BRB No. 08-0249 BLA

J.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 10/07/2008
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Douglas A. Smoot and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5267) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) awarding benefits on a

subsequent claim[1] 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). The administrative law judge accepted the parties' stipulation of at least thirty years of coal mine employment,[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 total disability pursuant to 20 C.F.R. §718.204. 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. 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. 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 evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer also challenges the administrative law judge's finding that the new evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). 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. 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.[3]

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

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[1] Claimant filed his first claim on December 13, 1983. It was withdrawn. Claimant filed his second claim on February 27, 2001. It was finally denied on November 28, 2003, because the evidence did not establish total disability at 20 C.F.R. §718.204(b) or total disability due to pneumo at 20 C.F.R. §718.204(c). Claimant filed this claim on February 23, 2006. Director's Exhibit 2.

[2] The record indicates that claimant was employed in the coal mining industry in Pennsylvania. Director's Exhibits 5, 9, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Because the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 total disability at 20 C.F.R. §718.204(b) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order at 14. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Section 718.204(b)(2)(iv)

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Martin, Schaaf, Renn, and Fino. In an April 19, 2006 report and a November 13, 2006 deposition, Dr. Martin opined that claimant has a disabling pulmonary impairment. Director's Exhibit 17; Employer's Exhibit 2. In reports dated April 20, 2006 and May 18, 2006, as well as a December 5, 2006 deposition, Dr. Schaaf opined that claimant could not perform his duties as a coal miner. Director's Exhibit 19; Employer's Exhibit 1. By contrast, in an October 18, 2006 report and a July 16, 2007 deposition, Dr. Renn opined that claimant does not have a disabling respiratory impairment. Employer's Exhibits 3, 10. Similarly, in a June 8, 2007 report and an August 8, 2007 deposition, Dr. Fino opined that from a respiratory standpoint claimant was not disabled from returning to his last mining job or a job requiring similar effort. Employer's Exhibits 9, 11.

The administrative law judge stated, "[w]eighing the physician opinion evidence together, and taking into consideration the credentials of each physician, I find that the better reasoned opinions of Dr. Martin and Dr. Schaaf establish that [c]laimant is totally disabled from a pulmonary standpoint." Decision and Order at 13.

Dr. Schaaf

Employer argues that because Dr. Schaaf's opinion merely advises against further coal dust exposure, it does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). In an April 20, 2006 report, Dr. Schaaf opined that "[claimant's] lung function in the laboratory is not particularly impaired[;] [h]owever, there is no way I can conceive of this man performing his duties as described to me in coal mine employment." Director's Exhibit 19. In a May 18, 2006 report, Dr. Schaaf clarified his prior opinion by stating:

> By that last sentence, I meant to imply [that claimant] has multiple problems leading to his inability to work in a coal mine. They include his chronic industrial bronchitis, his age, his general status, and his extensive symptomatology. He also has chronic respiratory failure, testimony to inability to adequately breathe. A substantial contributing factor to these problems is his coal dust exposure.

Id. During a December 5, 2006 deposition, Dr. Schaaf stated, "I have not been able to identify any pulmonary impairment." Employer's Exhibit 1 (Dr. Schaaf's Deposition at 35). Nonetheless, Dr. Schaaf opined that claimant was unable to perform the duties of his usual coal mine job because of his coughing, spitting, age, and coronary artery disease. Employer's Exhibit 1 (Dr. Schaaf's Deposition at 36). Dr. Schaaf indicated that a return to claimant's prior coal mining activities and exposures could potentially exacerbate his cough and phlegm production. Employer's Exhibit 1 (Dr. Schaaf's Deposition at 41). In considering Dr. Schaaf's opinion at Section 718.204(b)(2)(iv), the administrative law judge noted that "Dr. Schaaf further explained that returning to coal mining would aggravate [c]laimant's cough and could lead to more severe lung problems." Decision and Order at 12. Because Dr. Schaaf found that claimant does not have a pulmonary impairment, *Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991), and because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988), the administrative law judge erred in relying on Dr. Schaaf's opinion to finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv).

Dr. Martin

Employer also argues that substantial evidence does not support the administrative law judge's finding that Dr. Martin's opinion established total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer asserts that Dr. Martin did not offer a reasoned and documented opinion that claimant has a totally disabling pulmonary impairment. 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). In this case, the administrative law judge found that Dr. Martin's disability opinion was better reasoned than the contrary opinions of Drs. Renn and Fino. Decision and Order at 13. However, the administrative law judge did not consider the validity of Dr. Martin's disability opinion in light of the underlying objective tests. An 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. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Although the administrative law judge found that the new pulmonary function study and arterial blood gas study evidence yielded non-qualifying values, he did not specifically consider the validity of Dr. Martin's disability opinion in light of the objective tests. Rather, the administrative law judge focused on the fact that "Dr. Martin opined that [c]laimant could not return to coal mine work based on Dr. Martin's personal observations of [c]laimant's shortness of breath at exam." Decision and Order at 12. The opinions of Drs. Renn and Fino, that claimant was not disabled from a pulmonary impairment, were based, in part, on non-qualifying pulmonary function study and arterial blood gas study evidence. Thus, the administrative law judge did not adequately explain why he found that Dr. Martin's disability opinion was better reasoned. *Wojtowicz*, 12 BLR at 1-165.

In view of the forgoing, we vacate the administrative law judge's finding that the new medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), 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).

Further, on remand, the administrative law judge must weigh together all of the new contrary probative evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Section 718.204(c)

Employer next contends that the administrative law judge erred in finding that the new evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Martin, Renn, and Fino. Dr. Martin opined that claimant's exposure to coal dust caused his pulmonary disability. Director's Exhibit 17; Employer's Exhibit 2 (Dr. Martin's Deposition at 16, 24, 25). By contrast, Dr. Renn opined that claimant does not have a disabling pulmonary impairment that results from his coal workers' pneumoconiosis. Employer's Exhibit 10 (Dr. Renn's Deposition at 25). Dr. Fino did not render an opinion with regard to the issue of total disability due to pneumoconiosis. Employer's Exhibits 9, 11. The administrative law judge stated, "I find Dr. Martin's opinion, which is supported by Dr. Fino's opinion, better reasoned than the contrary opinion of Dr. Renn; consequently, I find that [c]laimant is totally disabled due to shortness of breath caused by pneumoconiosis and coal dust exposure." Decision and Order at 13. As discussed, *supra*, the 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. In this case, the administrative law judge did not adequately explain why he found that Dr. Martin's disability causation opinion was better reasoned than Dr. Renn's contrary disability causation opinion. *Wojtowicz*, 12 BLR at 1-165. In addition, the administrative law judge did not adequately explain why he found that Dr. Martin's disability causation opinion was supported by Dr. Fino's opinion. *Id*. Furthermore, because we vacate the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that the new evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). On remand, the administrative law judge must consider all the new evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c),[4] *Bonessa v. U.S. Steel Corp.*,

[4] 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

884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), and fully explain the rationale for his conclusions, *Wojtowicz*, 12 BLR at 1-165.

Section 725.309

At the outset, on remand, the administrative law judge must determine whether the new evidence establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on either the element of total disability pursuant to 20 C.F.R. §718.204(b) or the element of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *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 consider the evidence on the merits at 20 C.F.R. Part 718.

> impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge