BRB No. 08-0157 BLA

D.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED: 10/24/2008
	)	
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5086) of Administrative Law Judge Ralph A. Romano (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant filed his first claim on October 7, 1977. Director's Exhibit 1. It was finally denied on November 30, 1988. *Id*. Claimant filed his second claim on January 27, 1994. Director's Exhibit 2. It was finally denied on May 12, 1994. *Id*. Claimant filed his third claim on October 28, 1996. Director's Exhibit 3. It was finally denied on

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with thirty-five years and three months of coal mine employment based on the parties' stipulation,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also challenges the administrative law judge's finding that the new medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer therefore challenges the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) on the merits. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

April 25, 1997. *Id*. Claimant filed his fourth claim on December 6, 1999. Director's Exhibit 4. It was finally denied on November 17, 2000. *Id*. Claimant filed his fifth claim on March 18, 2002. Director's Exhibit 5. It was finally denied on January 26, 2004. *Id*. Claimant filed this claim on December 9, 2005. Director's Exhibit 7.

[2] The record indicates that claimant was employed in the coal mining industry in Alabama. Director's Exhibits 8, 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant's prior claim was denied because he failed to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Director's Exhibit 5.

[4] Because the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) and his

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

CHANGE IN AN APPLICABLE CONDITION OF ENTITLEMENT

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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As noted by the administrative law judge, claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order at 4; Director's Exhibit 5. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a). 20 C.F.R. §725.309(d)(2); *United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Section 718.202(a)(1)

Employer initially contends that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). We agree. The record consists of eight interpretations of two x-rays dated February 8, 2006[5] and April 25, 2006. Of these eight x-ray interpretations, three readings were negative for pneumoconiosis, Director's Exhibits 26, 27, and five readings were positive for pneumoconiosis. Director's Exhibit 16; Claimant's Exhibits 1-4. Dr. Wiot, who is dually qualified as a B reader and a Board-certified radiologist, read the February 8, 2006 x-ray as negative for pneumoconiosis, Director's Exhibit 27, while Drs. Nath, Ahmed, and Miller, who are also dually qualified, read this x-ray as positive for

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finding that the evidence established total disability at 20 C.F.R. §718.204(b) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Dr. Barrett, who is dually qualified as a B reader and a Board-certified radiologist, read the February 8, 2006 x-ray for quality only. Director's Exhibit 14.

pneumoconiosis. Director's Exhibit 16; Claimant's Exhibits 2, 4. Dr. Goldstein, who is a B reader, and Dr. Wheeler, who is dually qualified, read the April 25, 2006 x-ray as negative for pneumoconiosis, Director's Exhibit 26, while Drs. Ahmed and Miller, who are also dually qualified, read this x-ray as positive for pneumoconiosis. Claimant's Exhibits 1, 3.

As required by Section 718.202(a)(1), the administrative law judge considered the B reader and Board-certified radiologist status of the readers of the x-rays. 20 C.F.R. §718.202(a)(1). In so doing, the administrative law judge noted that one of the x-rays was read as negative by a physician who is a B reader. The administrative law judge additionally noted that both claimant and employer submitted negative and positive readings of each of the x-rays by physicians who are highly qualified as B readers and Board-certified radiologists. The administrative law judge therefore found that the x-ray readings that were submitted by claimant and employer were "equally credible." Decision and Order at 5. The administrative law judge then gave greater weight to the positive reading of the February 8, 2006 x-ray by Dr. Nath, who is dually qualified as a B reader and a Board-certified radiologist, because it is more objective since it was provided by the Department of Labor. However, because there is no evidence of record that the x-ray readings of physicians submitted by claimant and employer were biased or that Dr. Nath's x-ray reading was independent, the administrative law judge erred in according greater weight to Dr. Nath's positive reading of the February 8, 2006 x-ray, on the ground that it was more objective. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991)(*en banc*). Thus, we vacate the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for reconsideration of the new x-ray evidence in accordance with the Administrative Procedure Act (APA).[6]

Section 718.202(a)(4)

Employer next contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Boedefeld and Goldstein. Dr. Boedefeld diagnosed pneumoconiosis and severe airway obstruction related to tobacco smoking. Director's Exhibit 16. Dr. Goldstein diagnosed chronic obstructive pulmonary disease related to cigarette smoking, and opined that claimant does

[6] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

not have coal workers' pneumoconiosis. Director's Exhibit 25. Based on his review of the medical opinions, the administrative law judge found that "Dr. Boedefeld's report is more persuasive, better reasoned and better supported than the contrary report of Dr. Goldstein." Decision and Order at 9. Consequently, the administrative law judge concluded that the new medical opinion evidence established the existence of pneumoconiosis.

