BRB No. 04-0129 BLA

ETHEL ELAINE TOLLIVER (Widow of MICHAEL LEE TOLLIVER)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 10/22/2004
EASTERN ASSOCIATED COAL CORPORATION	)	
and	)	
OLD REPUBLIC INSURANCE 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-882) of Administrative Law Judge Alice M. Craft awarding benefits on a miner's duplicate claim and a survivor'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).[1] Based on the date of filing, the administrative law judge adjudicated the claims pursuant to 20 C.F.R Part 718 and credited the miner with at least eighteen years of coal mine employment.[2] The administrative law judge found the newly submitted evidence established the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), an element of entitlement previously adjudicated against the miner, and thus was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Based on her review of all of the evidence in the record, the administrative law judge found that claimant, the miner's widow, established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1) and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded on both claims.

On appeal, employer challenges the administrative law judge's weighing of the evidence under Sections 718.202(a)(1) and (a)(4), 718.204(c) and 718.205(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend 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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[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 (2002).

[2] The miner, Michael Lee Tolliver, filed his initial claim for benefits on February 8, 1993. Decision and Order at 2; Director's Exhibit 32-1. This claim was denied by the district director on July 20, 1993. Decision and Order at 2; Director's Exhibit 32-18. No further action was taken on this claim. The instant miner's duplicate claim was filed on May 16, 1995. Decision and Order at 2; Director's Exhibit 1. A hearing was held before Administrative Law Judge Stuart Levin on July 20, 1999, but the miner died on September 25, 1999, prior to the issuance of a Decision and Order by Judge Levin. Decision and Order at 2; Director's Exhibit 62. Claimant is Ethel E. Tolliver, the miner's widow, who filed her survivor's claim on October 15, 1999. Decision and Order at 2; Director's Exhibit 70. The miner's claim and the survivor's claim were subsequently consolidated.

Employer initially contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) (2000) on the basis that the administrative law judge erroneously found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a). In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert denied*, 519 U.S. 1090 (1997), the United States Court of Appeals for the Fourth Circuit held that in order for claimant to establish a material change in conditions, claimant must prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against the miner. If a material change in conditions is established, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits.

In this case, the administrative law judge initially discussed the general standard of review for determining whether a material change in conditions was established. Decision and Order at 5. The administrative law judge then summarily concluded that the existence of pneumoconiosis was established, an element of entitlement which defeated entitlement in the prior case. Decision and Order at 5. We agree with employer's contention that because the administrative law judge did not render a specific finding based upon a consideration of the relevant newly submitted evidence, her material change in conditions finding cannot be affirmed. Consequently, we vacate the administrative law judge's finding of the existence of pneumoconiosis, as well as a material change in conditions, and remand this case to the administrative law judge to reconsider the medical evidence and determine if claimant suffers from pneumoconiosis pursuant to Section 718.202(a) by a preponderance of the new evidence. *Rutter*, 86 F.3d 1358, 20 BLR 2-227.

In the interest of judicial economy, we will address employer's other specific allegations of error. Employer also argues that the administrative law judge mischaracterized the x-ray evidence and failed to explain her weighing of the x-ray evidence pursuant to Section 718.202(a)(1). Employer's Brief at 19-20. The administrative law judge listed the x-ray evidence, which included the dates of the various x-rays and the dates they were read or reread, the names of the physicians and their qualifications, interpretations and comments. Decision and Order at 7-10; Director's Exhibits 32-14, 32-15, 32-16, 12, 13, 14, 26, 42, 46, 48, 49, 50, 72, 73, 75, 77, 78, 85; Employer's Exhibits 2, 3, 8. The administrative law judge stated that there were twelve x-rays classified for the existence of pneumoconiosis, of which ten were positive, taken between July 8, 1993, and

September 24, 1999.[3] Decision and Order at 19. The regulations at Section 718.202(a)(1) state that the existence of pneumoconiosis may be established by a chest x-ray conducted and classified in accordance with 20 C.F.R. §718.102. 20 C.F.R. §718.202(a)(1). The regulations specifically state that in evaluating conflicting x-ray reports, "consideration shall be given to the *radiological* qualifications of the physicians interpreting such X-rays." (emphasis added). Although the x-ray evidence was conflicting, the administrative law judge stated that "[n]onetheless, the weight of the x-ray evidence is positive for pneumoconiosis. Decision and Order at 10. Employer correctly asserts that the administrative law judge has failed to provide an adequate rationale for her weighing of the x-ray evidence of record since she did not provide an explanation of her reasons or the bases for her conclusions in light of the various qualifications of the readers and the conflicting interpretations of the evidence. *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000). Based on the foregoing, we vacate the administrative law judge's determination that the x-ray evidence establishes the existence of pneumoconiosis and the administrative law judge is instructed to reconsider the relevant x-ray evidence of record on remand under 20 C.F.R. §718.202(a)(1). *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

In challenging the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), a finding upon which the administrative law judge's disability and death causation findings at Sections 718.204(c) and 718.205(c) were predicated, employer contends that the administrative law judge improperly credited the medical opinions of Drs. Jenkins, Rasmussen and Albin, while improperly discounting the contrary opinions of Drs. Tuteur, Renn, Naeye, Repsher, Dahhan and Kleinerman. Employer asserts that the administrative law judge improperly credited Dr. Jenkins based on his status as a treating physician. Additionally, employer argues that the opinions of Drs. Albin, Jenkins and Rasmussen are not well-reasoned and documented and that the administrative law judge erred in failing to adequately explain her reasons for crediting these opinions over the contrary opinions as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), and the decision of the United States Court of Appeals for

[3] Employer asserts that there were only eight properly classified x-rays taken during this time period that complied with 20 C.F.R. §718.102, of which the two most recent x-rays were unanimously negative, four of which were unanimously positive and two of which were read as both positive and negative. Employer's Brief at 19.

the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Before finding the medical reports of record sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge must determine if the reports are reasoned and documented. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A reasoned opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). To make that determination, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. In *Hicks*, as well as *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Fourth Circuit held that in evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses," and that absolute deference should not be accorded to the opinions of treating and examining physicians. *Akers*, 131 F.3d 438, 21 BLR 2-269; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

At Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinions of Drs. Jenkins, Abin and Rasmussen in finding the existence of pneumoconiosis established and stated that she found their opinions to be in better accord with the overall weight of the medical evidence of record. Decision and Order at 31. In addressing the contrary opinions of Drs. Tuteur, Renn, Dahhan and Repsher, the administrative law judge concluded that these physicians relied on the negative biopsy results in rejecting the evidence of the x-rays and CT scans. Decision and Order at 30. In light of our determination that the administrative law judge's finding regarding the x-ray evidence was flawed, as well as the administrative law judge's own conclusion that the CT scan evidence was inconclusive, Decision and Order at 12-13; Director's Exhibit 32-11, 46; Employer's Exhibit 4, the administrative law judge's credibility determinations cannot be affirmed. Moreover, employer correctly asserts that the administrative law judge appears to have credited Dr. Jenkins primarily on his status as a treating physician, but did not consider and discuss the weight she accorded to the various

credentials of the other physicians of record nor did she adequately address the other factors for consideration identified by the Fourth Circuit.

Furthermore, the administrative law judge did not expressly explain her weighing of all of the evidence under Section 718.202(a)(4). We vacate, therefore, the administrative law judge's finding that the existence of pneumoconiosis was established, and remand this case to the administrative law judge for a full review of the opinions in light of these authorities. The administrative law judge must set forth the findings she has made upon applying the factors identified by the Fourth Circuit in *Hicks* and *Akers* to the medical opinions relevant to Section 718.202(a)(4) and must also set forth the bases for these findings. Moreover, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) or (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 in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *See also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Additionally, since the administrative law judge's errors directly impact her findings regarding disability causation and death due to pneumoconiosis, we vacate the administrative law judge's finding that the evidence was sufficient to establish total disability due to pneumoconiosis at Section 718.204(c) and death due to pneumoconiosis at Section 718.205(c) and instruct the administrative law judge, on remand, to reconsider the evidence thereunder, if necessary. *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Moreover, in rendering findings on remand, the administrative law judge is further instructed to weigh the medical evidence so as to satisfy the requirements of the APA.

Accordingly, the Decision and Order Granting Benefits of the administrative law judge is vacated and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge