BRB No. 04-0307 BLA

LEONARD L. BONCZEWSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LUCKY STRIKE COAL CORPORATION	)	
	)	DATE ISSUED: 11/23/2004
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Stephen J. Bachman (DeLuca Law Offices), Nanticoke, Pennsylvania, for claimant.

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

Barry H. Joyner (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5485) of Administrative Law Judge Robert D. Kaplan awarding benefits 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 a subsequent claim filed on January 9, 2002.[2]

[1] The Department of Labor (DOL) 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 relevant procedural history of this case is as follows: Claimant filed claims on May 19, 1983, May 13, 1985, and April 24, 1987. Director's Exhibit 1. Each of these claims was denied by a district director who found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* The last of these claims, the 1987 claim, was denied on May 28, 1987. *Id.* There is no indication that claimant took any further action in regard to his 1987 claim.

Claimant filed a fourth claim on July 21, 1989. Director's Exhibit 1. In a Decision and Order dated October 1, 1991, Administrative Law Judge Paul H. Teitler credited claimant with seventeen years of coal mine employment and noted that employer conceded the existence of pneumoconiosis. *Id.* Judge Teitler also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* However, Judge Teitler found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Judge Teitler, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Teitler denied benefits. *Id.* By Decision and Order dated January 31, 1994, the Board affirmed Judge Teitler's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Bonczewski v. Lucky Strike Coal Corp.*, BRB No. 92-0450 BLA (Jan. 31, 1994) (unpublished). The Board, therefore, affirmed Judge Teitler's denial of benefits. *Id.* Claimant subsequently filed a timely request for modification. Director's Exhibit 1. The district director denied claimant's request for modification on February 10, 1995. *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

Claimant filed a fifth claim on April 16, 1996. Director's Exhibit 2. On June 11, 1996, the district director found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* The district director also found that the evidence was insufficient to establish a material change in conditions pursuant to

Administrative Law Judge Robert D. Kaplan (the administrative law judge) found that the newly submitted medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that an applicable condition of entitlement had changed since the date upon which claimant's prior 1996 claim became final. The administrative law judge, therefore considered the merits of claimant's 2002 claim. The administrative law judge noted that employer conceded at the hearing that claimant suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge also noted that the parties stipulated that claimant was engaged in coal mine employment for seventeen years. Considering all of the evidence of record, the administrative law judge found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge also found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, contending that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director concedes that if the administrative law judge, on remand, finds that the evidence is insufficient to establish that claimant is totally disabled due to pneumoconiosis, the case will have to be remanded to the district director so that the Department of Labor can provide claimant with a complete, credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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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20 C.F.R. §725.309 (2000). *Id.* The district director, therefore, denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim.

Claimant filed a sixth claim on January 9, 2002. Director's Exhibit 4.

Employer argues that the administrative law judge erred in finding the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In finding the newly submitted medical opinion evidence sufficient to establish total disability, the administrative law judge found that Drs. Landin, Cali and Dittman all agreed that claimant suffered from a totally disabling respiratory or pulmonary condition. Decision and Order at 7. Employer and the Director contend that the administrative law judge erred in relying upon Dr. Cali's opinion to support his finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Dr. Cali opined that claimant suffered from a "100% impairment due to asthma and heart disease." Director's Exhibit 8. Dr. Cali further opined that claimant's impairment was due to "50% heart disease [and] 50% lung disease." *Id.* Employer argues that because Dr. Cali attributed 50% of claimant's disability to his heart disease, the doctor's opinion does not support a finding of a totally disabling respiratory or pulmonary impairment. Employer's Brief at 3-4. The Director similarly contends that "Dr. Cali's opinion does not address the question of whether [claimant's] pulmonary condition alone is totally disabling." Director's Brief at 1.

Section 718.204(b)(1) provides that a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents the miner from performing his usual coal mine work or comparable gainful employment. 20 C.F.R. 718.204(b)(1). Section 718.204(a) further provides, in pertinent part, that:

> For purpose of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner was totally disabled due to pneumoconiosis.

20 C.F.R. §718.204(a).

Because Dr. Cali did not opine that claimant's pulmonary or respiratory impairment, standing alone, would prevent him from performing his usual coal mine work, the administrative law judge erred in finding that Dr. Cali's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case to reconsider whether the opinions of Drs. Cali, Landin and Dittman are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In light of

this holding, we also vacate the administrative law judge's finding that an applicable condition of entitlement has changed since the date upon which claimant's prior 1996 claim became final. *See* 20 C.F.R. 20 C.F.R. §725.309.

Employer also argues that the administrative law judge erred in finding that Dr. Cali's opinion was sufficient to support a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a claimant need only prove that his pneumoconiosis is a substantial contributor to his total disability. *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

In his consideration of whether the evidence was sufficient to establish that claimant's total disability is due to pneumoconiosis, the administrative law judge found that Dr. Dittman's opinion, that claimant's disability was caused solely by his smoking history, was outweighed by the contrary opinions of Drs. Landin and Cali. Decision and Order at 9-10. The administrative law judge, therefore, found that the evidence was sufficient to establish that pneumoconiosis is a substantial contributor to claimant's total disability pursuant to §718.204(c). *Id.*

Employer contends that Dr. Landin's opinion is insufficient to support a finding that claimant's pneumoconiosis is a substantial contributor to his total disability. In a report dated September 24, 2002, Dr. Landin opined that claimant was totally disabled and that "pneumoconiosis constitute[ed] a significant part of his symptomatology." Director's Exhibit 28. Although Dr. Landin, during a July 9, 2003 deposition, indicated that he could not provide an exact percentage as to the contribution that claimant's

smoking and coal dust exposure made to his pulmonary impairment, he subsequently stated that if he had to make such an estimate, he would attribute 70% of claimant's pulmonary impairment to his coal dust exposure and the remaining 30% to his smoking history. Claimant's Exhibit 1 at 13-14. Consequently, contrary to employer's contention, Dr. Landin's opinion is sufficient to support a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer also contends that the administrative law judge erred in finding that Dr. Cali's opinion is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer specifically contends that the administrative law judge impermissibly substituted his own opinion for that of Dr. Cali.

After attributing claimant's pulmonary impairment to his heart disease and lung disease, Dr. Cali stated that "[d]ust exposure may have contributed, but x-ray does not show pneumoconiosis." Director's Exhibit 8. Because Dr. Cali did not diagnose pneumoconiosis or any lung disease attributable to claimant's coal dust exposure, his opinion cannot support a finding that claimant's total disability is due to pneumoconiosis. The administrative law judge, however, found that:

> Although Dr. Cali did not find pneumoconiosis present, he was open to the possibility that Claimant had pneumoconiosis and, I have no doubt, would have found pneumoconiosis a substantial contributor to disability if the physician had been in possession of evidence of the disease.

Decision and Order at 10.

The administrative law judge's finding amounts to an improper speculation as to what Dr. Cali would have concluded had he believed that claimant suffered from pneumoconiosis. An administrative law judge may not substitute his opinion for that of a physician. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We, therefore, vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remand the case for further consideration.[3]

[3] In regard to the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), the Director, Office of Workers' Compensation Programs, states that:

> Employer implicitly relies on Dr. Dittman's opinion that claimant's total disability was due to smoking rather than pneumoconiosis. In reaching his conclusion, Dr. Dittman relied on an assumption that pneumoconiosis will cause restrictive, but not obstructive impairments. The regulations,

Finally, the Director notes that Dr. Cali's examination was performed at his request in fulfillment of the Director's obligation to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Should the administrative law judge, on remand, discredit Dr. Cali's opinion and determine that the remaining evidence is insufficient to establish total disability or that claimant's total disability is due to pneumoconiosis, the Director contends that the case must be remanded to the district director so that the Director can satisfy his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Given the Director's concession, the administrative law judge is instructed that, should he find the evidence insufficient to establish total disability or disability causation, he must remand the case to the district director so that the Director can satisfy his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

> however, make plain that pneumoconiosis can cause restrictive as well as obstructive impairments. To the extent that Dr. Dittman relied on a contrary assumption, his opinion is not credible.

Director's Response Brief at 2 (citations omitted).

On remand, the administrative law judge is instructed to address whether Dr. Dittman's opinion is based upon an improper assumption that pneumoconiosis cannot cause an obstructive impairment. *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

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.

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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