Employer argues that substantial evidence does not support the administrative law judge's finding that Dr. Boedefeld's opinion outweighed Dr. Goldstein's contrary opinion. The administrative law judge gave greater weight to Dr. Boedefeld's opinion than to Dr. Goldstein's contrary opinion, because he found "Dr. Boedefeld's opinion better supported since she relies upon a more persuasive x-ray report as well as other medical evidence."[7] Decision and Order at 8. Dr. Boedefeld's diagnosis of pneumoconiosis was based, in part, on Dr. Nath's positive reading of the February 8, 2006 x-ray. At Section 718.202(a)(1), as discussed, *supra*, the administrative law judge erred in according greater weight to Dr. Nath's positive reading of the February 8, 2006 x-ray, on the ground that it was more objective since the Department of Labor provided it. *See generally Melnick*, 16 BLR at 1-36. At Section 718.202(a)(4), the administrative law judge stated, "[a]s noted above, I find the objective x-ray report by Dr. Nath more persuasive than the equally credible x-ray reports submitted by [e]mployer and [c]laimant." Decision and Order at 8. Because the administrative law judge's weighing of Dr. Boedefeld's opinion, that claimant has pneumoconiosis, was tainted by his erroneous finding regarding Dr. Nath's positive reading of the February 8, 2006 x-ray, the administrative law judge erred in finding that Dr. Boedefeld's opinion outweighed Dr. Goldstein's contrary opinion on that basis. Furthermore, the administrative law judge did not adequately explain why he found that Dr. Boedefeld's opinion was better supported by the other medical evidence. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also argues that the administrative law judge erred in reinterpreting Administrative Law Judge Gerald M. Tierney's findings with regard to the biopsy evidence that was submitted in the prior claim. At Section 718.202(a)(2), the administrative law judge noted that no new biopsy evidence was submitted into the record. At Section 718.202(a)(4), however, the administrative law judge found that a biopsy report that was submitted in the prior claim did not support Dr. Goldstein's new opinion that claimant does not have pneumoconiosis. The administrative law judge specifically stated:

[7] The administrative law judge stated that "Dr. Boedefeld refers to [c]laimant's history and pulmonary function study results as well as the results on chest x-ray as a basis for her finding that pneumoconiosis is present." Decision and Order at 8.

> Employer argues that the negative chest x-ray reading on which Dr. Goldstein relied in concluding that pneumoconiosis is not present is better supported since it is consistent with the biopsy results submitted in the prior denial. While I note Judge Tierney found the biopsy results submitted in the prior denial were insufficient to establish the presence of pneumoconiosis, I do not find they are sufficient to establish that pneumoconiosis is absent in these proceeding[s] before me.
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> To clarify, I do not find the biopsy report sufficient to establish the absence of pneumoconiosis and, thus, I do not find this biopsy report a basis for crediting the newly submitted negative chest x-ray reports over the newly submitted positive reports. Dr. Goldstein primarily relied upon his negative chest x-ray reading in determining pneumoconiosis was not present and [e]mployer argues that his findings are supported by the negative biopsy report. Since I find, however, that the biopsy report is not negative for pneumoconiosis, but rather is not sufficient to establish pneumoconiosis, I find Dr. Goldstein's conclusions are not better supported by the biopsy report. Under these circumstances, Dr. Goldstein's newly submitted medical opinion report will be weighed against Dr. Boedefeld's newly submitted medical opinion report.

Decision and Order at 7-8.

Pursuant to Section 725.309(d)(3), if the applicable condition of entitlement relates to the miner's physical condition, a subsequent claim may be approved only if new evidence submitted in connection with it establishes at least one applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(3). As discussed, *supra*, the existence of pneumoconiosis at Section 718.202(a) was one of the elements of entitlement adjudicated against claimant in the prior claim. Consequently, the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) had to be based solely on new evidence. *See* 20 C.F.R. §725.309(d)(3). Because the administrative law judge considered a biopsy report that was submitted in the prior claim with Dr. Goldstein's new opinion that claimant does not have pneumoconiosis, the administrative law judge erred in weighing Dr. Goldstein's new opinion at Section 718.202(a)(4).

Further, employer argues that substantial evidence does not support the administrative law judge's characterization of Dr. Goldstein's opinion. The administrative law judge gave less weight to Dr. Goldstein's opinion because he found that Dr. Goldstein did not objectively consider claimant's smoking and coal mine employment histories. The administrative law judge specifically stated:

> Dr. Goldstein refers [to] [c]laimant's smoking history of 24 to 48 years as "severe" while he uses no such qualifier in his reference to [c]laimant's coal mine employment of 35 years. This characterization indicates a less objective review of [c]laimant's medical condition given his significant exposure to both cigarette smoke and coal mine dust. Dr. Boedefeld, in contrast, considered both exposure histories in a more objective fashion in her report and, on this basis, I also attribute weight to her opinion.

Decision and Order at 9.

Contrary to the administrative law judge's finding, Dr. Goldstein did not refer to claimant's smoking history as "severe." *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Rather, in clarifying his prior opinion regarding the etiology of claimant's chronic obstructive pulmonary disease, Dr. Goldstein determined that claimant's smoking history of 24 to 48 pack years was significant. Because there is no evidence in the record to support the administrative law judge's finding that Dr. Goldstein was biased against claimant, the administrative law judge erred in giving less weight to Dr. Goldstein's opinion because Dr. Goldstein did not objectively consider claimant's smoking and coal mine employment histories. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Employer additionally argues that the administrative law judge erred in failing to consider Dr. Renn's new report. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). In this case, employer submitted Dr. Renn's December 26, 2006 report into the record as part of its affirmative case. Dr. Renn stated that additional medical records that indicated that claimant has ischemic cardiomyopathy and congestive heart failure did not alter his opinion, as provided in an April 20, 2003 consultation report.[8] Employer's Exhibit 1. However, the administrative law judge did not consider Dr. Renn's December 26, 2006 report. Rather, the administrative law judge merely noted that Judge Tierney mentioned Dr. Renn in considering evidence submitted in the prior claim. The administrative law judge specifically stated that "Judge Tierney found Dr. Crain's[9] opinion insufficient to establish the presence of pneumoconiosis since he did not

[8] Dr. Renn's April 20, 2003 report was considered in the prior claim by Administrative Law Judge Gerald M. Tierney. In the April 20, 2003 report, Dr. Renn opined that claimant does not have coal workers' pneumoconiosis or a ventilatory impairment related to coal workers' pneumoconiosis. Director's Exhibit 5.

[9] The administrative law judge acknowledged that Dr. Crain was claimant's treating physician for the follow-up of his lung cancer. Decision and Order at 9.

have an opportunity to consider Dr. Bigg's testimony regarding the biopsy or the opinions of reviewing physicians, Drs. Renn and Goldstein." Decision and Order at 9. The administrative law judge further noted that "[a]lthough the record does not establish whether or not he has reviewed Dr. Bigg's testimony and the biopsy review comments of Drs. Renn and Goldstein, I note [that Dr. Crain] continues to include a diagnosis of pneumoconiosis in his treatment records." *Id.* Thus, as employer argues, the administrative law judge erred in failing to specifically consider Dr. Renn's new report. *McCune*, 6 BLR at 1-988.

In view of the forgoing, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the new medical opinion evidence in accordance with the APA. On remand, when considering the new medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally 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).

Section 725.309

Further, because we vacate the administrative law judge's findings that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), we also vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. On remand, the administrative law judge must determine whether the new evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thereby, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1 (2004). If the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, then he must determine whether the evidence establishes the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a). If reached, the administrative law judge must also consider whether the evidence establishes that the pneumoconiosis arose out of coal mine employment on the merits at 20 C.F.R. §718.203. In addition, the administrative law judge must consider whether the evidence establishes total disability due to pneumoconiosis on the merits at 20 C.F.R. §718.204(c),[10] if

[10] 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

reached.[11] *Black Diamond Coal Mining Co. v. Director, OWCP* [*Marcum*], 95 F.3d 1079, 20 BLR 2-325 (11th Cir. 1996); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

> cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> > (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)(i), (ii).

[11] For the sake of judicial economy, we address employer's argument regarding Dr. Goldstein's opinion at 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge erred in discounting Dr. Goldstein's opinion. Although the administrative law judge considered Dr. Goldstein's opinion at Section 718.204(c), Decision and Order at 10, a review of the record indicates that Dr. Goldstein did not render an opinion with regard to the issue of total disability due to pneumoconiosis. Director's Exhibit 25; Employer's Exhibit 1. Dr. Goldstein merely noted that "[i]n patients who have significant respiratory impairment secondary to coal workers' pneumoconiosis, the x-ray is distinctly abnormal and usually shows far advanced simple pneumoconiosis or complicated pneumoconiosis." Director's Exhibit 25. Thus, contrary to employer's assertion, Dr. Goldstein's opinion was not relevant at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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