BRB No. 03-0731 BLA

BOBBY R. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RALEIGH MINE & INDUSTRIAL SUPPLY, INC.	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 05/28/2004
	)	
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 – Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Bobby R. Smith, Port Richey, Florida, *pro se*.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund, Employment Programs Litigation Unit), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

West Virginia Coal-Workers' Pneumoconiosis Fund (carrier), on behalf of employer, appeals the Decision and Order – Award of Benefits (2002-BLA-5314) of

Administrative Law Judge Robert L. Hillyard 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).[1] Initially, the administrative law judge found that this case involves the filing of a subsequent claim dated April 1, 2001, pursuant to 20 C.F.R. §725.309.[2] Decision and Order at 2. Finding that employer did not contest the issue of length of coal mine employment, the administrative law judge credited claimant with twenty-two years of coal mine employment as supported by claimant's Social Security earnings records. Decision and Order at 3. Addressing the merits of entitlement, the administrative law judge found that the weight of the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, found that claimant established a material change in conditions pursuant to Section 725.309(d). Decision and Order at 7-8. Weighing all of the medical evidence of record, old and newly submitted, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Decision and Order at 8-9. In addition, the administrative law judge found the medical evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 9-10. Accordingly, the administrative law judge awarded benefits, commencing as of April 1, 2001.

On appeal, carrier contends that the administrative law judge erred in finding the evidence sufficient to establish entitlement to benefits, arguing that the administrative law judge erred in finding the medical evidence sufficient to establish total respiratory disability due to pneumoconiosis. Claimant, without the assistance of counsel, responds, urging affirmance of the administrative law judge's award of benefits. The Director,

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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.

[2] The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, BLR , BRB No. 03-0367 BLA (Jan. 22, 2004).

In this case, claimant's initial application for benefits, filed on November 16, 1999, was denied by the district director on March 24, 2000, based on the determination that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718. Decision and Order at 2; Director's Exhibit 1.

Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[3]

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).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

On appeal, carrier challenges the award of benefits, arguing that the administrative law judge erred in finding the medical opinion evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. In particular, carrier contends that the administrative law judge erred in mechanically according greater weight to the medical opinion of Dr. Newan, based on his status as claimant's treating physician. Additionally, carrier contends that the administrative law judge erred in according little weight to Dr. Fino's opinion. These contentions have merit.

The administrative law judge, in finding the medical opinion evidence sufficient to establish a totally disabling respiratory impairment, accorded substantial weight to the opinion of Dr. Newan, that claimant is totally disabled, because the doctor is claimant's treating physician and he examined claimant on a regular basis. Decision and Order at 9; Director's Exhibit 13; Claimant's Exhibits 1, 2. In addition, the administrative law judge found that Dr. Newan "did not qualify his diagnosis that [claimant] is disabled due to, at least in part, his coal mine work" and found the physician's "reasoned and documented" diagnosis is based on histories, symptoms, physical examinations and objective testing. Decision and Order at 9.

[3] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-two years of coal mine employment, his finding that employer is the properly named responsible operator, or his findings pursuant to 20 C.F.R. §§725.309(d), 718.202(a), 718.203(b) and 718.204(b)(2)(i) and (ii). As these findings are not adverse to claimant, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

However, the administrative law judge failed to explain his rationale for the weight he accorded the medical opinion of Dr. Newan, that claimant is totally disabled, which was contained in a letter sent by claimant to the doctor, requesting the physician to either agree or disagree with the statement that "[claimant] has total pulmonary disability and due to his respiratory condition he would never be able to return to work in the coal industry as an electrician, welder or any other position." Claimant's Exhibits 1, 2. Specifically, the administrative law judge did not adequately discuss whether the statement, signed by Dr. Newan on January 2, 2002, was reasoned and documented. In stating that claimant was totally disabled, Dr. Newan placed a check by the word "Agree" and provided the additional statement that "lung capacity (FEV_1) is 48% of predicted." *Id*. In crediting this opinion, however, the administrative law judge did not discuss whether the physician provided an adequate basis for his agreement with the pre-printed statement and unidentified testing result, indicating that claimant has a totally disabling respiratory condition. Decision and Order at 9; Claimant's Exhibits 1, 2. Likewise, the administrative law judge did not fully discuss his conclusion that Dr. Newan's treatment notes, which provided an "Assessment" of pneumoconiosis, were reasoned and documented and sufficient to establish claimant's burden of proof. Decision and Order at 9; Director's Exhibit 13; Claimant's Exhibits 1, 2.

With regard to Dr. Fino's opinion, that claimant was not totally disabled and retained the respiratory capacity to perform his usual coal mine employment, the administrative law judge found that this opinion was entitled to little weight because Dr. Fino did not have access to all of the medical evidence of record and did not personally examine claimant. Decision and Order at 9; Employer's Exhibit 1. As carrier contends, the administrative law judge fails to explain his rationale for the conclusion that Dr. Fino's opinion, that claimant is not totally disabled, was entitled to little weight because the physician did not review all of the medical evidence. Specifically, the administrative law judge does not identify the evidence Dr. Fino did not consider, nor the reason that this gap in information undermined the physician's opinion. Decision and Order at 9. Nor did the administrative law judge adequately discuss how the fact that the physician did not examine claimant, but only reviewed the medical evidence of record, undermined the doctor's opinion to the extent that it was entitled to little weight. Decision and Order at 9.

The administrative law judge must address the relevant factors bearing on the credibility of the medical opinions, including the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge did not adequately address these factors which bear on the credibility of the conflicting opinions under Section 718.204(b)(2)(iv), his finding that claimant established a totally disabling respiratory

impairment thereunder cannot be affirmed. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish a totally disabling respiratory impairment and remand the case to the administrative law judge to more fully discuss the bases for his conclusions regarding the credibility of the medical evidence. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In addition, if on remand, the administrative law judge again finds that claimant has established a totally disabling respiratory impairment, he must determine, in a separate analysis, whether the medical evidence of record is sufficient to establish that claimant's total respiratory disability was due to his pneumoconiosis. 20 C.F.R. §718.204(c); *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Robinson v. Pickands Mather and Co*., 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *see also Hicks*, 138 F.3d 524, 21 BLR 2-323.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part, 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge