BRB No. 04-0684 BLA

JACKIE E. SCOTT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BELLAIRE CORPORATION	)	
	)	DATE ISSUED: 05/31/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for respondent.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-0011) of Administrative Law Judge Michael P. Lesniak rendered 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] This case involves claimant's request for

[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

modification, pursuant to 20 C.F.R. §725.310 (2000), of the previous denial of his claim.[2] Considering the new evidence submitted by the parties on modification in conjunction with that previously submitted, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). The administrative law judge therefore concluded that claimant did not establish a change in conditions or a mistake in a determination of fact to justify modification of the prior denial of benefits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in discounting medical opinions that claimant is totally disabled by chronic obstructive pulmonary disease related to dust exposure in coal mine employment, and in crediting medical opinions that claimant suffers from asthma unrelated to coal mine employment. Employer responds, urging affirmance of the denial of benefits. The Director, Office Workers' Compensation Programs has indicated that he will not participate in this appeal. Claimant has filed a reply brief reiterating his contentions.[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

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim on August 14, 1998. Director's Exhibit 1. The district director denied benefits and claimant requested a hearing, but his request was denied as untimely. Director's Exhibits 16, 19, 21. Claimant then requested modification of the denial of benefits pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 22. Ultimately, Administrative Law Judge Michael P. Lesniak denied benefits in a Decision and Order issued on November 15, 2000. Director's Exhibit 44. The administrative law judge found that although claimant was totally disabled by a respiratory or pulmonary impairment, he had not established the existence of pneumoconiosis or that his total disability is due to pneumoconiosis. On November 14, 2001, claimant timely requested modification and submitted additional medical evidence. Director's Exhibit 45.

[3] Claimant does not challenge the administrative law judge's findings that the evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3). Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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 (1987); *Perry v. Director, OWCP*.

Pursuant to Section 725.310 (2000), claimant may, within one year of a final order, request modification of a denial of benefits. Modification may be granted if there is a change in conditions or if there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge provided invalid reasons for discounting Dr. Cohen's opinion that claimant suffers from obstructive lung disease arising out of his coal mine employment. The administrative law judge discounted Dr. Cohen's opinion because he found it "conflicting" as to the role of claimant's asbestos exposure and smoking history in claimant's pulmonary disease. Decision and Order at 11.

The administrative law judge erred in discounting Dr. Cohen's opinion for his discussion of the cause of claimant's "severe diffusion impairment" in the doctor's 2001 report. Director's Exhibit 45 at 6. The issue before the administrative law judge is not the cause of the severe diffusion impairment detected in 2001; that impairment is no longer severe, according to the pulmonary function tests in Dr. Cohen's 2003 report. Claimant's Exhibit 1 at 5 (diagnosing "mild" diffusion impairment). The doctors agree that claimant has a severe obstructive impairment. It is the cause of the severe obstructive impairment which the administrative law judge must determine. *See* 20 C.F.R. §718.201(a)(2). Review of Dr. Cohen's two reports reflects that Dr. Cohen consistently opined that claimant's obstructive lung disease was caused or aggravated by coal mine dust exposure, and that asbestos exposure did not contribute to his obstructive disease because asbestos does not cause an obstructive lung impairment.[4] Director's Exhibit 45 at 6; Claimant's Exhibit 1 at 9.

[4] A review of the record reflects that, with the possible exception of Dr. Saludes, Director's Exhibit 45, no physician attributed any portion of claimant's obstructive lung

Furthermore, the record does not support the administrative law judge's assertion that Dr. Cohen's opinion was conflicting on the contribution of asbestos exposure to the diffusion impairment diagnosed by Dr. Cohen in 2001. The doctor explained that claimant's severe diffusion impairment was caused by obstructive changes, and for that reason he attributed the pulmonary impairment principally to coal dust exposure. Director's Exhibit 45 at 4, 6. Dr. Cohen noted that asbestos exposure can cause diffusion impairment but because asbestos exposure had caused minimal pleural thickening, the doctor thought that the contribution of claimant's asbestos exposure to his impairment would be insignificant. Director's Exhibit 45 at 9, 13.

Additionally, the administrative law judge faulted Dr. Cohen for failing to "explain how he finds that the minimal exposure this man had to tobacco played any role in his pulmonary disease." Decision and Order at 11. Dr. Cohen stated that both coal dust exposure and smoking can cause obstructive changes and although claimant's obstructive lung disease was primarily related to his nineteen years of coal mine dust exposure, claimant's two-year history of smoking may have contributed. Claimant's Exhibit 1 at 8. The administrative law judge did not explain how Dr. Cohen's inclusion of two years of smoking as a possible, contributing causal factor, even if inadequately unexplained, undercuts Dr. Cohen's opinion that claimant's obstructive disease is related to coal mine dust exposure. *Cf. Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000)(holding that it is error to rely on a doctor's acknowledgment of the contributing causality of smoking to discredit the doctor's opinion that a lung disease was aggravated by coal dust exposure). Because the administrative law judge did not properly analyze Dr. Cohen's opinion, we must vacate his finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for him to reconsider Dr. Cohen's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Claimant alleges further that the administrative law judge did not adequately explain his finding that Dr. Diaz's opinion was "deficient." Decision and Order at 11. Dr. Diaz concluded that claimant has progressive, severe airflow obstruction to which coal mine dust exposure "contributed significantly." Claimant's Exhibit 3 at 1. The administrative law judge found Dr. Diaz's opinion deficient because he failed to address

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disease to asbestos exposure. Moreover, even had a physician identified asbestos as a factor in claimant's obstructive lung disease, the record reflects that part of claimant's exposure to asbestos occurred during his coal mine employment as a mechanic. Director's Exhibit 45 at 3; Claimant's Exhibit 1 at 2; *see Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56, 1-59 (1992)(explaining that lung disease related to asbestos exposure in coal mine employment may be found to be pneumoconiosis under the Act).

"the other possible etiology: asbestos exposure." Decision and Order at 12. As we have just discussed, the record does not reflect that any physician attributed claimant's obstructive lung disease to asbestos exposure. *See* n.4, *supra*. Consequently, the administrative law judge did not provide a valid reason for discounting Dr. Diaz's medical opinion. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Additionally, as we will discuss below, the administrative law judge did not explain his reasons for accepting the opinions of Drs. Altmeyer and Fino that claimant suffers from asthma. Thus, we do not affirm his alternative finding that Dr. Diaz's opinion that asthma would be unlikely to develop at claimant's age was countered by the opinions of Drs. Altmeyer and Fino. Decision and Order at 11; Claimant's Exhibit 3 at 2. On remand, the administrative law judge should reconsider Dr. Diaz's opinion.

Claimant argues that the administrative law judge did not fully consider the record when he found that Dr. Alam inaccurately understood claimant's medical picture. Dr. Alam opined that claimant's severe obstruction was related to his coal mine employment. Claimant's Exhibit 2. Part of Dr. Alam's reasoning was that asthma was an unlikely cause of claimant's condition for several reasons, including the absence of a history of asthma in claimant's distant past; the doctor observed that adult onset of asthma is rare in males. Claimant's Exhibit 2 at 2. The administrative law judge discounted Dr. Alam's opinion on the ground that "it cannot be said that the treatment records make no mention of asthma," since in "February of 2000, Dr. Lenkey recorded that . . . claimant had . . . been told that he had asthma." Decision and Order at 12.

But as claimant asserts, the record reflects that in February 2000, Dr. Lenkey, claimant's treating pulmonologist, did not diagnose asthma. At that time, claimant went to Dr. Lenkey seeking "a second opinion" because "he ha[d] been told that he has asthma."[5] Director's Exhibit 39. Asked to render a second opinion, Dr. Lenkey examined and tested claimant and diagnosed "[c]hronic, fixed airflow limitation" that was "supportive of coal workers' pneumoconiosis" in view of the fact that bronchodilator medications did not reverse the airflow impairment. *Id*. On remand, the administrative law judge should consider the entirety of the medical information to which Dr. Alam referred and reconsider Dr. Alam's opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge should also revisit his finding that Dr. Alam inaccurately believed that claimant had had cardiac bypass surgery. The record reflects that other physicians specifically noted that claimant had cardiac surgery. Employer's Exhibit 1 at 3, 4; Employer's Exhibit 2 at 1.

[5] Claimant notes that he visited Dr. Lenkey for a second opinion three months after he was told by employer's physician, Dr. Altmeyer, that he should be treated for asthma. Claimant's Brief at 14; Director's Exhibit 33 at 5.

Claimant additionally asserts that the administrative law judge did not analyze the opinions of Drs. Altmeyer and Fino that claimant has asthma unrelated to coal mine employment, but merely accepted them after having discounted the contrary views of claimant's experts for invalid reasons. Review of the administrative law judge's Decision and Order does not reveal his reasons for crediting the opinions of Drs. Altmeyer and Fino, other than that he had discounted those opinions submitted by claimant. Decision and Order at 12. Further, we agree with claimant that the administrative law judge did not discuss evidence identified by claimant's experts as conflicting with the diagnosis of asthma reached by Drs. Altmeyer and Fino.[6] *See* 30 U.S.C. §923(b). On remand, the administrative law judge should fully consider the record and resolve the conflicting medical opinions as to the etiology of claimant's obstructive lung disease. In so doing, the administrative law judge should consider the underlying bases of each opinion and adequately explain his rationale for weighing each opinion. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Finally, although the administrative law judge noted the credentials of some of the physicians, he did not discuss the physicians' credentials when weighing the medical opinions. On remand, the administrative law judge should consider the physicians' respective credentials in determining the credibility of their opinions. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995). Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his attendant finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and we instruct him to reconsider that issue, if reached.

[6] Claimant notes that his experts pointed to the lack of reversibility with bronchodilators on pulmonary function testing, claimant's chronic deterioration and failure to improve with asthma medication, the absence of a medical or family history of asthma, claimant's productive cough as opposed to the dry, non-productive cough of asthmatics, and the presence of wheezing that is unrelated to weather changes or allergies. Claimant's Exhibit 1 at 12-13; Claimant's Exhibit 2 at 3.

Accordingly, the administrative law judge's Decision and Order – Denying 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge