BRB No. 98-0212 BLA

BERNARD B. HAPNEY	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Perry D. McDaniel (Crandall, Pyles, Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (96-BLA-1824) of Administrative Law Judge Richard A. Morgan on a duplicate 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] The administrative law judge found that the newly submitted evidence established the existence of a totally disabling respiratory impairment and thus established a material change in conditions at 20 C.F.R. §725.309. He then considered all the evidence of record and found the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204 (c),(b). Accordingly, he awarded benefits. Employer argues that the administrative law judge erred in finding a material change in conditions, in finding the existence of pneumoconiosis arising out of coal mine employment, and in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis.[2]

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[1]Claimant filed his initial claim for benefits on June 22, 1993. Director's Exhibit 27. The district director denied the claim because claimant failed to establish any of the elements of entitlement, namely, the existence of pneumoconiosis arising out of coal mine employment, and a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 27. No further action was taken in regard to this claim and the denial became final. Claimant filed the instant claim in December 1995. The district director made an initial finding of entitlement on May 20, 1996. Director's Exhibit 20. Employer requested a hearing before the Office of Administrative Law Judges, and the hearing was held on July 17, 1997.

[2]Employer does not challenge the administrative law judge's finding of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c). We affirm this finding as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-

Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that contrary to the employer's contention, the "one element" test for a material change in conditions adopted by the United States Court of Appeals for the Fourth Circuit does not impermissibly shift the burden of proof to the party opposing entitlement. Employer has submitted a reply brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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 Associated, Inc.,* 30 U.S. 359 (1965).

Initially, employer contends that the one element standard for establishing a material change in conditions at Section 725.309 adopted by the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case lies, in *Lisa Lee Mines v. Director, OWCP [Rutter],*86 F. 3d 1358, 20 BLR 2-227 (4th Cir. 1996) is invalid in view of the decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997). Employer argues that, under the *Rutter* standard, once a claimant proves a change in his claim as to some element of entitlement, the claimant benefits from an "irrebuttable presumption" that the change is material. Employer argues that this presumption violates *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), *Rambo II,* and Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), all of which require that claimant prove a material change in conditions by a preponderance of the evidence. We disagree. In *Rambo II*, the United States Supreme Court addressed the issue of a longshoreman's potential future decline in earning capacity, and did not address what proof was necessary to establish a material change in conditions in a duplicate claim under the Act. The Court's decision in *Rambo II* does not alter the Fourth Circuit's decision in *Rutter* and the other cases adopting the one element standard. *See Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995);

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710 (1983).

Sharondale Corp. v. Ross, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Peabody Coal Co. v. Spese,* 117 F.3d 1001, 21 BLR 2-115 (7th Cir. 1997).

Employer next contends, in the alternative, that even under *Rutter,* the administrative law judge erred by finding a material change in conditions based on Dr. Rasmussen's opinion. Employer argues that Dr. Rasmussen's opinion, submitted with the duplicate claim, was "almost a carbon copy" of his opinion submitted with claimant's original claim and thus did not establish a change in claimant's condition. Employer's Brief at 11. Employer also argues that the pulmonary function studies submitted with the duplicate claim show improvement in claimant's condition since the denial of his original claim. We reject this argument. The administrative law judge considered all of the newly submitted evidence. He found the newly submitted pulmonary function studies and blood gas studies "somewhat equivocal" as to claimant's total disability. *See* Decision and Order Awarding Benefits at 14. Within his discretion as fact-finder, the administrative law judge also found that the newly submitted medical opinions were determinative of the issue, as every doctor who submitted a report with the duplicate claim, namely Drs. Rasmussen, Fino and Zaldivar, diagnosed a totally disabling respiratory impairment. Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 1, 23. Inasmuch as this finding is based on substantial evidence in the record, it is affirmed. We, therefore, affirm the administrative law judge's finding that the newly submitted evidence establishes a material change in conditions under Section 725.309. *Rutter, supra.*

On the merits of the claim, employer first argues that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a). The administrative law judge found the x-ray evidence equivocal and therefore not sufficient to establish the existence of pneumoconiosis under Section 718.202 (a)(1). He also found that the presumptions referred to in Section 718.202(a)(3) were inapplicable to this claim.[3] The administrative law judge found, however, that the existence of pneumoconiosis was established based on the biopsy evidence at Section 718.202(a)(2) and based on Dr. Rasmussen's opinion at Section 718.202(a)(4).

The administrative law judge specifically found that because the biopsy that

[3]We affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(3) as they are unchallenged on appeal. *See Skrack, supra*.

claimant underwent in 1972 included a diagnosis of anthracosis, it was sufficient to establish the existence of pneumoconiosis. He noted that "anthracosis is pneumoconiosis, as a matter of law, if it results in respiratory or pulmonary impairment and is significantly related to or substantially aggravated by coal dust exposure." Decision and Order Awarding Benefits at 17. The administrative law judge then indicated, without further discussion, that he would not accord determinative weight to Dr. Zaldivar's opinion since he found that the opinion was contrary to the finding of pneumoconiosis made on biopsy. Decision and Order Awarding Benefits at 19. Employer correctly argues that Dr. Zaldivar opined that the 1972 biopsy findings do not constitute a diagnosis of pneumoconiosis, Employer's Exhibits 20, 23.[4]

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[4]Dr. Zaldivar opined,

> The biopsy of the lung was read on 12/6/72 by a Charleston Memorial Hospital pathologist. There was no mention of pneumoconiosis. Perivascular anthracosis was found. I should point out that this is not the same as coal workers' pneumoconiosis. Anthracosis is black pigment which may be caused by smoking itself.

Employer's Exhibit 20. In a later report, Dr. Zaldivar added,

> The problem in 1972 which prompted surgery was eventration of the

Insofar as the administrative law judge relied on the autopsy evidence to find the existence of pneumoconiosis established at Section 718.202(a)(2), he erred. The Act defines the term "pneumoconiosis" to mean a chronic dust disease of the lung arising out of employment in a coal mine. 30 U.S.C. §902(b). The regulation at 20 C.F.R. §718.201, cited by the administrative law judge in the instant case, provides:

> For the purposes of the Act, *pneumoconiosis* means a dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthracosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis, *arising out of coal mine employment* (emphasis added). For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201. The record, as it now stands, contains no biopsy evidence which affirmatively links the diagnosis of "anthracosis" with claimant's coal mine employment. Thus, the administrative law judge's finding of the existence of pneumoconiosis based on the biopsy evidence at Section 718.202(a)(2) cannot be

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> right hemidiaphragm with atelectasis of the right lower and middle lobe. I concluded that there was no evidence of coal workers' pneumoconiosis in those records, and that Mr. Hapney suffered from emphysema caused by his smoking habit. This emphysema was responsible for airway obstruction and mild impairment of diffusion.

Employer's Exhibit 23.

sustained, and is vacated. On remand, the administrative law judge must redetermine the sufficiency of evidence to meet claimant's burden to establish the existence of pneumoconiosis at Section 718.202(a).

At Section 718.202(a)(4), the administrative law judge credited the opinion of Dr. Rasmussen, who diagnosed coal workers' pneumoconiosis, over the contrary opinions of Drs. Fino and Zaldivar. The administrative law judge initially accorded greater weight to the opinions of Drs. Rasmussen and Zaldivar because they both examined claimant "on at least one occasion and have been familiar with his condition over a course of at least four years", Decision and Order Awarding Benefits at 18, and accorded less weight to the opinion of Dr. Fino, who submitted a consultative report after review of claimant's medical records. The administrative law judge then discredited Dr. Zaldivar's opinion because Dr. Zaldivar stated that no pneumoconiosis was found in the 1972 biopsy, "even though the biopsy sample was taken from that portion of the lung where pneumoconiosis is most likely to be found." Decision and Order Awarding Benefits at 18. Employer contends that the administrative law judge erred in rejecting Dr. Fino's opinion on the basis that he did not examine claimant. Employer argues that Dr. Rasmussen was not a treating physician and the administrative law judge gave his opinion undue deference because he examined claimant on two occasions.

In *Sterling Smokeless Coal Co. v. Ake*rs, 131 F.3d 438, 21 BLR 2-269 (4th Cir.1997), the Fourth Circuit held that a rule of absolute deference to treating and examining physicians is contrary to the precedent of the Fourth Circuit. In the instant case, the administrative law judge provided no other reason for rejecting the opinion of Dr. Fino, and did not explain why the opinions of physicians who examined the miner on at least one occasion and have been familiar with the miner's condition over a course of four years, are worthy of more weight than the opinion of a physician who reviewed medical reports spanning a number of years. *See Ake*rs, *supra.* Furthermore, the administrative law judge erroneously discredited the opinion of Dr. Zaldivar and must reconsider the weight it is to be accorded, *see* discussion, *supra*. We, therefore, vacate the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(4) and further remand the case for reconsideration of the medical opinion evidence thereunder.

Employer next argues that the administrative law judge erred in his consideration of the evidence at Section 718.203 when he found that there was no evidence to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment. Employer correctly argues that Dr. Zaldivar opined, without

contradiction, that the 1972 biopsy findings were not related to claimant's coal mine employment, but were related to claimant's smoking history and resulting emphysema. Employer's Exhibits 20, 23. Since the administrative law judge has not considered all of the relevant evidence at this Section, and given that his finding of the existence of pneumoconiosis cannot be upheld on appeal, we vacate the administrative law judge's finding at Section 718.203. If the administrative law judge again finds the existence of pneumoconiosis established on remand, he must consider all of the relevant evidence at Section 718.203.

At Section 718.204(b), the administrative law judge relied on the opinion of Dr. Rasmussen to find that claimant's pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. *See* Decision and Order Awarding Benefits at 21-22. Employer argues that the administrative law judge improperly accorded little weight to the opinions of Drs. Zaldivar and Fino because these doctors did not diagnose pneumoconiosis. Inasmuch as we vacate the administrative law judge's determination that pneumoconiosis was established in the instant case, we also vacate the administrative law judge's finding pursuant to Section 718.204(b). If the existence of pneumoconiosis is again established on remand, the administrative law judge must redetermine the sufficiency of the evidence in meeting claimant's burden to establish total disability due to pneumoconiosis at Section 718.204(b). *See Toler v. Eastern Associated Coal Corp.,* 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

I join with my colleagues in rejecting employer's assertion that the administrative law judge's decision violates well-recognized standards of finality and *res judicata*. I fully agree that *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997) does not alter the decision of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter],*86 F. 3d 1358, 20 BLR 2-227 (4th Cir. 1996). However, while I also agree that this case ultimately must be remanded to the administrative law judge for further findings, my reasoning differs from that of my colleagues.

On appeal, employer asserts that in weighing the biopsy evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge substituted his judgment for that of a physician. I do not agree with this assertion. The administrative law judge found that the 1972 biopsy contained a diagnosis of anthracosis, *see* Employer's Exhibit 22, and concluded that this diagnosis met the legal definition of pneumoconiosis found at Section 718.201. This was proper. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264(7th Cir. 1990)(a diagnosis of anthracosis is pneumoconiosis for purposes of the Act); *see also Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

The administrative law judge then indicated that he would not accord

determinative weight to Dr. Zaldivar's opinion since this opinion was contrary to the finding of pneumoconiosis on biopsy. I take exception to the administrative law judge's finding. Dr. Zaldivar's opinion should not be rejected simply because it is contrary to the biopsy findings. Rather, giving proper consideration to qualifications, as well as other relevant factors, the administrative law judge must determine whether Dr. Zaldivar presents a reasoned and documented opinion that should be credited over the finding of pneumoconiosis contained in the 1972 biopsy. It is on this basis that I would vacate the administrative law judge's finding at Section 718.202(a)(2) and remand the case.

Turning to the administrative law judge's alternative finding of the existence of pneumoconiosis at Section 718.202(a)(4), while he did not specifically cite *Sterling Smokeless Coal Co. v. Ake*rs, 131 F.3d 438, 21 BLR 2-269 (4th Cir.1997), he acknowledged factors other than status as an examining physician that are relevant in distinguishing the medical evidence. In fact, the administrative law judge concluded that based on qualifications, there was no basis for crediting one opinion over the others. The administrative law judge then accorded greater weight to the opinions of Drs. Rasmussen and Zaldivar over the opinion of Dr. Fino, since both Drs. Rasmussen and Zaldivar examined claimant on at least one occasion and "have been familiar with [claimant's] condition over a course of at least four years." Decision and Order Awarding Benefits at 18. However, as between the two reports by examining physicians, the administrative law judge ultimately gave controlling weight to Dr. Rasmussen, after finding his report well-documented and well-reasoned and concluding that Dr. Zaldivar's report contradicted the biopsy evidence.

For the reasons discussed above, I do not agree with employer's assertion that, in weighing the medical reports, the administrative law judge substituted his opinion for that of Dr. Zaldivar. Rather, the administrative law judge has not satisfactorily explained his weighing of the evidence. As discussed *supra*, Dr. Zaldivar's report cannot be dismissed simply because it is contrary to the biopsy evidence. Moreover, under the facts of this case, if more weight is to be accorded to those doctors who examined the miner on at least one occasion and have been familiar with the miner's condition over the course of four years, then the administrative law judge must explain why these opinions are worthy of more weight than the opinion of a doctor who reviewed medical reports spanning a number of years. *See Akers, supra*.

Lastly, I agree with the majority's decision to vacate the administrative law judge's findings at both 20 C.F.R. §718.203 and 20 C.F.R. §718.204(b). The administrative law judge premised each of these findings, in part, on his finding that the existence of pneumoconiosis was established in the instant case. Since the finding of the existence of pneumoconiosis cannot be affirmed on appeal, I agree that the case must be remanded for reconsideration of the relevant evidence under 20 C.F.R. §718.203 and 718.204(b). I further agree with my colleagues' decision to affirm the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c) since this finding is not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge