reasoned and remand the case for the administrative law judge to reconsider the medical opinion in light of the proper standard. *See Fields*, 10 BLR at 1-22. Moreover, on remand, the administrative law judge must consider whether Dr. Clarke's opinion, which was procured for the purpose of claimant's state workers' compensation claim, constitutes a medical determination of total disability in this case, in light of the divergent standards of proof in state occupational claims and Federal Black Lung claims. *See Clark v. Karst-Robbins Coal Co.*, No. 93-4173, 1994 WL 709288 (Dec. 20, 1994, 6th Cir.).

Moreover, if, the administrative law judge finds Dr. Clarke's opinion is a reasoned medical opinion and, therefore, sufficient to trigger the statute of limitations, he must then more fully discuss whether the finding of total disability due to pneumoconiosis was communicated to claimant. The administrative law judge must determine whether the specifics of Dr. Clarke's opinion were communicated to claimant by the physician in 1993, as alleged by employer. *Kirk*, 264 F.3d at 608, 22 BLR at 2-299. Specifically, the administrative law judge must consider claimant's testimony from the hearing, that he was "pretty sure [Dr. Clarke] did" tell him he was totally disabled and that he was "almost a hundred (100) percent sure" in light of the additional comment that he did not remember the exact words Dr. Clarke used because quite a bit of time had passed. Hearing Transcript at 21, 23, 24. Consequently, the administrative law judge must determine whether Dr. Clarke communicated to claimant that he was totally disabled due to pneumoconiosis and not merely that claimant believed that he was totally disabled based on the medical opinion. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298.

Merits of Entitlement

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Mettu, Rasmussen, Fino and Dahhan. Decision and Order at 6-7, 9-10. Dr. Mettu diagnosed chronic bronchitis due to "working [in] coal mines and smoking" and opined that claimant suffered from a severe pulmonary impairment that was also due to coal mine employment and that "coal dust exposure caused and (or) significantly aggravated [the] pulmonary impairment causing legal pneumoconiosis." Director's Exhibit 11. Dr. Rasmussen also diagnosed legal pneumoconiosis, opining that claimant has "chronic obstructive pulmonary disease/emphysema, which is caused in part

by his coal mine dust exposure and which contributes in a material fashion to his disabling lung disease." Claimant's Exhibit 1.

Dr. Fino diagnosed chronic bronchitis with partial reversibility and a restrictive-like abnormality due to obesity and open heart surgery. Employer's Exhibit 1. Dr. Fino opined that claimant does not have pneumoconiosis based on a negative chest x-ray interpretation and the results of claimant's pulmonary function tests. *Id*. Nonetheless, Dr. Fino stated that "I certainly cannot exclude a small portion of the obstructive defect as being due to coal mine dust." *Id*. Dr. Dahhan diagnosed a partially reversible moderate obstructive ventilatory defect and opined that claimant does not retain the respiratory capacity to continue his previous coal mine employment. Employer's Exhibit 2. Dr. Dahhan further opined that claimant "has no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust" but rather, that claimant's respiratory impairment is due to his lengthy cigarette smoking history. *Id*.

The administrative law judge found that the opinion of Dr. Rasmussen, that claimant had a totally disabling respiratory impairment that was due to both smoking and coal dust exposure, is "the most rational opinion of record." Decision and Order at 9. In addition, the administrative law judge determined that while Dr. Mettu did not entirely explain the conclusions in his opinion, his report substantiated the opinion of Dr. Rasmussen, that claimant has legal pneumoconiosis. Decision and Order at 9; Director's Exhibit 11; Claimant's Exhibit 1. With regard to the contrary opinions, the administrative law judge found that Dr. Fino's opinion was internally inconsistent because he stated that there was insufficient evidence to support a diagnosis of pneumoconiosis, but also indicated that a "small portion" of claimant's obstructive defect was due to coal dust exposure. Decision and Order at 9; Employer's Exhibit 1. The administrative law judge found that Dr. Dahhan opined that claimant's total disability was entirely due to smoking, without addressing whether coal dust exposure aggravated claimant's condition. Decision and Order at 9; Employer's Exhibits 2, 3. The administrative law judge concluded that the existence of legal pneumoconiosis was established under Section 718.202(a)(4) based on Dr. Rasmussen's reasoned medical opinion. Decision and Order at 10.

Employer contends that the administrative law judge erred by failing to adequately explain the bases for his crediting of the medical opinions of Drs. Mettu and Rasmussen, that claimant has legal pneumoconiosis, over the contrary opinions of Drs. Fino and Dahhan, that claimant's respiratory disability is due to his cigarette smoking and not his coal dust exposure. Specifically, employer maintains that the administrative law judge erred in crediting the opinions of Drs. Mettu and Rasmussen as they are not supported by their underlying documentation and the physicians have not adequately explained their conclusions. Employer's Brief at 13-15. In addition, employer argues that the

administrative law judge erred by failing to consider that Drs. Mettu and Rasmussen relied on a "grossly exaggerated history of [thirty] years of coal mine employment." Employer's Brief at 16. Employer also contends that Dr. Rasmussen's opinion should not be credited over the opinions of Drs. Fino and Dahhan because he is not Board-certified in Pulmonary Disease. Employer's Brief at 14, 18. Employer further alleges that the administrative law judge erred by failing to credit the medical opinions of Drs. Fino and Dahhan, because these opinions are well-reasoned and their opinions are entitled to greater weight based upon the physicians' qualifications as Board-certified pulmonologists. Employer's Brief at 18-20. Finally, employer contends that the administrative law judge erred in failing to adequately explain his weighing of the conflicting medical evidence.

Contrary to employer's contention, the administrative law judge addressed the fact that Drs. Mettu and Rasmussen relied on a thirty year coal mine employment history, which conflicted with the parties' stipulation of fifteen years of coal mine employment. Decision and Order at 6, 9. The administrative law judge noted that all of the physicians relied on the same coal mine employment history, Decision and Order at 6, and stated that "the reports note a [thirty] year history of coal mine employment, but I accept that a [fifteen] year history of coal mine employment is significant." Decision and Order at 9. Consequently, the administrative law judge reasonably exercised his discretion in finding that the greater length of coal mine employment relied upon by the physicians in their reports did not affect the credibility of their conclusions. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Moreover, contrary to employer's contention, the administrative law judge considered the qualifications of the physicians, noting that all of the physicians with the exception of Dr. Rasmussen are Board-certified pulmonologists. Decision and Order at 9. The administrative law judge further found, however, that Dr. Rasmussen has extensive experience and is "an acknowledged expert in the field of pulmonary impairments of coal miners." *Id.*, citing *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Consequently, it was not irrational for the administrative law judge to decline to accord less weight to Dr. Rasmussen's opinion based on a comparison of professional credentials. The remainder of employer's contentions regarding the administrative law judge's consideration of the opinions of Drs. Mettu and Rasmussen, constitute a request that the Board reweigh the evidence, which the Board is not empowered to do. We affirm, therefore, the administrative law judge's findings regarding the credibility of these opinions. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

We agree, however, with employer's contention that the administrative law judge has not adequately explained all of his bases for finding that the medical opinion

evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). In according little weight to Dr. Dahhan's opinion, the administrative law judge stated only that Dr. Dahhan opined that claimant's total disability was due entirely to his cigarette smoking and that Dr. Dahhan had not addressed the issue of whether coal dust exposure aggravated claimant's pulmonary condition. Decision and Order at 9-10. However, contrary to the administrative law judge's finding, Dr. Dahhan stated that claimant "has no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." Employer's Exhibit 2. Because the administrative law judge has not accurately characterized the entirety of Dr. Dahhan's opinion, nor provided an adequate rationale for discrediting Dr. Dahhan's opinion, we vacate the administrative law judge's Section 718.202(a)(4) findings and remand the case to the administrative law judge for reconsideration of Dr. Dahhan's opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We also vacate the administrative law judge's weighing of the opinion of Dr. Fino. The administrative law judge did not accurately characterize Dr. Fino's statement regarding the existence of legal pneumoconiosis, in finding that his opinion is internally inconsistent. Decision and Order at 9. The administrative law judge determined that Dr. Fino diagnosed legal pneumoconiosis because he attributed a small portion of claimant's obstructive lung disease to coal dust exposure.[3] In light of Dr. Fino's statement that claimant does not have pneumoconiosis, the administrative law judge found that Dr. Fino's opinion was internally inconsistent and, therefore, entitled to little weight. *Id.* In actuality, Dr. Fino did not conclusively diagnose legal pneumoconiosis, but rather stated that:

> I certainly cannot exclude a small portion of the obstructive defect as being due to coal mine dust. However, the most significant portion of this defect, in my opinion, is related to cigarette smoking.

Employer's Exhibit 1. Because the administrative law judge did not accurately characterize Dr. Fino's opinion, the administrative law judge must also reconsider the

[3] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Pursuant to 20 C.F.R. §718.201(b), a disease arising out of coal mine employment is "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

entirety of Dr. Fino's opinion regarding the existence of legal pneumoconiosis on remand. *Tackett*, 7 BLR at 1-706; *Branham*, 2 BLR at 1-113; *see also Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must provide a further evaluation of all of the relevant evidence of record, in light of his reweighing of the opinions of Drs. Dahhan and Fino. In particular, he must provide a more detailed explanation of his weighing of Dr. Dahhan's opinion, including the physician's statement that there was no evidence that claimant's condition was "caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis." Employer's Exhibit 3. In addition, the administrative law judge must also provide a more detailed explanation of his interpretation of the entirety of Dr. Fino's opinion regarding the existence of legal pneumoconiosis. Employer's Exhibit 1. Accordingly, the administrative law judge must consider whether claimant has established the existence of legal pneumoconiosis at Section 718.202(a)(4), based on his consideration of all of the relevant medical opinion evidence, and taking into account the quality of the reasoning provided by each of the physicians.

Employer also alleges that the administrative law judge erred in finding that claimant proved that he is totally disabled due to pneumoconiosis. Because the administrative law judge's finding that claimant established legal pneumoconiosis at Section 718.202(a)(4) influenced his credibility determinations on the issue of disability causation, we vacate his finding that claimant established that pneumoconiosis was a contributing cause of his total disability pursuant to Section 718.204(c). If the administrative law judge again finds the evidence sufficient to establish the existence of legal pneumoconiosis, he must reconsider the evidence relevant to whether claimant has satisfied his burden to establish disability causation at Section 718.204(c). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 516, 22 BLR 2-625, 2-651-2 (6th Cir. 2003); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In so doing, the administrative law judge must address whether each physician's opinion is reasoned and documented for the purpose of proving or disproving that claimant's total disability is due to pneumoconiosis. *See Rowe*, 710 F.2d at 255; 5 BLR at 2-103.

Accordingly, the administrative law judge's Decision and Order – Award of 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge