BRB No. 08-0457 BLA

D. G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REEDY COAL COMPANY	)	
	)	
and	)	
	)	
ANESTHESIOLOGIST PROFESSIONAL ASSURANCE	)	DATE ISSUED: 03/26/2009
	)	
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.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

William E. Brown, II (Pohl, Kiser & Aubrey, PSC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (07-BLA-5301) 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] Claimant filed his claim for benefits on February 9, 2006. Director's Exhibit 1. The administrative law judge credited claimant with thirty-three years of coal mine employment[2] pursuant to the parties' stipulation. The administrative law judge found that the new x-ray, biopsy, and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(2),(4). The administrative law judge further found that the new medical opinion evidence established the existence of legal pneumoconiosis,[3] in the form of emphysema and chronic bronchitis arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2),(c). Based on these findings, the administrative law judge concluded that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found that all of the evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the new medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis, total disability, and total disability due to legal

[1] Claimant filed two previous claims. His first claim, filed on April 9, 2001, was finally denied by the district director on January 9, 2003, because although claimant established the existence of pneumoconiosis, he did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. His second claim, filed on March 30, 2004, was denied by the district director on January 6, 2005, because claimant again established that he had pneumoconiosis, but did not establish that he was totally disabled. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 11. 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*).

[3] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv),(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response in this appeal.[4]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner 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); *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 failed to establish that he was totally disabled. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim.[5] 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge found that the new pulmonary function studies and blood gas studies were preponderantly non-

[4] Because no party challenges the administrative law judge's findings that the existence of clinical pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a)(1),(2),(4), 718.203(b), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Because the element of pneumoconiosis was decided in claimant's favor in his prior claim, it was not an applicable condition of entitlement in his subsequent claim. *See* 20 C.F.R. §725.309(d)(2). Therefore, the administrative law judge's discussion of whether the new medical evidence established the existence of pneumoconiosis, Decision and Order at 4-12, was not relevant to whether claimant established a change in the applicable condition of entitlement.

qualifying,[6] and that there was no evidence of cor pulmonale with right-sided congestive heart failure. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Rasmussen and Alam, that claimant lacks the respiratory capacity to perform his last coal mine employment, and the opinions of Drs. Dahhan and Jarboe, that claimant retains the respiratory capacity to perform his last coal mine employment. Director's Exhibits 13, 22, 26; Employer's Exhibits 1, 2. The administrative law judge found that the opinions of Drs. Rasmussen and Alam were "consistent with the record" and well-reasoned. Decision and Order at 15. He found that, by contrast, the opinions of Drs. Dahhan and Jarboe were not well-reasoned because the doctors "provided no explanation for their findings. . . ." Decision and Order at 16. Based on the new medical opinions of Drs. Rasmussen and Alam, the administrative law judge found that claimant is totally disabled.

Employer contends that, contrary to the administrative law judge's finding, Drs. Jarboe and Dahhan offered an explanation for their opinion that claimant is not totally disabled. Employer's Brief at 14-16. We agree. The record contains these physicians' explanations for their opinion that claimant is not totally disabled, in which they addressed claimant's objective test results, and in which Dr. Jarboe provided his opinion that Dr. Rasmussen's exercise blood gas study results were unreliable. Director's Exhibit 26 at 12-13; Employer's Exhibit 1 at 6-7; Employer's Exhibit 2 at 13-15. As it is the function of the administrative law judge to determine the credibility of the evidence, we must vacate his finding pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 725.309(d), and remand this case for him to discuss and weigh all of the relevant new medical opinion evidence as to whether claimant is totally disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Additionally, we agree with employer that the administrative law judge, on remand, must specify the basis for his finding that the opinions of Drs. Rasmussen and Alam are consistent with the record. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Karst-Robbins*, 10 BLR 1-19 (1987).

On remand, after the administrative law judge reconsiders whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all of the relevant new evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), and thus a change in the applicable condition of entitlement

[6] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

pursuant to 20 C.F.R. §725.309(d).[7] *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

In the interest of judicial economy, and to avoid any repetition of error on remand, we will address employer's remaining arguments as to the existence of pneumoconiosis and whether claimant is totally disabled due to pneumoconiosis. As noted, employer does not challenge the administrative law judge's finding that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1),(2),(4). *See* n.4, *supra*. Ordinarily, affirmance of the finding that the existence of clinical pneumoconiosis was established by these methods of proof would obviate the need to review the administrative law judge's finding that the medical opinions also established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the administrative law judge credited medical opinion evidence that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 16. Therefore, we will address employer's argument that substantial evidence does not support the administrative law judge's finding that claimant established legal pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Alam, Dahhan, and Jarboe. Dr. Rasmussen diagnosed claimant with emphysema due to both smoking and coal mine dust exposure. Director's Exhibits 13, 22; Claimant's Exhibit 6. Dr. Alam, claimant's treating physician, diagnosed claimant with chronic cough and chronic obstructive pulmonary disease aggravated by coal dust exposure. Claimant's Exhibit 2. In contrast, Drs. Dahhan and Jarboe concluded that claimant does not have a chronic lung disease related to coal mine dust exposure, but suffers from asthma, emphysema, and chronic bronchitis due to smoking. Director's Exhibits 18, 26; Employer's Exhibits 1, 2.

The administrative law judge found that Dr. Rasmussen's opinion was well-reasoned and documented. He further found that Dr. Alam's opinion, although less well-documented than the other opinions, was consistent with Dr. Rasmussen's opinion and therefore merited some weight. The administrative law judge found that, by contrast, Drs. Dahhan and Jarboe offered no explanation for ruling out coal mine dust exposure as a potential etiology or aggravating factor in claimant's impairment. He therefore found that their opinions were "compromised" and not adequately reasoned. Decision and Order at 12.

[7] The administrative law judge found that total disability was not established by the new evidence under 20 C.F.R. §718.204(b)(2)(i)-(iii).

Employer contends that substantial evidence does not support the administrative law judge's finding that Drs. Dahhan and Jarboe offered no explanation for their opinion that claimant's impairment is unrelated to coal mine dust exposure. Employer's Brief at 2, 16. Employer's contention has merit. The record reflects that both physicians explained why they concluded that claimant's impairment is unrelated to coal mine dust exposure. Director's Exhibit 18 at 3-4; Director's Exhibit 26 at 11-12; Employer's Exhibit 1 at 7-9; Employer's Exhibit 2 at 10-13. Because the administrative law judge did not discuss this evidence when he found that these physicians did not explain their opinions, we must vacate his finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), and instruct him to consider all of the relevant medical opinion evidence on this issue. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that the opinions of Drs. Rasmussen and Alam established that legal pneumoconiosis is a substantially contributing cause of claimant's total disability. By contrast, he found that the contrary opinions of Drs. Dahhan and Jarboe were not well-reasoned because the doctors did not explain how they ruled out coal dust exposure as a factor in claimant's pulmonary impairment. Employer challenges this finding, based on the same arguments it raised with respect to the issue of legal pneumoconiosis. Employer's Brief at 2, 16. Because we have vacated the administrative law judge's findings of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and instruct him to reconsider this issue, if reached, on remand.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part and vacated in part, and the case is remanded 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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BETTY JEAN HALL
Administrative Appeals Judge