BRB No. 08-0406 BLA

R.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARC ENERGIES, INCORPORATED	)	DATE ISSUED: 03/20/2009
	)	
and	)	
	)	
OLD REPUBLIC 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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2007-BLA-05489) of Administrative Law Judge Ralph A. Romano rendered on a subsequent 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 credited claimant with fifteen years of coal mine employment, based on a stipulation by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge acknowledged that it was claimant's burden to demonstrate a change in an applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309, and accorded diminished weight to the old record evidence. The administrative law judge determined, based on the newly submitted evidence, that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding Dr. Mettu's opinion to be sufficient to establish that claimant suffers from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the evidence established total disability and disability causation pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Employer also argues that the administrative law judge erred in failing to perform the requisite analysis of whether claimant satisfied his burden to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Employer filed a reply to claimant's response.[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,

[1] Claimant filed his initial claim for black lung benefits on April 10, 1996, which was denied by the district director on July 15, 1996, by reason of abandonment. Director's Exhibit 1. Claimant filed a second claim on December 14, 1998. Director's Exhibit 2. That claim was finally denied by the district director on March 26, 1999, because the evidence did not establish any of the elements of entitlement. *Id*. Claimant filed a subsequent claim on July 27, 2005, which is the subject of this appeal. Director's Exhibit 4.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of fifteen years of coal mine employment, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in his consideration of the medical opinion evidence as to whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer contends that the administrative law judge's finding that Dr. Mettu diagnosed legal pneumoconiosis[4] cannot be reconciled with the record evidence, and that the administrative law judge failed to explain the basis for his credibility determinations. Employer also contends that the administrative law judge erred in shifting the burden to employer to prove that coal dust exposure is not a contributing cause of claimant's chronic obstructive pulmonary disease. Employer's assertions of error have merit.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports by Drs. Mettu and Jarboe. Dr. Mettu performed the Department of Labor examination on April 6, 2006. Director's Exhibit 12. Dr. Mettu noted that there was no evidence of pneumoconiosis by x-ray, but diagnosed chronic bronchitis. *Id*. Under the "Etiology of Cardiopulmonary Diagnosis" portion of the report, he wrote:

> [Claimant] smoked from 1966 to 1996 [and] quit smoking [in] 1991. He worked in coal mine 20 [years and] quit work in mine in 1995. He has [a] moderately severe pulmonary impairment.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 2, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[4] 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).

Id. Dr. Mettu opined that claimant was totally disabled by his moderately severe pulmonary impairment, and when asked the extent to which claimant's chronic bronchitis contributes to his impairment, Dr. Mettu replied:

> Though smoking and working in [the] coal mine caused pulmonary impairment, coal dust exposure and coal mine work significant aggravated [claimant's] pulmonary impairment causing legal pneumoconiosis.

Id.

Dr. Jarboe examined claimant at the request of employer on September 28, 2006. Employer's Exhibit 1. Dr. Jarboe opined that claimant's x-ray showed no evidence of pneumoconiosis, but diagnosed bronchial asthma, chronic bronchitis, persistent hemoptysis and possible bronchiectasis by history. Employer's Exhibits 1, 2. Dr. Jarboe opined that claimant has a mild respiratory impairment in the form of a mild air flow obstruction caused by his "history of very heavy cigarette smoking" and bronchial asthma. Employer's Exhibit 1. Dr. Jarboe also opined that claimant is not totally disabled. *Id*.

In weighing these conflicting medical opinions, the administrative law judge gave controlling weight to Dr. Mettu, noting that Dr. Mettu "clearly makes a diagnosis of legal pneumoconiosis" insofar as the doctor stated that coal dust exposure "*significantly aggravated* [c]laimant's pulmonary condition." Decision and Order at 10, citing Director's Exhibit 12 (emphasis in the decision). The administrative law judge also found that Dr. Mettu's opinion is "the best reasoned" and provided the following explanation for his credibility finding:

> Both physicians diagnosed claimant with chronic bronchitis. Their opinions differ in that Dr. Jarboe attributed that condition solely to cigarette smoking. However, he offers no explanation as to why he has ruled out [c]laimant's history of coal mine dust exposure as a potential etiology or aggravating factor, despite acknowledging [c]laimant's years of coal mine employment. Dr. Jarboe even testified that [c]laimant has had a significant amount of years [of coal dust exposure] to cause pneumoconiosis. [Employer's Exhibit] 2 at 8. An adequately reasoned opinion would have addressed the relationship between [c]laimant's substantial coal mine employment history and his pulmonary condition. Dr. Jarboe's opinion is compromised by his failure to do so.

Decision and Order at 10.

Employer argues that the administrative law judge erred in failing to explain why he found Dr. Mettu's opinion to be better reasoned than Dr. Jarboe's opinion.[5] Employer asserts that, contrary to the administrative law judge's finding, Dr. Mettu provided no reasoning for his diagnosis of legal pneumoconiosis, while Dr. Jarboe specifically explained why he believed that claimant's respiratory condition is due to asthma and smoking, and not coal dust exposure. We agree that the administrative law judge has failed to properly explain the basis for his credibility findings, as required by 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).

The administrative law judge's summary finding that Dr. Mettu's opinion is reasoned and entitled to controlling weight does not comport with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge has failed to discuss what rationale, if any, Dr. Mettu provided for his diagnosis of legal pneumoconiosis. While a diagnosis of chronic bronchitis due, in part, to coal dust exposure may satisfy the legal definition of pneumoconiosis pursuant to 20 C.F.R. §718.201, the administrative law judge must weigh the conflicting medical opinions at 20 C.F.R. §718.202(a)(4) to determine whether claimant has established the existence of legal pneumoconiosis based on a reasoned medical opinion. S*ee Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Thus, we vacate the administrative law judge's credibility finding with regard to Dr. Mettu.

The administrative law judge also erred in concluding that Dr. Jarboe provided "no explanation" for his opinion. Dr. Jarboe specifically stated:

> I do not feel the pulmonary function data indicates the presence of a dust-induced lung disease. He has a preserved forced vital capacity while his FEV 1.0 is lowered. This disproportionate reduction of FEV1 vis-à-vis the FVC is indicative of air flow obstruction caused by cigarette smoking or asthma and not the inhalation of coal dust. When the latter causes impairment, there usually is a more proportionate reduction of the FVC and the FEV1.

[5] Claimant asserts that the administrative law judge properly rejected Dr. Jarboe's opinion because it is hostile to the Act. The administrative law judge, however, did not reject Dr. Jarboe's opinion on the ground that it was hostile, and the Board is not empowered to render factual findings in that regard. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Employer's Exhibit 1 at 4. Because the administrative law judge has failed to properly consider the totality of Dr. Jarboe's opinion in addressing whether claimant suffers from legal pneumoconiosis, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. *See Wojtowicz*, 12 BLR at 1-162.

On remand, the administrative law judge must reconsider whether the medical opinion evidence is sufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In so doing, the administrative law judge must specifically address whether the opinions of Drs. Mettu and Jarboe are reasoned and documented. The administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), and determine whether it constitutes a reasoned medical judgment as to the presence or absence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998).

We also agree with employer that the administrative law judge erred in rejecting Dr. Jarboe's opinion on the issue of whether claimant established total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv). The administrative law judge stated that he credited the "reasoned" opinion of Dr. Mettu that claimant is totally disabled, over Dr. Jarboe's contrary opinion that claimant is not totally disabled, because Dr. Jarboe "provided no explanation" for his conclusions. Contrary to the administrative law judge's finding, Dr. Jarboe testified that he was familiar with the exertional requirements of claimant's coal mine work, and specifically opined that claimant's mild respiratory impairment would not prevent claimant from performing his duties. Employer's Exhibit 2. Because the administrative law judge has not fully considered Dr. Jarboe's opinion as to whether claimant is totally disabled, his finding at 20 C.F.R. §718.204(b)(iv) must be vacated and remanded for further consideration. *See Wojtowicz*, 12 BLR at 1-162; *Clark*, 12 BLR at 1-151. Consequently, if the administrative law judge determines that claimant has established the existence of pneumoconiosis on the merits on remand, he must resolve the conflict among the medical opinions as to whether claimant has a mild or moderately severe respiratory impairment, and whether he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In addition, because the administrative law judge relied upon his credibility determinations at 20 C.F.R. §718.202(a)(4) in finding that claimant is totally disabled by pneumoconiosis, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). The administrative law judge must reconsider this issue if he determines on remand that claimant has established that he has pneumoconiosis and is totally disabled.

Finally, employer argues that the administrative law judge did not properly address the issue of whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. When a miner files a claim for benefits more than one year after the final denial of a previous claim, 20 C.F.R. §725.309(d) provides that 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); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). 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 because he did not establish any of the elements of entitlement. Director's Exhibit 2. Thus, a determination that the newly submitted evidence is sufficient to prove that claimant has pneumoconiosis, or is totally disabled, would establish a change in an applicable condition of entitlement and trigger consideration of the merits of claimant's subsequent claim.

In this case, the administrative law judge acknowledged that 20 C.F.R. §725.309 applied to claimant's 2005 claim and that if claimant established a change in an applicable condition of entitlement, "all of the record evidence must be reviewed to determine whether [claimant] is entitled to benefits." Decision and Order at 4. The administrative law judge further determined, however, that the age of the previously submitted evidence "severely compromised [its] reliability and persuasiveness." *Id*. Accordingly, the administrative law judge considered entitlement on the merits based upon a consideration of only the newly submitted evidence of record without first determining whether claimant satisfied the requirements of 20 C.F.R. §725.309.

Because we have vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv), (c), and remanded the case to the administrative law judge for reconsideration of the relevant evidence, we direct the administrative law judge to determine whether claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, prior to reaching the merits of entitlement. In considering this issue, the administrative law judge must comply with the instructions we have set forth concerning the weighing of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) and 20 C.F.R. §718.204(b).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and 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