BRB No. 02-0300 BLA

ROY LEE CHRISTIAN[1] Claimant-Respondent v. SHANNON-POCAHONTAS MINING COMPANY and ACORDIA EMPLOYERS SERVICES CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

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[1]A notice from the U.S. Department of Labor's Office of Workers' Compensation Programs was sent to the Board on March 20, 2002 stating that the miner died on March 7, 2002.

Employer appeals the Decision and Order (00-BLA-0662) of Administrative Law Judge Robert J. Lesnick awarding benefits on modification of a miner's 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). Initially, the administrative law judge noted that employer conceded that claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000) by establishing total respiratory disability. Employer's May 15, 2001 Post-hearing Brief at 8; Decision and Order at 20. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that all of the evidence of record was sufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 21-22. Accordingly, benefits were awarded, commencing December 2000. Decision and Order at 22.

On appeal, employer contends that the administrative law judge's finding of total respiratory disability is unsupported by the record and contrary to applicable law. Employer's Brief at 8-11. Additionally, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 11-20. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

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[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.

[3]Claimant is Roy Lee Christian, the miner, who filed his claim for benefits on May 21, 1992. Director's Exhibit 1. The denial of claimant's present claim for benefits was affirmed by the Board on September 2, 1998 because claimant failed to establish total respiratory disability. Director's Exhibit 72. On August 5, 1999, claimant requested modification. Director's Exhibit 73. The district director denied claimant's request for modification and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 81, 82.

Employer first asserts that the administrative law judge erred in finding total respiratory disability. In his Decision and Order, the administrative law judge stated that employer conceded "that claimant has established a change in condition by establishing that he is now totally disabled," but that employer contends that "such disability is not due to pneumoconiosis." Decision and Order at 20. In its May 15, 2001 Post-hearing Brief, employer, in fact, stated that it "has withdrawn its contest to all issues listed in Director's Exhibit No. 84, except the following: Issue No. 7 (Total Disability) and Issue No. 9 (Causation)." Employer's May 15, 2001 Post-hearing Brief at 7-8. Employer further stated that it conceded that claimant has established modification pursuant to 20 C.F.R. §725.310 (2000) by demonstrating a change in his condition. *Id.* at 8. As outlined in its Post-hearing Brief, employer based its concession regarding a change in condition on the December 19, 2000 qualifying pulmonary function study performed by Dr. Leacock. *Id.* Employer, however, reiterated that "[d]espite this concession, the employer maintains that this change in condition has not resulted in total disability due to pneumoconiosis." *Id.* Later in employer's Post-hearing Brief and again in its Petition for Review and brief before the Board, employer reiterates and substantiates its position that claimant has not established total respiratory disability on the merits. Therefore, it appears that while employer intended to concede to claimant's having established a change in conditions based on new evidence submitted regarding total respiratory disability, employer did not concede to total respiratory disability on the merits. Accordingly, we hold that the administrative law judge mischaracterized, *see generally Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), employer's concession regarding the establishment of total respiratory disability on the merits. Because the administrative law judge's finding of total respiratory disability is based on his mistaken interpretation of employer's concession, we vacate the administrative law judge's finding that claimant established total respiratory disability and instruct the administrative law judge on remand to consider all the relevant evidence in accordance with 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iv) to determine if claimant has established total respiratory disability on the merits of his claim. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236

[4]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

[5]Employer asserts that the contrary probative evidence in the record weighs against a finding of total respiratory disability based on one qualifying pulmonary function study and one qualifying blood gas study. Employer's Brief at 8-11.

(1987)(*en banc*).

Regarding the cause of claimant's disability, the administrative law judge, citing 20 C.F.R. §718.204(c)(1)(i), (ii), stated that:

> [p]neumoconiosis is a "substantially contributing cause" of claimant's disability if it: "(i) [has] a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) [m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment."

Decision and Order at 21. Applying this standard, the administrative law judge found the opinions of Dr. Leacock and Dr. Gonzales-Chambers, claimant's treating oncologist, to be most persuasive. *Id.* The administrative law judge added that the interaction between claimant's coal workers' pneumoconiosis and lung cancer can best be assessed by the expertise of claimant's treating oncologist, Dr. Gonzales-Chambers. *Id.* Accordingly, the administrative law judge found that claimant's coal workers' pneumoconiosis "materially worsened his already existing[] totally disabling lung cancer" and concluded that claimant has established total disability due to pneumoconiosis based on the opinions of Dr. Leacock and Dr. Gonzales-Chambers. *Id.*

Employer contends that the administrative law judge erred in finding the opinions of Dr. Leacock and Dr. Gonzales-Chambers sufficient to meet the standard of causation articulated by the United States Court of Appeals for the Fourth Circuit. Employer's Brief at 15-18. Specifically, employer contends that neither Dr. Leacock nor Dr. Gonzales-Chambers found that claimant's coal mining was a necessary condition of his disability and that neither of these physicians' opinions has demonstrated that pneumoconiosis has a material adverse effect or materially worsens claimant's totally disabling respiratory impairment. *Id.* To substantiate its assertion, employer cites to the Fourth Circuit court's opinion in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Employer's Brief at 12-13. In *Ballard*, the Fourth Circuit court stated:

> if the record before the [administrative law judge] contains substantial evidence to support the conclusion that Ballard's cigarette smoking and resulting lung cancer would have disabled him to the same degree by the same time in his life had he never been a miner, he is not entitled to black lung benefits.

