BRB No. 99-1234 BLA

JUNIOR L. GARRETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J & H COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Steven H. Theisen (Midkiff & Hiner, P.C.), Richmond, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1772) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a duplicate 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). The administrative

[1]Claimant's initial claim was filed on November 14, 1985. Director's Exhibit 32. This claim was denied by the Department of Labor (DOL) on March 11, 1986 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on October 31, 1996. Director's Exhibit 1.

law judge credited claimant with thirty-five years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge erred in failing to provide a valid basis for according greater weight to the opinion of Dr. Paranthaman than to the contrary opinions of Drs. Fino, Hippensteel and Sargent. In *Hicks*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that "[j]ust as the length of a miner's employment in the coal mines does not compel the conclusion that a miner's disability was entirely respiratory in nature, it does not conclusively

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[2]The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish that pneumoconiosis contributed to a totally disabling respiratory condition." *Hicks*, 138 F.3d at 535, 21 BLR at 2-340. Whereas Dr. Paranthaman opined that claimant suffers from pneumoconiosis, Director's Exhibits 13, 15; Employer's Exhibit 1, Drs. Fino, Hippensteel and Sargent opined that claimant does not suffer from pneumoconiosis, Employer's Exhibits 6-8. The

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[4]In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), the administrative law judge credited Dr. Rasmussen's opinion, that the miner suffered from a disabling respiratory condition arising from both coal mine work and cigarette smoke exposure, over the contrary opinion of Dr. Zaldivar. The United States Court of Appeals for the Fourth Circuit observed that the administrative law judge stated, "[i]n according greater weight to the opinion of Dr. Rasmussen, I find that, despite some discrepancy in [c]laimant's reported cigarette smoking history, his opinion is most consistent with the [c]laimant's extensive history of coal mine employment, [c]laimant's subjective complaints, some abnormal findings on physical examination, x-ray and medical opinion evidence of pneumoconiosis, and the preponderance of the valid arterial blood gas results." *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. The Fourth Circuit held that "[n]one of these reasons is a sufficient basis for concluding [that the miner] was disabled due to a respiratory impairment." *Id*.

[5]We reject employer's assertion that Dr. Paranthaman's opinion is not well reasoned because Dr. Paranthaman did not explain the inconsistencies in his medical reports. The administrative law judge rationally found that "Dr. Paranthaman changed his mind when he was told that the history was 31.98 years." Decision and Order at 12. In a report dated December 4, 1996, Dr. Paranthaman diagnosed pulmonary emphysema primarily due to cigarette smoking and opined that "[i]f 23 years of coal mine employment is documented, this could have aggravated the condition." Director's Exhibit 13; Employer's Exhibit 1. In a subsequent report dated February 7, 1997, Dr. Paranthaman opined that "[b]ecause of the duration of coal mine employment of 31.98 years, I consider that the coal dust exposure has significantly aggravated the condition and therefore he is considered to have coal workers' pneumoconiosis." Director's Exhibit 15. Dr. Paranthaman's 1997 medical report was in response to the DOL's January 27, 1997 letter, requesting Dr. Paranthaman to render an opinion with regard to the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis in view of its verification of 31.98 years of coal mine employment. Director's Exhibit 14.

[6]The administrative law judge also considered the opinions of Drs. Taylor and Molony. The administrative law judge observed that Dr. Molony "indicated in a May 27, 1997 note that the [c]laimant would be unable to undergo extensive testing due to weakness, CWP [coal worker's pneumoconiosis], and anxiety." Decision and Order at 8. The administrative law judge also observed that Dr. Taylor "diagnosed

administrative law judge stated, "I have considered all these opinions together with the [c]laimant's account of his coal mine employment and the significant dust exposure he received both underground and at the tipple, as well as the [c]laimant's smoking history, which did not exceed one pack per day and ended in 1987." Decision and Order at 12. The administrative law judge also stated, "[u]nder these circumstances, I find Dr. Paranthaman's opinion to be the most consistent with the [c]laimant's history of significant exposure to both coal mine dust and cigarette smoke, and I adopt his opinion that the [c]laimant's emphysema was aggravated by coal dust exposure and may therefore be deemed pneumoconiosis under the regulations." *Id*. at 12-13. However, the administrative law judge's reason for crediting Dr. Paranthaman's opinion is not in accordance with *Hicks*. Moreover, the administrative law judge did not provide an explanation for his rejection of the contrary opinions of Drs. Fino, Hippensteel and Sargent. An administrative law judge must not reject relevant evidence without an explanation. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the newly submitted evidence. If the administrative law judge finds the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether claimant has established the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 303, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Employer further contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). The administrative law judge stated, "[f]or the same reasons

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'Chronic Bronchitis, Possible Emphysematous Lung Disease versus early Pneumoconiosis' and he indicated, by checking the appropriate box, his opinion that the diagnosed condition was related to dust exposure in the [c]laimant's coal mine employment." *Id*. at 9. The administrative law judge stated, "[a]lthough [Dr. Taylor's] report provides some support to a finding of pneumoconiosis, I find that it is not entitled to significant weight in view of the significant amount of clinical information now available that was not available at the time of Dr. Taylor's examination." *Id*. at 12 n.6. The administrative law judge also stated, "Dr. Molony's diagnosis of CWP [coal worker's pneumoconiosis], while also providing support for the claim, is too conclusory to be entitled to significant weight." *Id*.

that I found the [c]laimant to have pneumoconiosis as defined in the regulations, I find that [c]laimant's totally disabling respiratory or pulmonary impairment is due to his pneumoconiosis." Decision and Order at 14. As previously noted, the administrative law judge's reason for crediting Dr. Paranthaman's opinion is not in accordance with *Hicks*. In addition, the administrative law judge did not provide an explanation for his rejection of the contrary opinions of Drs. Fino, Hippensteel and Sargent. *See Tanner, supra*; *McGinnis, supra*; *Shaneyfelt, supra*. Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and remand the case for further consideration of the evidence, if reached.

On remand, the administrative law judge must consider, at the outset, whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In accordance with *Rutter*, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235. The administrative law judge correctly stated that "[t]he prior claim was finally denied on the grounds that [c]laimant failed to establish that he had pneumoconiosis arising out of coal mine employment." Decision and Order at 10; Director's Exhibit 32. The administrative law judge further stated, "I must first address the evidence concerning whether the [c]laimant has pneumoconiosis." Decision and Order at 10. The administrative law judge additionally stated that "[e]stablishing pneumoconiosis would be tantamount to establishing a material change in conditions." *Id*. However, the administrative law judge did not render a specific finding with respect to the issue of whether claimant established a material change in conditions at 20 C.F.R. §725.309.

Finally, if on remand the administrative law judge finds that claimant established a material change in conditions under 20 C.F.R. §725.309, the administrative law judge must consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits on the merits under 20 C.F.R. Part 718.

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[7]While the alj must consider only the newly submitted evidence of record in determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309, she must consider both the previously submitted and the newly submitted evidence of record on the merits if claimant establishes a

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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material change in conditions at 20 C.F.R. §725.309. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).