BRB No. 03-0707 BLA

DELBERT M. STEWART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH ON THE GREEN, INCORPORATED	)	DATE ISSUED: 05/27/2004
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (02-BLA-5044) of Administrative Law Judge Robert L. Hillyard on a subsequent claim for benefits[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).[2] The administrative law judge credited claimant with seventeen years of coal mine employment. Considering the instant subsequent claim at 20 C.F.R. §725.309(d), the administrative law judge noted that the prior claim was denied based on claimant's failure to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to the disease. *See* Director's Exhibit 19; Decision and Order at 9. The administrative law judge stated, "Claimant must now prove that he has pneumoconiosis, the initial element of entitlement that was previously adjudicated against him. If he is successful, then all the evidence of record will be reviewed." *Id.* The administrative law judge found that the evidence submitted subsequent to the district director's denial of the prior claim was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) through (a)(4). The administrative law judge thus determined that claimant was not entitled to benefits because the new evidence "failed to demonstrate that [claimant] has pneumoconiosis, the initial element of entitlement." Decision and Order at 12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge committed reversible error by applying the wrong standard to determine whether claimant established, at 20 C.F.R. §725.309(d), that the new evidence demonstrates a change in one of the applicable conditions of entitlement. Specifically, claimant argues that the administrative law judge erred by finding entitlement precluded in the instant subsequent claim because the new evidence failed to establish the existence of pneumoconiosis, *one* of the applicable conditions of entitlement. Claimant also alleges error in the administrative law judge's weighing of the new medical evidence at 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds, and urges

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[1] Claimant filed the instant claim on February 8, 2001. Director's Exhibit 1. Claimant's prior claim, filed March 17, 1989, Director's Exhibit 19, was denied by the district director. Specifically, on August 29, 1989, the district director found that claimant was not entitled to benefits because the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to the disease. *Id.* On October 17, 1991, the district director indicated that the reasons given for his initial denial dated August 29, 1989 remained unchanged after review of additional evidence and information. *Id.* Claimant did not seek review of the district director's denial of his prior claim.

[2] 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.

affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the administrative law judge erred in failing to determine whether claimant established, at 20 C.F.R. §725.309(d), a change in at least one of the applicable conditions of entitlement upon which the prior claim was denied. Claimant argues that because the prior claim was denied based on his failure to establish the existence of pneumoconiosis, that the disease arose out of his coal mine employment, and that he is totally disabled due to the disease, *see* Director's Exhibit 19, the administrative law judge should have considered whether the new evidence established a change in any applicable condition of entitlement, instead of finding entitlement precluded because the new evidence failed to establish the existence of pneumoconiosis. Employer agrees that the administrative law judge erred by not considering whether the new evidence established a change in any applicable condition of entitlement, but argues that the error was harmless.

Claimant's contention has merit. Claimant correctly argues that the administrative law judge erred by determining that entitlement was precluded in the instant subsequent claim because the new evidence failed to establish the existence of pneumoconiosis. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim shall be denied unless the claimant demonstrates 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). Because the prior claim was denied based on claimant's failure to establish the existence of pneumoconiosis arising out of claimant's coal mine employment and total disability due to the disease, Director's Exhibit 19, the administrative law judge should have considered whether the new evidence established a change in *any one* applicable condition of entitlement. The administrative law judge thus erred by denying the claim based solely on his finding that the new evidence failed to establish the existence of pneumoconiosis, only one of the applicable conditions of entitlement. 20 C.F.R. §725.309(d).

Claimant further argues that the administrative law judge's error in failing to apply the correct standard at 20 C.F.R. §725.309(d) was not harmless. Claimant asserts that assuming, for the sake of argument, that the new evidence does not establish the existence of pneumoconiosis, it establishes a totally disabling respiratory or pulmonary impairment and thus establishes a change in at least one applicable condition of entitlement at 20 C.F.R. §725.309(d). Employer argues that the administrative law judge's error was harmless because, employer submits, the evidence of record, both old and new, fails to establish the

existence of pneumoconiosis. In support of its argument, employer cites to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and asserts that the district director's determination, that the evidence submitted in the prior claim failed to establish the existence of pneumoconiosis, must be accepted as correct.

We hold that the administrative law judge's error, in denying the instant subsequent claim at 20 C.F.R. §725.309(d), based on his finding that the new evidence failed to establish the existence of pneumoconiosis, was not harmless. A review of the record shows that the old evidence, submitted in connection with the prior claim, contains conflicting medical evidence regarding the existence of pneumoconiosis at 20 C.F.R. §718.202. *See* Director's Exhibit 19. Thus, a finding that claimant has met his burden to establish the existence of pneumoconiosis on the merits of the claim at 20 C.F.R. §718.202(a) is not precluded as a matter of law, based on the relevant evidence of record. We, therefore, vacate the administrative law judge's denial of the instant subsequent claim. We remand the case for the administrative law judge to determine whether the new evidence is sufficient to establish a change in at least one of the applicable conditions of entitlement. 20 C.F.R. §725.309(d).

Further, it is the duty of the administrative law judge to assess the credibility and weight of the medical evidence. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Because the administrative law judge did not consider any of the old evidence, we decline to address employer's assertion that such evidence is insufficient to establish the existence of pneumoconiosis. Similarly, because the administrative law judge did not consider whether the new evidence establishes a totally disabling respiratory or pulmonary impairment, we decline to address claimant's assertion that the new evidence establishes such an impairment and thereby establishes a change in this applicable condition of entitlement at 20 C.F.R. §725.309(d).[3]

Claimant additionally contends that the administrative law judge erred in finding that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R.

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[3] The new evidence contains conflicting medical evidence on the issue of total disability due to a respiratory or pulmonary impairment, *see e.g.* Director's Exhibit 7; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 4. This evidence includes the November 26, 2002 testimony of Dr. Vincent, Employer's Exhibit 4 at 25; the September 11, 2002 opinion of Dr. O'Bryan, Employer's Exhibit 1; and the blood gas studies dated September 11, 2002 and September 18, 2002 which resulted in qualifying values, Claimant's Exhibit 1; Employer's Exhibit 1. Thus, as there is evidence that, if credited, could support claimant's burden to establish total respiratory or pulmonary disability on the merits of the claim at 20 C.F.R. §718.204(b), this evidence must be considered on remand.

§718.202(a)(1) and (a)(4).[4] The new x-ray evidence consists of three readings each of the x-rays dated April 17, 2001 and September 11, 2002. Director's Exhibits 7, 8; Claimant's Exhibit 3; Employer's Exhibits 1-3. Dr. Sargent read the April 17, 2001 x-ray for quality purposes only. Director's Exhibit 8. The administrative law judge correctly noted that only the reading of the September 11, 2002 x-ray by Dr. Brandon, who is the only Board-certified radiologist and B reader to submit a substantive interpretation of a new x-ray, resulted in an interpretation which is positive for pneumoconiosis. Claimant's Exhibit 3. Dr. Brandon read the September 11, 2002 x-ray as 1/2 pp and rated the film's quality as Grade 3, noting "OE." Claimant's Exhibit 3. The administrative law judge accorded less weight to Dr. Brandon's reading because, although Dr. Brandon was dually qualified, the physician had graded the film's quality as poor. The administrative law judge then found that the remaining new x-ray evidence was negative, including (1) the reading by Dr. Wheeler, whom the administrative law judge found was a B reader, and (2) the reading by Dr. Chavda, whom the administrative law judge found had no specialized skills. Decision and Order at 10. The administrative law judge then stated, "Based on the majority of negative readings by the more qualified readers, I find that the x-ray evidence is negative for the presence of pneumoconiosis." *Id.*

Claimant argues that Dr. Brandon did not find that the quality of the September 11, 2002 x-ray was poor or unreadable and thus, the administrative law judge erred in according less weight to Dr. Brandon's positive interpretation. Claimant also argues that the administrative law judge's determination that the majority of the more qualified readers interpreted the x-rays they read as negative, is contrary to the record.

Claimant's contention that the administrative law judge erred in according less weight to Dr. Brandon's x-ray interpretation, lacks merit. Of the five substantive new x-ray readings, only Dr. Brandon's interpretation of the September 11, 2002 x-ray was positive for the existence of pneumoconiosis. The administrative law judge permissibly accorded less weight to Dr. Brandon's reading based on the physician's indication that the film's technical quality was "3". *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993)(administrative law judge must consider the qualitative as well as the quantitative nature of the x-ray evidence).[5] Further, because the remaining new x-ray evidence is entirely negative, we hold harmless any error committed by the administrative law judge when he indicated that his finding, that the new evidence failed to established the existence of

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The Department of Labor's roentgenographic interpretation form defines technical quality 3 as, "Poor, with some technical defect but still acceptable for classification purposes." *See e.g.* Director's Exhibit 19.

pneumoconiosis, was based on the majority of negative readings "by the more qualified readers." Decision and Order at 10.

Claimant further challenges the administrative law judge's weighing of the three new medical opinions at 20 C.F.R. §718.202(a)(4). Dr. Chavda diagnosed, *inter alia*, mild chronic obstructive pulmonary disease that he attributed to claimant's smoking history and exposure to coal dust. Director's Exhibit 7. Dr. Vincent stated that the September 19, 2002 CT scan obtained by Dr. O'Bryan showed "some scarring in the left upper lobe, which I do feel is probably secondary to [claimant's] exposure to coal mine dust." Claimant's Exhibit 2. Dr. Vincent admitted on deposition that he never independently diagnosed pneumoconiosis or any pulmonary condition related to claimant's coal mine employment. Employer's Exhibit 4 at 13, 18. Dr. Vincent added that claimant told him he had pneumoconiosis when he first came to see him. *Id*. at 13. Dr. Vincent attributed claimant's pulmonary problems to his smoking history and to his coal mine employment based on his "history of pneumoconiosis." *Id*. at 18-20. Dr. O'Bryan diagnosed emphysema and resting hypoxemia, relating both to claimant's smoking history, and found that claimant does not suffer from "a black lung pneumoconiosis." Employer's Exhibit 1. Dr. O'Bryan indicated that claimant's September 19, 2002 CT scan was consistent with non-bullous emphysema and added, "No significant interstitial disease is present." *Id.*

Considering these three new medical opinions of record, the administrative law judge accorded less weight to Dr. Chavda's opinion, that claimant has a mild chronic obstructive pulmonary disease due to his smoking history and exposure to coal dust, Director's Exhibit 7, because he found that it was not well reasoned and because Dr. Chavda did not explain why he failed to consider claimant's "extensive" smoking history as a cause of his impairment.[6] Decision and Order at 11. The administrative law judge determined that Dr. O'Bryan's opinion, that claimant does not have pneumoconiosis and his emphysema and resting hypoxemia are due to his smoking history," Employer's Exhibit 1, is reasoned, documented, and entitled to substantial weight because Dr. O'Bryan conducted a thorough examination of claimant, relied on objective testing including a CT scan, and explained his conclusions. The administrative law judge also noted that Dr. O'Bryan is a Board-certified internist, pulmonologist, and critical care physician. The administrative law judge accorded less weight to Dr. Vincent's opinion, that claimant's pulmonary problems were related to his coal mine employment and smoking history, Claimant's Exhibit 2; Employer's Exhibit 4, because Dr. Vincent admitted that he relied on Dr. O'Bryan's pulmonary diagnoses, where the record shows that Dr. O'Bryan actually attributed claimant's pulmonary conditions to smoking alone and found that claimant did *not* have pneumoconiosis. Decision and Order at 11-12.

[6] The administrative law judge found that claimant smoked two packs of cigarettes per day from 1948 to 1988, for a total of eighty pack years. Decision and Order at 4.

The administrative law judge also found that Dr. Vincent's opinion was not well reasoned because he did not explain why he failed to consider claimant's "extensive" smoking history as a cause of his impairment. *Id.* at 12. The administrative law judge thus determined that Dr. O'Bryan's opinion outweighed Dr. Vincent's contrary opinion. Claimant contends that the administrative law judge selectively analyzed the evidence. Specifically, claimant argues that the reasons given by the administrative law judge for discrediting Dr. Chavda's opinion are equally applicable to Dr. O'Bryan's contrary opinion that the administrative law judge relied on to find that the new medical opinions failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also argues that the administrative law judge mischaracterized the record by finding (1) that Dr. Vincent did not include objective test results or explain how these results supported his conclusions, and (2) that Dr. Vincent failed to explain why he did not consider claimant's smoking history as a cause of his impairment.

Claimant's contentions have merit. A review of the record reveals that Drs. Chavda and O'Bryan each based their competing diagnoses on the results of objective tests, including x-ray readings, pulmonary function and blood gas studies, and electrocardiograms. Director's Exhibit 7; Employer's Exhibit 1. Drs. Chavda and O'Bryan each further considered claimant's employment, smoking, and medical histories. Director's Exhibit 7; Employer's Exhibit 1. Based on this record, we find merit in claimant's contention that the administrative law judge selectively analyzed the evidence by determining that Dr. O'Bryan explained his diagnoses, while Dr. Chavda did not. *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); Decision and Order at 11.

Further, we find merit in claimant's argument that the administrative law judge mischaracterized the record by finding that Drs. Chavda and Vincent did not consider claimant's smoking history as a cause of his impairment. *See* Decision and Order at 11, 12. Dr. Chavda attributed claimant's mild chronic obstructive pulmonary disease to smoking and exposure to coal dust and specifically opined that "[claimant's] pulmonary impairment may be caused or exagerated (sic) by his chronic smoking." Director's Exhibit 7. Dr. Vincent independently interpreted the September 19, 2002 CT scan performed by Dr. O'Bryan, attributing to pneumoconiosis the thickening of the pleura and scarring, but agreed that he would defer to Dr. O'Bryan's interpretation of the CT scan.[7] Employer's Exhibit 4 at 16, 20-21. Dr. Vincent further opined that claimant's impairment was due to his smoking and exposure to coal mine dust, but indicated that he could not numerically apportion claimant's impairment between the two. *Id.* at 26. Because the administrative law judge selectively analyzed the new medical opinions of Drs. Chavda and O'Bryan and mischacterized them, we vacate the administrative law judge's finding that the new medical opinions fail to

[7]Dr. O'Bryan found that claimant's September 19, 2002 CT scan was consistent with non-bullous emphysema. He found no significant interstitial disease. Employer's Exhibit 1.

establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must redetermine the weight and credibility of the new medical opinions at 20 C.F.R. §718.202(a)(4).

Based on the foregoing, we affirm the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We vacate the administrative law judge's finding that the new evidence failed to establish pneumoconiosis at 20 C.F.R. §718.202(a)(4), and further vacate the denial of benefits. We remand this case for further findings based on the new evidence at 20 C.F.R. §718.202(a)(4) and at 20 C.F.R. §725.309(d). Should the administrative law judge find, on remand, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he must consider the instant subsequent claim on its merits.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the 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