BRB No. 07-0290 BLA

R.W.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COPPERAS COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/30/2007
	)	
Employer/Carrier-Respondents	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; 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:

Claimant appeals[1] the Decision and Order (05-BLA-5256) of Administrative Law Judge Richard A. Morgan denying benefits on a subsequent 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).[2] The administrative law judge credited claimant with eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and, thus, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] However, considering the claim on the merits, the administrative law judge determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

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[1] By letter dated October 5, 2007, the Board was notified by an attorney of the law firm of Rundle & Rundle, L.C., that her office no longer represents claimant and she attached a document indicating that claimant has released the firm as counsel. The Board will treat claimant as represented by counsel for purposes of this appeal, as a brief was filed on claimant's behalf, to which employer and the Director, Office of Workers' Compensation Programs, have responded.

[2] Claimant previously filed a claim on November 2, 1998. Director's Exhibit 1. On September 11, 2000, Administrative Law Judge Robert J. Lesnick issued a Decision and Order denying benefits. Judge Lesnick specifically determined that while claimant established the existence of pneumoconiosis, he failed to establish that he was totally disabled. *Id*. Claimant appealed, and the Board affirmed Judge Lesnick's denial of benefits. *[R.W.B.] v. Copperas Coal Corp.*, BRB No. 00-1186 BLA (Aug. 31, 2001) (unpub.). Claimant took no further action with regard to the denial of his claim until he filed his subsequent claim on December 9, 2003. Director's Exhibit 3.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

On appeal, claimant argues that the administrative law judge erred by failing to credit Dr. Rasmussen's opinion that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief. The Director agrees with claimant that the administrative law judge erred in his consideration of Dr. Rasmussen's opinion, insofar as the administrative law judge did not specifically address whether Dr. Rasmussen's opinion was sufficient to establish that claimant suffered from legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Director's Brief at 1. The Director urges the Board to vacate the administrative law judge's findings pursuant to Section 718.202(a)(4), and to remand the case for consideration of whether claimant established the existence of legal pneumoconiosis based on Dr. Rasmussen's opinion. *Id*. at 2. Employer has also responded to the Director's brief.[4]

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.[5] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant contends that the administrative law judge erred in failing to find that he suffers from pneumoconiosis based on Dr. Rasmussen's opinion, and that fact that he

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding with respect to claimant's length of coal mine employment, and his findings that claimant established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2) and 725.309. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[5] Because the miner's coal mine employment occurred in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director,* 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

proved the existence of pneumoconiosis in his prior claim.[6] The Director agrees with claimant that the administrative law judge erred in evaluating the evidence at Section 718.202(a)(4), asserting that the administrative law judge erred by failing to consider whether Dr. Rasmussen's opinion, that claimant has chronic bronchitis caused by a combination of coal-dust exposure and smoking, was sufficient to establish the existence of legal pneumoconiosis. These assertions of error have merit.

At Section 718.202(a)(4), the administrative law judge considered three medical opinions by Drs. Rasmussen, Zaldivar and Castle.[7] He noted that Dr. Rasmussen diagnosed coal workers' pneumoconiosis, but that the doctor failed to explain the basis for his diagnosis, other than to cite to claimant's history of dust exposure and Dr. Patel's positive reading of the x-ray dated February 18, 2004, which x-ray was also read as negative by a physician who was dually qualified, like Dr. Patel, as a Board-certified radiologist and B reader. Because the administrative law judge determined that it was "unclear if Dr. Rasmussen's opinion would change if he reviewed both the positive and negative x-ray interpretations by equally qualified physicians," he found that Dr. Rasmussen's diagnosis of clinical pneumoconiosis was entitled to little weight. Decision and Order at 14. Although the administrative law judge had discretion to accord Dr. Rasmussen's diagnosis of clinical pneumoconiosis less weight, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*), we agree with the Director that the administrative law judge erred by failing also to consider whether Dr. Rasmussen's diagnosis that claimant has chronic bronchitis due, in part, to coal dust exposure is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

[6] Claimant essentially argues that collateral estoppel should apply to preclude employer from relitigating the issue of whether he has pneumoconiosis. *See generally, Polly v. D&K Coal Co.*, 23 BLR 1-77 (2005).

[7] Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic bronchitis due to smoking and coal dust exposure. Director's Exhibit 11. Dr. Zaldivar opined that claimant "may have" pneumoconiosis by radiographic evidence but that he did not have a "dust disease." Director's Exhibit 13. Dr. Zaldivar diagnosed pulmonary fibrosis but stated that there was no coal workers' pneumoconiosis. Employer's Exhibit 5. The administrative law judge considered Dr. Zaldivar's opinion as to the existence of pneumoconiosis to be inconclusive and unclear, and therefore gave it little weight. Decision and Order at 15. The administrative law judge credited Dr. Castle's opinion that claimant does not have coal workers' pneumoconiosis or any respiratory disease due to coal dust exposure. Decision and Order at 15; Employer's Exhibit 1.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Because the administrative law judge did not weigh the medical opinion evidence to determine whether claimant established the existence of legal pneumoconiosis, we vacate his finding pursuant to 20 C.F.R. §718.202(a)(4).[9] Furthermore, to the extent that the administrative law judge relied on his finding that claimant did not have pneumoconiosis in determining the issue of disability causation, we vacate his finding that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

On remand, the administrative law judge should consider claimant's argument that the doctrine of collateral estoppel applies to preclude employer from relitigating the issue of the existence of pneumoconiosis. If not, the administrative law judge must determine whether claimant is able to establish the existence of legal pneumoconiosis based on any of the medical opinions contained in the record pursuant to Section 718.202(a)(4). If he finds that claimant suffers from pneumoconiosis under Section 718.202(a)(4), the administrative law judge must further consider whether claimant established the existence of pneumoconiosis based on a review of all of the evidence together under Section 718.202(a). *Compton*, 211 F.3d at 208-11; 22 BLR at 2-169-74. Thereafter, if the issue is reached, the administrative law judge is instructed to render new findings as to whether the evidence is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[9] The administrative law judge also failed to consider whether any of the evidence developed in conjunction with claimant's prior claim was sufficient to establish the existence of legal pneumoconiosis, and should do so on remand.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, 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