BRB No. 05-0562 BLA

LINCOLN KEITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE M COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 03/16/2006
RELIANCE INSURANCE COMPANY	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6133) of Administrative Law Judge Alice M. Craft 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). As the administrative law judge noted, this case involves a subsequent claim. Claimant filed an application for benefits on December 18, 1983, which was denied by the district director on May 6, 1985. Director's Exhibit 1. More than ten years later, on October 2, 1995, claimant

filed another application for benefits. In a Decision and Order Denying Benefits issued on September 5, 1997, Administrative Law Judge Daniel F. Sutton found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.310 (2000),[1] as well as the existence of pneumoconiosis arising out of coal mine employment. However, Judge Sutton found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. On claimant's *pro se* appeal, the Board affirmed Judge Sutton's finding that the evidence was insufficient to establish total disability. The Board, therefore, affirmed the denial of benefits. *Keith v. Double M Coal Company, Inc.*, BRB No. 98-0122 BLA (Sept. 28, 1998)(unpub.). Subsequently, the Board denied claimant's motion for reconsideration. *Keith v. Double M Coal Company, Inc.*, BRB No. 98-0122 BLA (Jan. 5, 1999)(Order on Reconsideration)(unpub.). Director's Exhibit 2.

More than one year later, on January 7, 2002, claimant filed a new application for benefits. Director's Exhibit 3. In her Decision and Order issued on March 8, 2005, Administrative Law Judge Alice M. Craft (the administrative law judge) noted the procedural history of the case, and determined that the instant claim constituted a subsequent claim pursuant to 20 C.F.R. §725.309. Finding the newly submitted evidence sufficient to establish a totally disabling pulmonary impairment, the administrative law judge determined that claimant had demonstrated a change in one of the applicable conditions of entitlement since the denial of the prior claim. *See* 20 C.F.R. §725.309. Decision and Order at 3, 16. The administrative law judge therefore considered all of the evidence of record and found it sufficient to establish the existence of pneumoconiosis, which she found arose out of claimant's coal mine employment, and found that claimant is totally disabled due to pneumoconiosis. Therefore, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and total disability. Employer also challenges the administrative law judge's determination that claimant's total disability was due to pneumoconiosis, and it contends that the administrative law judge erred in her finding regarding the date from which benefits commence. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a brief on appeal.[2]

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[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 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. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[2] Employer also submitted a Notice of Appeal indicating that it was appealing the administrative law judge's Supplemental Decision and Order Awarding Attorney Fee Benefits

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).[3]

20 C.F.R. §718.202(a)(1)

While employer does not challenge the administrative law judge's ultimate finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), it asserts that the administrative law judge erred in considering Dr. Rosenberg's positive interpretation of the September 30, 2002 film because neither party had "designated this particular interpretation" and employer "had specifically designated an alternative interpretation of the film by a doctor who was both a B-reader and a board-certified radiologist." Employer's Brief at 12. Employer contends that this error may have influenced the administrative law judge's weighing of the evidence, had she weighed all of the evidence, as required by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

The record contains a medical report written by Dr. Rosenberg on October 15, 2002. In addition to reviewing claimant's medical records, Dr. Rosenberg, who is Board-certified in Internal Medicine and Pulmonary Diseases, considered objective test results, including the September 30, 2002 x-ray of claimant's chest. Dr. Rosenberg stated:

> [claimant's] chest X-ray, as reported by Dr. Halbert, revealed a congenital deformity of the first and second ribs on the right, without interstitial opacities of CWP. My interpretation of the chest X-ray with respect to small opacities

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and the administrative law judge's Order Denying Motion for Reconsideration on Attorney Fees. In an Order dated August 4, 2005, the Board acknowledged receipt of employer's Notice of Appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fee Benefits issued on May 3, 2005. However, in view of employer's statement that it had filed a second Motion for Reconsideration with the administrative law judge on the attorney fee issue, the Board dismissed employer's supplemental appeal as premature.

[3] The administrative law judge's finding that claimant has established a change in one of the applicable conditions of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309, in addition to her findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iii), are not challenged on appeal. Accordingly, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> was that there were p/s changes in all lung fields, except the left upper, with a profusion of 1/0.

Employer's Exhibit 1. Submitted with Dr. Rosenberg's report is an x-ray interpretation form completed by Dr. Halbert, a B reader and a Board-certified radiologist, on October 1, 2002, which purports to interpret a chest x-ray taken on October 1, 2003.[4] On this form, Dr. Halbert stated that there were no parenchymal abnormalities or pleural abnormalities consistent with pneumoconiosis. Employer's Exhibit 1. Also submitted with Dr. Rosenberg's report is Dr. Halbert's radiology report addressing claimant's x-ray dated September 30, 2002, and dictated by Dr. Halbert on October 1, 2002. In this written x-ray interpretation report, Dr. Halbert stated that there is no evidence of pneumoconiosis. Employer's Exhibit 1.

Because it is unclear which x-ray interpretations are part of the record, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(1). On remand, the administrative law judge must clarify which interpretations are properly admitted into the record pursuant to 20 C.F.R. §725.414 prior to reevaluating the x-ray evidence pursuant to Section 718.202(a)(1).

20 C.F.R. §718.202(a)(4)

Employer asserts that the administrative law judge erred in finding that the opinions of Drs. Forehand and Rasmussen establish the existence of pneumoconiosis. In weighing the medical opinion evidence, the administrative law judge found that all of the medical opinions of record are documented, and she noted that every physician who examined claimant, except for Dr. Dahhan, diagnosed coal workers' pneumoconiosis. The administrative law judge also noted that Dr. Dahhan diagnosed "symptoms of chronic bronchitis" due to claimant's prior cigarette smoking. The administrative law judge determined that Dr. Dahhan's conclusions regarding the cause of claimant's disease are unreasoned, because claimant "worked for 31 years in the mines until 1995, but only smoked ½ pack a day for 5 years ending in 1962." Decision and Order at 15. The administrative law judge noted that some of the diagnoses of pneumoconiosis were based on "questionable positive x-ray interpretations," namely Dr. Kanwal's earlier opinion, in addition to the opinions of Drs. Sargent, Rosenberg and Rasmussen, but others were not, namely Dr. Kanwal's later opinion, and that of Dr. Forehand. Decision and Order at 15. The administrative law judge concluded:

> despite normal pulmonary function studies and resting arterial blood gases, recent exercise arterial blood gases revealed an impairment for which coal mine dust appears to be the only reasoned explanation.

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[4] The 2003 date of this x-ray appears to be a typographical error, since the film was interpreted on October 1, 2002. Employer's Exhibit 1.

> Weighing all of the evidence together, I conclude that the Claimant has established that he has "legal" pneumoconiosis.

Decision and Order at 15. [5]

Employer asserts that Dr. Forehand's opinion is unreasoned and contends that the only basis for Dr. Rasmussen's diagnosis of pneumoconiosis is the x-ray and claimant's coal mine employment history which, it argues, is insufficient to support a diagnosis of pneumoconiosis. Further, employer contends that Dr. Rasmussen did not provide any reasoning to support his diagnosis of pneumoconiosis. Employer also contends that Dr. Rosenbaum's opinion cannot

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[5] Dr. Rosenberg examined claimant in 2002, administered objective tests, and reviewed claimant's medical records. He opined that claimant has simple coal workers' pneumoconiosis. Dr. Rosenberg stated:

> as reported by Dr. Halbert, [claimant's] chest X-ray did not have the micronodular changes associated with past coal dust exposure. In contrast, I felt category 1 changes (p/s) were present. Clearly, when all the above information is looked at in total, my interpretation of [claimant's] chest X-ray is consistent with simple coal workers' pneumoconiosis (CWP).

Employer's Exhibit 1. Dr. Dahhan examined claimant in 2002, administered objective tests, and reviewed claimant's medical records. Dr. Dahhan stated that there are "insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis." Employer's Exhibit 4. Dr. Rasmussen examined claimant in 2003 and administered objective tests. Dr. Rasmussen stated that claimant had a significant history of exposure to coal dust and he noted x-ray changes consistent with pneumoconiosis. Dr. Rasmussen stated that it is medically reasonable to conclude that claimant has coal workers' pneumoconiosis due to his coal mine employment. Claimant's Exhibit 1. Dr. Forehand examined claimant in 2002 and administered objective tests. Dr. Forehand diagnosed coal workers' pneumoconiosis based on claimant's history, physical examination and blood gas study results. Director's Exhibit 11. Dr. Sargent examined claimant in 1996 and administered objective tests. Dr. Sargent stated "It is my impression that [claimant] is suffering from simple coal workers' pneumoconiosis based on his chest x-ray findings." Director's Exhibit 2 at Employer's Exhibit 21. Dr. Kanwal examined claimant in 1995 and administered objective tests. Dr. Kanwal diagnosed shortness of breath and wheezing due to coal dust exposure, although not all of Dr. Kanwal's opinion is legible. Director's Exhibit 2 at Director's Exhibit 13. In response to a letter from the claims examiner, Dr. Kanwal indicated that claimant has coal workers' pneumoconiosis due to his coal mine employment. Director's Exhibit 2 at Director's Exhibit 14. In a 1984 opinion, based on an examination of claimant, as well as objective testing, Dr. Kanwal diagnosed early radiological pneumoconiosis. Director's Exhibit 1.

support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as the physician indicates that his diagnosis of pneumoconiosis is based only on his interpretation of claimant's x-ray. Employer asserts that the administrative law judge erred by substituting her opinion for that of Dr. Dahhan, when she questioned Dr. Dahhan's conclusion that claimant's symptoms are related to smoking. Decision and Order at 15. In addition, employer contends that the administrative law judge improperly interjected her own medical opinion when she stated "Moreover, despite normal pulmonary function studies and resting arterial blood gases, recent exercise arterial blood gases revealed an impairment for which coal mine dust appears to be the only reasoned explanation." Decision and Order at 15. Employer also notes that the administrative law judge did not discuss Dr. Dahhan's opinion that claimant does not suffer from pneumoconiosis. Employer asserts that the administrative law judge erred by not analyzing the medical opinions to determine if they are explained. Employer challenges the administrative law judge's statement that claimant has established legal pneumoconiosis, urging that Section 718.202(a)(4) involves both clinical and legal pneumoconiosis. Moreover, employer asserts that the administrative law judge, despite acknowledging *Compton*, failed to weigh the evidence as required by that decision. Employer also notes, at this point, that it is not clear whether the administrative law judge was aware of the radiological qualifications of the physicians interpreting the most recent x-ray evidence.

After consideration of the arguments raised on appeal, the administrative law judge's Decision and Order, and the evidence of record, we vacate the administrative law judge's findings at Section 718.202(a)(4). On remand, the administrative law judge must evaluate each medical opinion to determine whether it is a reasoned medical opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In rendering these findings, the administrative law judge is cautioned to avoid substituting her opinion for that of the physicians, who are charged with evaluating the objective test results. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Further, in weighing the evidence at Section 718.202(a)(4), the administrative law judge is advised to consider whether claimant has established the existence of either legal or clinical pneumoconiosis. 20 C.F.R. §718.201. Finally, after weighing the evidence of pneumoconiosis at each subsection of Section 718.202(a), the administrative law judge must weigh all of the evidence regarding the existence of pneumoconiosis at Section 718.202(a)(1)-(4) in compliance with *Compton*, 211 F.3d 203, 22 BLR 2-162.

Total Disability

As a preliminary matter relating to total disability, we consider employer's assertion that the administrative law judge erred in assuming that claimant's last coal mine employment involved heavy labor. The administrative law judge noted claimant's descriptions of his coal mine employment and concluded that "Although operating the shuttle car was sedentary work, the other parts of the job he described required heavy physical labor." Decision and Order at 4.

The administrative law judge noted that at the hearing claimant's counsel asked claimant "whether all of his work was heavy work," and when employer objected, counsel for claimant struck the question and the answer. Hearing Transcript at 30-31; Decision and Order at 4, n.1.

A review of the record reveals claimant's 1995 description of his coal mine employment, wherein he stated that he worked from 1973 to 1995 on the shuttle car, which hauls coal from the miner to the belt feeder. Claimant indicated that this job required sitting for eight hours per day. Director's Exhibit 2 at Director's Exhibit 8. In 2002, claimant stated that his last coal mine employment, working as a shuttle car operator, required him to sit for eight hours per day. However, claimant further described this job, stating that he would "set on the machine and work levers – if we were broke down, I had to rock dust, shovel, work on the machinery." Director's Exhibit 5.

We vacate the administrative law judge's findings regarding the exertional requirements of claimant's usual work, as the administrative law judge has not explained the basis for them. On remand, the administrative law judge must consider all of the relevant evidence, and the credibility of such evidence, before making a specific finding regarding the exertional requirements of claimant's usual coal mine employment.

We now turn to the merits of the administrative law judge's findings regarding total disability. In evaluating the evidence pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that, although none of the resting blood gas studies yielded qualifying values, results of two of the three most recent exercise blood gas studies were qualifying. In considering the medical opinion evidence, the administrative law judge found that the newly developed evidence was split regarding disability. The administrative law judge noted that Dr. Forehand and Dr. Rasmussen opined that claimant is disabled and that Dr. Rosenberg and Dr. Dahhan disagreed. The administrative law judge stated:

> Dr. Rosenberg did not administer an exercise blood gas study, and neither Dr. Rosenberg nor Dr. Dahhan offered any explanation to discredit or otherwise discount the two qualifying exercise studies. Thus the weight of the evidence in the current claim supports the conclusion that Mr. Keith is now totally disabled.

Decision and Order at 16.

Regarding Section 718.204(b)(2)(ii), employer argues that he administrative law judge failed to note that two of the qualifying blood gas studies "are only barely qualifying," and employer contends that she also failed to note that a subsequent study yielded non-qualifying values. Employer notes that later evidence may properly be determined to be more probative of a miner's present condition. Employer urges that the administrative law judge should be required to "state the reasons for not crediting the most recent study." Employer's Brief at 23.

We reject employer's specific assertions regarding the administrative law judge's consideration of the blood gas study evidence at Section 718.204(b)(2)(ii). The determination of whether or not test results are qualifying is set out by the regulations, and there is no requirement that the administrative law judge distinguish between test results that are "barely qualifying" and those that are significantly lower than the values needed to qualify. Instead, the interpretation of the blood gas study evidence must comply with the express regulatory requirements. *See* 20 C.F.R. §718.204(b)(2)(ii); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987). In addition, while an administrative law judge may find that the most recent evidence of record is most probative, there is no requirement that she do so, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). However, because the administrative law judge did not make any specific finding pursuant to Section 718.204(b)(2)(ii), we must remand the case for further consideration of the blood gas study evidence. On remand, the administrative law judge must render conclusive findings on the issue of whether the blood gas study evidence demonstrates total disability pursuant to Section 718.204(b)(2)(ii). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Turning to the administrative law judge's consideration of the medical opinions at Section 718.204(b)(2)(iv), employer alleges error by the administrative law judge in her expectation that Drs. Rosenberg and Dahhan should have "offered some explanation to discredit or otherwise discount the two qualifying exercise studies." Employer's Brief at 23. In view of our remand for further findings on the issue of the exertional requirements of claimant's coal mine employment, we also vacate the administrative law judge's evaluation of the medical opinion evidence at Section 718.204(b)(2)(iv). On remand, the administrative law judge must consider each medical opinion to determine whether it is a reasoned and documented opinion, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and then weigh the medical opinions to determine whether they demonstrate that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.2004(b)(2)(iv). In addition, as employer asserts, after evaluating the evidence under each subsection at Section 718.204(b)(2), the administrative law judge must then weigh all of the contrary probative evidence together, like and unlike, *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), to determine whether claimant has established total disability pursuant to Section 718.204(b)(2).

Disability Causation

Employer asserts that the administrative law judge's disability causation analysis is inadequate. In addition, employer asserts that the administrative law judge should have discredited Dr. Forehand's opinion regarding disability causation. In view of our holdings regarding the existence of pneumoconiosis and total disability, and because the administrative law judge has not provided any explanation for her weighing of the evidence regarding the cause of claimant's disability, Decision and Order at 17, we also vacate the administrative law judge's

findings pursuant to Section 718.204(c), and remand for reconsideration of all the relevant evidence thereunder.[6] *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR 1-162.

Date of Onset

Employer challenges the administrative law judge's determination of the date for the commencement of benefits. In view of our decision to vacate the administrative law judge's findings on the merits of entitlement, we also vacate the administrative law judge's determination regarding the commencement of benefits. On remand, if the administrative law judge finds that claimant is entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should the administrative law judge find that claimant is entitled to benefits, she must determine whether the medical evidence establishes when claimant became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless there is credited evidence which establishes that claimant was not totally disabled at some point subsequent to his filing date. *Lykins*, 12 BLR 1-181.

[6] Further, in view of our holdings above, we also vacate the administrative law judge's findings regarding pneumoconiosis causation pursuant to 20 C.F.R. §718.203. On remand, the administrative law judge must reconsider this element of entitlement.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge 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