BRB No. 08-0686 BLA

C.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	
	)	DATE ISSUED: 06/25/2009
Employer-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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

C.B., Chelyan, West Virginia, *pro se*.

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:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (04-BLA-6488) of Administrative Law Judge Janice K. Bullard on a subsequent claim[1] 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 adjudicated this claim, filed on September 23, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718, and credited the parties' stipulation that

[1] Claimant's first application for benefits, filed on October 25, 1996, was denied by the district director on September 22, 1997, based on claimant's failure to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1.

claimant worked in qualifying coal mine employment for thirty-seven years. The administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) since the denial of his prior claim. Considering all of the evidence of record, however, the administrative law judge found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office Workers' Compensation Programs, is not participating in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[2] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a claimant 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). 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 based on his failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

718.204(b). In considering the new evidence submitted in this subsequent claim, the administrative law judge properly found a change in an applicable condition of entitlement because the new evidence established total respiratory disability.[3] 20 C.F.R. §§718.204(b), 725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); Director's Exhibit 13; Claimant's Exhibit 4; Employer's Exhibits 1, 7. We affirm the administrative law judge's determination that, because the newly submitted evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), claimant demonstrated that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309, as this determination is not adverse to claimant and has not been challenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 22.

Next, the administrative law judge stated that since claimant established a change in an applicable condition of entitlement, it was incumbent upon her to review all the evidence of record to determine whether claimant was entitled to benefits. In cases where the administrative law judge finds that claimant has demonstrated a change in an applicable condition of entitlement under Section 725.309, the administrative law judge must then consider whether all of the evidence of record, including that evidence submitted with the previous claims, establishes entitlement to benefits. *See Rutter*, 86 F.3d at 1361, 20 BLR at 2-235; *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76, 2-94 (3d Cir. 1995). In the instant case, in so doing, however, the administrative law judge erred in failing to specifically address and weigh both the old and new evidence together, in determining whether claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) on the merits. The administrative law judge found that the evidence associated with claimant's prior claim failed to establish legal or clinical pneumoconiosis. Decision and Order at 22. She did not, however, conduct a comparative analysis of the conflicting evidence and discuss her reasons for crediting or not crediting the relevant evidence. Because the medical evidence associated with claimant's 1996 claim contains conflicting x-ray interpretations, biopsy reports, and medical opinions, the administrative law judge must specifically consider the previously submitted evidence, along with the newly submitted evidence, to

[3] Although the administrative law judge found that the new evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge found that the four newly submitted doctors' opinions established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). On weighing the new evidence together, the administrative law judge found that it established total respiratory disability at 20 C.F.R. §718.204(b) and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d)(2), (3).

determine whether claimant has established the presence of pneumoconiosis pursuant to Section 718.202(a).[4] In addition, we note that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held "a bare appeal to recency is an abdication of rational decisionmaking." *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993). Hence, if the administrative law judge on remand wishes to accord little weight to the medical evidence associated with claimant's 1996 claim, she must provide a specific explanation for so doing. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992). Accordingly, we remand this case for the administrative law judge to consider together all of the relevant evidence, both old and new, in determining whether the existence of pneumoconiosis was established at Section 718.202(a).

Further, in an effort to avoid repetition of error on remand, we note that the administrative law judge's weighing of the newly submitted medical opinions with respect to legal pneumoconiosis under Section 718.202(a)(4) is problematic. The administrative law judge discounted Dr. Rasmussen's diagnosis of legal pneumoconiosis, *i.e.*, chronic bronchitis due to coal mine dust exposure, as this diagnosis was not only contrary to her overall finding that the x-ray evidence did not support a finding of pneumoconiosis, but also was contrary to the CT scan evidence that failed to demonstrate the presence of pneumoconiosis. With respect to Dr. Cohen's opinion, the administrative law judge initially accorded it "some" weight as she found that Dr. Cohen, who is Board-certified in radiology and pulmonary disease medicine,[5] had rendered a well-reasoned opinion. However, the administrative law judge concluded that Dr. Cohen's pneumoconiosis diagnosis suffered similar deficiencies because Dr. Cohen, like Dr.

[4] In association with claimant's 1996 claim, there is evidence which, if fully credited, would be sufficient to establish the existence of clinical and legal pneumoconiosis, namely two chest x-ray interpretations of a film dated December 20, 1996 that were read as positive by B readers, one biopsy report by Dr. Hansbarger who found evidence of mild to moderate coal workers' pneumoconiosis and pulmonary anthracosilicosis, and the December 20, 1996 medical report of Dr. Gaziano diagnosing the presence of coal workers' pneumoconiosis. Director's Exhibit 1. In contrast, while Dr. Crisalli initially diagnosed coal workers' pneumoconiosis in a report dated July 25, 1997, he subsequently reviewed additional x-ray evidence and, in a report dated October 6, 1997, opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 1.

[5] The administrative law judge noted that Dr. Cohen's curriculum vitae is not contained in the record but, instead, relied upon the physician's letterhead stating his medical qualifications and affiliations. Decision and Order at 17; *see* Claimant's Exhibit 3.

Rasmussen, relied primarily upon a positive interpretation of a chest x-ray that was subsequently reread as negative for pneumoconiosis by a better qualified physician and, he rendered an opinion contrary to the CT scan evidence that demonstrated an absence of pneumoconiosis. Decision and Order at 17. While these reasons constitute a rational basis for discounting the probative value of a physician's diagnosis of *clinical* pneumoconiosis, *see e.g. Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), they are not necessarily sufficient to discount a physician's diagnosis of *legal* pneumoconiosis.

Because the administrative law judge failed to render specific credibility determinations and weigh all of the medical evidence on the merits, we vacate her determination that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). On remand, the administrative law judge must weigh all of the relevant evidence of record at each subsection of Section 718.202(a), *i.e.*, the x-ray interpretations, the biopsy reports, medical opinions, and other medical evidence in determining whether claimant established the existence of either clinical pneumoconiosis, legal pneumoconiosis, or both pursuant to Section 718.202(a)(1), (2), and (4). Thereafter, the administrative law judge must determine whether the evidence, when weighed together, establishes the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and if reached, whether the evidence of record establishes that pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for 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