See Ballard, 65 F.3d at 1196, 19 BLR at 2-320. In *Ballard*, the Fourth Circuit court reversed the award of benefits ordered by the Board because "substantial evidence in the record support[ed] the [administrative law judge's] determination that Ballard failed to establish that pneumoconiosis was a contributing factor to his total disability." *See Ballard*, 65 F.3d at 1196, 19 BLR at 2-321.

Dr. Gonzales-Chambers and Dr. Leacock found the following in their medical opinions. Dr. Gonzales-Chambers found complicated pneumoconiosis and stated that coal workers' pneumoconiosis at least contributed to claimant's disability. Employer's Exhibit 12 at 22-26, 35. Dr. Gonzales-Chambers also opined that the removal of claimant's left lung made him totally disabled from a pulmonary standpoint. Employer's Exhibit 12 at 36. Dr. Leacock stated that he agrees with Dr. Iosif that coal workers' pneumoconiosis is not a *significant* contributing factor to claimant's disability, but stated that it is a contributing cause. Employer's Exhibit 10 at 17, 20. Dr. Leacock also stated that there is no way to say with any level of certainty that coal workers' pneumoconiosis is, in and of itself, totally disabling. Employer's Exhibit 10 at 18. Dr. Leacock added that since the lung cancer is, in and of itself, totally disabling, the coal workers' pneumoconiosis is, in essence, aggravating an already bad condition. Employer's Exhibit 10 at 20.

Because the administrative law judge has not adequately explained why he found the opinions of Dr. Leacock and Dr. Gonzales-Chambers to be sufficient to meet the standard of disability causation articulated by the United States Court of Appeals for the Fourth Circuit, we vacate the administrative law judge's Section 718.204(c) finding and remand this case for the administrative law judge to reconsider all of the relevant evidence regarding cause of disability. On remand, we instruct the administrative law judge to more thoroughly address the relevant evidence in conjunction with the Fourth Circuit court's holdings in *Ballard* to determine whether claimant has established that his total respiratory disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990), citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[6]The administrative law judge must determine on remand whether 20 C.F.R. §718.104(d) of the new regulations is applicable to Dr. Gonzales-Chambers' March 20, 2001 deposition testimony. *See* 20 C.F.R. §718.104(d).

In this regard, employer additionally asserts that the administrative law judge erred in dismissing, as outdated, the 1992 opinion of Dr. Daniel and the 1993 opinion of Dr. Crisalli. Employer specifically argues that these opinions help provide an understanding of the total picture of claimant's respiratory status. Employer's Brief at 14-15. We agree. Therefore, we further instruct the administrative law judge on remand to consider the historical significance of these opinions in understanding the total picture of claimant's respiratory function. *See Ballard*, *supra*.

Moreover, employer contends that the administrative law judge erred in failing to provide a reason for dismissing the opinion of Dr. Iosif, who is Board-certified in internal medicine and pulmonary disease on the issue of disability causation. Employer's Brief at 18-20. Dr. Iosif found that claimant's respiratory functional impairment could be fully explained by the previous resection of his entire left lung and extensive involvement of the residual right lung by cancer. Employer's Exhibit 9. Dr. Iosif further found that there is no medical evidence that would support any significant or measurable contribution to claimant's respiratory functional impairment from his prior coal mine employment or simple coal workers' pneumoconiosis. Employer's Exhibit 9. Because the administrative law judge has failed to provide any rationale for dismissing Dr. Iosif's opinion, we instruct the administrative law judge to reconsider Dr. Iosif's opinion on remand and to provide an adequate rationale for crediting or discrediting this opinion, as required by the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

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[7]In 1992, Dr. Daniel found that claimant's chronic obstructive pulmonary disease due to smoking is the cause of his pulmonary impairment. Director's Exhibit 8. Dr. Crisalli stated in 1993 that claimant had no coal workers' pneumoconiosis and that his mild pulmonary function impairment is secondary to his chronic bronchitis due to his heavy smoking history. Director's Exhibit 26. Dr. Crisalli also opined that claimant's extertional limitations are due to his significant cardiac disease that is not in any way related to his coal dust exposure. *Id.*

[8]Employer also asserts that the administrative law judge erred in finding the opinion of Dr. Gonzales-Chambers to be more persuasive than the opinion of Dr. Iosif because Dr. Gonzales-Chambers, who is Board-certified in internal medicine and oncology, is not as qualified as Dr. Iosif, who is Board-certified in internal medicine and pulmonary disease. Employer's Brief at 18-19. We instruct the administrative law judge on remand that a physician's qualifications is one of the factors that should be considered when determining the weight to be accorded to that physician's opinion. *See Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

In the event that the administrative law judge does not find total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 on remand, then the administrative law judge must consider the evidence of complicated pneumoconiosis contained in the record to determine whether claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Finally, the administrative law judge found claimant to be entitled to benefits as of December 2000. Decision and Order at 22. Because we vacate the administrative law judge's findings regarding total respiratory disability and disability causation at Section 718.204(b), (c), we instruct the administrative law judge to revisit the onset date issue on remand, if he again finds that claimant has established entitlement. *See* 20 C.F.R. §725.503(d)(2).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge