BRB No. 08-0171 BLA

L.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/30/2008
	)	
CANTERBURY COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Administrative Law Judge Daniel L. Leland, United States Department of Labor.

L.C., Salina, Pennsylvania, *pro se*.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order – Denying Benefits (2006-BLA-06163) of Administrative Law Judge Daniel L. Leland

[1] Lynda D. Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested on behalf of claimant that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

rendered on a subsequent claim[2] 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). Claimant filed his subsequent claim on August 29, 2005. The administrative law judge noted that claimant's prior claim had been denied because "the evidence showed that claimant was totally disabled due to asthma rather than pneumoconiosis." Decision and Order at 2. The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thus, found that claimant failed to demonstrate a change in one of the applicable conditions of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the administrative law judge's denial of his claim. Employer responds, urging the Board to affirm the administrative law judge's findings pursuant to Sections 718.202(a) and 725.309. The Director, Office of Workers' Compensation Programs has declined to file a brief unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP* ,9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

If 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.

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[2] Claimant filed four prior claims for benefits on August 2, 1988, August 8, 1990, July 9, 1997, and May 28, 2004, which were denied. Director's Exhibits 1-3. The May 28, 2004 claim was denied by Administrative Law Judge Richard A. Morgan on the ground that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 3. Claimant took no further action on that claim until he filed this subsequent claim on August 29, 2005. Director's Exhibit 5.

[3] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

§725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because claimant's prior claim was denied on the ground that he failed to establish the existence of pneumoconiosis, he is required to establish, based on the newly submitted evidence, that he has pneumoconiosis in order to satisfy the requirements of Section 725.309. If he satisfies his burden of proof under Section 725.309, then claimant is entitled to have all of the evidence of record considered as to his entitlement to benefits. *White*, 23 BLR at 1-3.

There are four methods by which claimant may establish the existence of pneumoconiosis under the regulations: (1) a chest x-ray conducted and classified in accordance with 20 C.F.R. §718.102; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) by application of one of the presumptions described in 20 C.F.R. §§718.304, 718.305 or 718.306; or (4) by a physician's reasoned medical opinion, notwithstanding a negative x-ray, that he has pneumoconiosis. *See* 20 C.F.R. § 718.202(a)(1)-(4). The United States Court of Appeals for the Third Circuit has held that although Section 718.202(a) provides four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997).

Initially, we hold that the administrative law judge properly found that the record contains no biopsy evidence as to the presence or absence of pneumoconiosis and that the presumptions set forth at Sections 718.304, 718.305, and 718.306 are not applicable to this claim.[4] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 12. Thus, we affirm the administrative law judge's finding that claimant was unable to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2), (3).

Pursuant to Section 718.202(a)(1), there are eleven x-ray readings, for the presence or absence of pneumoconiosis, of five x-rays dated October 6, 2005, April 4, 2006, April 11, 2006, May 19, 2006 and May 22, 2007. The October 6, 2005 x-ray was read as positive for pneumoconiosis by Dr. Colella, a dually qualified Board-certified radiologist and B reader,[5] and as negative by Drs. Gohel and Hayes, dually qualified

[4] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e). Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[5] A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R.

Board-certified radiologists and B readers.[6] Director's Exhibits 11, 13, 15; Claimant's Exhibit 2. The April 4, 2006 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B-reader. Claimant's Exhibit 4. The April 11, 2006 x-ray was read as positive for pneumoconiosis by Dr. Colella, and as negative by Dr. Fino, a B reader. Director's Exhibit 16; Claimant's Exhibit 3. The May 19, 2006 x-ray was read as positive by Dr. Cohen, a B reader, and as negative by Dr. Hayes. Claimant's Exhibit 1; Employer's Exhibit 1. Lastly, the May 22, 2007 x-ray was read as positive by Dr. Colella and as negative by Dr. Wiot, a Board-certified radiologist and B reader. Claimant's Exhibit 8; Employer's Exhibit 4.

The administrative law judge set forth his findings with respect to the x-ray evidence in a single sentence, stating:

> The chest x-rays of October 6, 2005[,] May 19, 2006, and May 22, 2007 are negative for pneumoconiosis because of the dually qualified status of the physicians interpreting them and therefore a preponderance of the x-ray evidence does not establish the existence of pneumoconiosis.

Decision and Order at 5. Although the administrative law judge has discretion to credit the most qualified radiologists in resolving the conflict in the x-ray evidence, the administrative law judge has failed to properly explain the basis for his finding that the May 22, 2007 x-ray is negative for pneumoconiosis, as that x-ray has one positive and one negative reading by dually qualified radiologists. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon.*); Claimant's Exhibit 8; Employer's Exhibit 4. Because the administrative law judge has not explained why he credited Dr. Wiot's negative reading over Dr. Colella's positive reading of the May 22, 2007 x-ray, and did not set forth his findings with respect to the films dated April 4, 2006 and April 11, 2006, we must conclude that his analysis fails to comport with 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), which 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

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§718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[6] The October 6, 2005 x-ray was also read for quality purposes only by Dr. Navani. Director's Exhibit 13.

BLR 1-162 (1989). Thus, we are compelled to vacate the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), and remand this case for further consideration.

Furthermore, with respect to Section 718.202(a)(4), the administrative law judge erred in his consideration of the medical opinion evidence as to whether claimant has pneumoconiosis. The record contains five newly submitted medical opinions. Dr. Celko examined claimant on behalf of the Department of Labor on October 10, 2005 and diagnosed chronic obstructive pulmonary disease (COPD) due predominately to coal dust exposure. Director's Exhibit 11. Dr. Fino examined claimant on April 11, 2006 and opined that claimant's pulmonary function studies showed "classic reversibility" consistent with asthma. Director's Exhibit 16. Dr. Fino also opined that claimant had emphysema caused by coal dust exposure, but that his emphysema had not resulted in any respiratory impairment. *Id*. Dr. Cohen examined claimant on October 16, 2006 and diagnosed clinical pneumoconiosis and COPD due thirty-nine years of coal dust exposure. Claimant's Exhibit 1. Dr. Rasmussen prepared a consultative opinion based on his review of the medical evidence and diagnosed COPD due to coal dust exposure. Claimant's Exhibit 5. Lastly, Dr. Pickerill examined claimant on April 4, 2006. Employer's Exhibit 16. Dr. Pickerill opined that claimant suffered from asthma, unrelated to coal dust exposure, noting that clamant had a negative chest x-ray, that claimant stopped working in coal mine employment in 1985, and that there was a fifteen percent improvement in his pulmonary function study results after the use of a bronchodilator. *Id*.

In weighing the conflicting medical opinions at Section 718.202(a)(4), the administrative law judge did not specifically address whether the evidence was sufficient to establish that claimant had clinical pneumoconiosis.[7] Rather, he focused his analysis on whether clamant established the existence of legal pneumoconiosis.[8] The administrative law judge stated:

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[7] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(1).

[8] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or

> The well-reasoned opinions of Drs. Pickerill and Fino show that the miner's reversible pulmonary function studies are suggestive of asthma. The opinions of Drs. Celko, Cohen and Rasmussen ignore the significance of the reversibility and do not provide convincing reasons for finding that the miner's asthma was caused by his coal mine employment. Their opinions are on highly theoretical terms and disregard the reversibility so evident in the pulmonary function studies. The evidence therefore does not show that the miner has developed pneumoconiosis . . .

Decision and Order at 5.

The administrative law judge's cursory explanation for the weight he accorded the conflicting medical opinions fails to satisfy the requirements of the APA. *Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). We are unable to reconcile the administrative law judge's finding that Drs. Celko, Cohen and Rasmussen "ignore the significance of the reversibility" of claimant's pulmonary function studies with the evidence of record. We note that Dr. Rasmussen explicitly addressed the reversibility of claimant's FEV1 value, as he opined that the "partial" reversibility of claimant's airway obstruction "is found in any type of chronic obstructive pulmonary disease" and therefore is not diagnostic of asthma. Claimant's Exhibit 5. Dr. Cohen similarly addressed the reversibility relied upon by Drs. Fino and Pickerill to exclude coal dust exposure as a cause of claimant's respiratory condition. Claimant's Exhibit 1. Dr. Cohen stated that "responsiveness to a bronchodilator may also be present in 23 to 42 [percent] of patients with COPD" unrelated to asthma. *Id*.

Additionally, we note that while the evidence suggests that claimant may have a respiratory condition that is partially responsive to bronchodilator, the administrative law judge has failed to properly consider whether claimant has any fixed respiratory condition due to coal dust exposure, which could meet the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2). *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). The administrative law judge has also failed to explain why he discredited Dr. Cohen's opinion that claimant's significant diffusion impairment is not a feature of asthma. Claimant's Exhibit 1. According to Dr. Cohen, claimant's respiratory condition is due to coal dust exposure based, not only on the obstructive pattern

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respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

demonstrated on pulmonary function testing, but also upon the fact that claimant's "resting pO2 and hemoglobin oxygen saturation are significantly depressed" and in light of his significant diffusion capacity impairment. *Id*. Thus, because the administrative law judge has failed to adequately explain, in accordance with the APA, the basis for his credibility findings, we vacate his determination that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Wojtowicz*, 12 BLR at 1-165; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21. We, therefore, vacate the administrative law judge's denial of benefits.

On remand, the administrative should first weigh the newly submitted x-ray evidence and determine whether it supports a finding of pneumoconiosis under Section 718.202(a)(1). The administrative law judge should then conduct the same inquiry with respect to the medical opinion evidence pursuant to Section 718.202(a)(4).[9] When considering the 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 Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). If the administrative law judge finds that the existence of clinical or legal pneumoconiosis, or both, has been demonstrated under either subsection, he must then determine whether the newly submitted evidence, when

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[9] Employer contends that because Judge Morgan determined in the prior claim that claimant was totally disabled due to asthma and not coal workers' pneumoconiosis, the doctrine of collateral estoppel applies to preclude claimant from re-litigating the cause of his disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). We disagree. The United States Court of Appeals for the Third Circuit has held that while collateral estoppel precludes a miner from collaterally attacking the denial of his prior claim, it does not bar him from filing a new claim based on a change in any of the elements of entitlement. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Furthermore, the preamble to the revised regulations specifically states that "a miner should not be denied benefits if [his] pneumoconiosis causes further deterioration of a totally disabling (non-occupationally) related pulmonary or respiratory impairment." 65 Fed. Reg. 79948 (Dec. 20, 2000). Thus, contrary to employer's assertion, if claimant can prove, based on the newly submitted evidence, that pneumoconiosis has had a "material adverse effect on [his] respiratory or pulmonary condition" or that it has "materially worsen[ed] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment," he can establish disability causation at Section 718.204(c) and a change in one of the elements of entitlement since the denial of his prior claim. 20 C.F.R. §718.204(c)(1)(i)-(ii); 20 C.F.R. §718.309; *see also* 65 Fed. Reg. 80049 (Dec. 20, 2000).

considered as a whole, is sufficient to establish the existence of the disease. *Williams*, 114 F.3d at 23, 21 BLR at 2-108. In addressing these issues, the administrative law judge must weigh all of the relevant evidence of record and set forth his findings, including the underlying rationale, as required by the APA. *See* 5 U.S.C. §557(c)(3)(A); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). *Wojtowicz*, 12 BLR at 1-165.

If, on remand, the administrative law judge concludes that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), clamant will have established a change in an applicable condition of entitlement pursuant to Section 725.309. The administrative law judge must then consider whether the record as a whole supports claimant's entitlement to benefits. The administrative law judge must render specific findings, as necessary, pursuant to 20 C.F.R. §§718.203, 718.204(b), (c). *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge