BRB No. 09-0234 BLA

B.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/29/2009
	)	
SURE FIRE COAL INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 – Denial of Benefits on Modification of Subsequent Claim of Administrative Law Judge Larry S. Merck, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

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:

Claimant appeals the Decision and Order - Denial of Benefits on Modification of Subsequent Claim (2007-BLA-5260) of Administrative Law Judge Larry S. Merck with respect to a 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). Claimant filed applications for benefits on September 8, 1994 and April 24, 1997, which were denied by the district director on February 13, 1995 and August 15, 1997, respectively, based upon claimant's failure to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a third application for benefits on June 28, 2002, which was denied by Administrative Law Judge Joseph E. Kane in a Decision and Order issued on June 24, 2005. Director's Exhibit 65. Judge Kane found that claimant established that he has a totally disabling respiratory impairment and, therefore, demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Judge Kane determined, on the merits, however, that claimant did not prove that he has pneumoconiosis or is totally disabled due to pneumoconiosis. *Id*. In an Order dated April 11, 2006, Judge Kane reaffirmed the denial of benefits. Director's Exhibit 68.

Claimant filed a request for modification on June 22, 2006. Director's Exhibit 69. After the district director issued a Proposed Decision and Order denying benefits, the case was transferred to the Office of Administrative Law Judges for a hearing at claimant's request. The case was assigned to Administrative Law Judge Larry S. Merck (the administrative law judge). In the Decision and Order that is the subject of the present appeal, the administrative law judge determined that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(4) and 718.204(c). Employer has responded and urges affirmance of the denial of benefits. Employer also maintains that the administrative law judge erred in finding the existence of pneumoconiosis established under Section 718.202(a)(1) because he erroneously excluded Dr. Wiot's negative reading of the x-ray dated May 23, 2006. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[1]

The Board's scope of review is defined by statute. We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational,

[1] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), but established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and are in accordance with applicable law.[2] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

We will first address employer's allegation of error regarding the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Employer argues that the administrative law judge erred in excluding an x-ray interpretation by Dr. Wiot that employer had designated as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii). The administrative law judge determined that because no readings of the film interpreted by Dr. Wiot, dated April 23, 2006, were designated as affirmative evidence, Dr. Wiot's reading was not admissible. Decision and Order at 9 n.5. As employer maintains, however, the district director stated that, although the date on the film was April 23, 2006, the x-ray was actually performed on May 23, 2006. Director's Exhibit 85 at 8. Thus, Dr. Wiot's negative reading of this film was in rebuttal of Dr. Forehand's positive reading, which claimant submitted as affirmative evidence. 20 C.F.R. §725.414(a)(3)(ii); Claimant's Exhibit 2; Employer's Exhibit 2. Because the administrative law judge determined whether each x-ray was positive or negative prior to weighing the x-ray evidence as a whole, it is possible that if he had considered Dr. Wiot's reading, he would have found the May 23, 2006 film to be in equipoise, rather than to be positive, which would alter the administrative law judge's determination that the record contained three positive films, two negative films, and one film in equipoise. Decision and Order at 11. Thus, the inclusion of Dr. Wiot's interpretation of the May 23, 2006 x-ray could alter the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1). We must vacate, therefore, the administrative law judge's finding and remand the case to the administrative law judge for reconsideration of the x-ray evidence, including Dr. Wiot's reading of the x-ray dated May 23, 2006. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1-3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Alam, Baker, Forehand, Wiot, Dahhan and Fino. Dr. Alam examined claimant on September 16, 2002, at the request of the Department of Labor, in conjunction with claimant's third application for benefits. Director's Exhibit 9. Dr. Alam diagnosed chronic bronchitis and emphysema due to coal dust exposure and smoking. *Id*. Dr. Alam stated that claimant had a forty-percent impairment to which coal dust inhalation and smoking contributed forty-percent. *Id*. In a separate addendum to his report, Dr. Alam opined that claimant is totally disabled due to a mild impairment attributable solely to smoking. *Id*. Dr. Alam subsequently became claimant's treating physician. In a treatment note dated January 20, 2004, Dr. Alam stated that a biopsy of claimant's lung was "positive for black lung." Director's Exhibit 44. Dr. Alam further stated, "[s]ince the biopsy is positive for deposition of anthrasilicotic [material], it is highly suggestive with [claimant's] history of thirteen years of work as a roof bolter, that development of [coal workers' pneumoconiosis] with worsening of his lung function is a reasonable possibility…." *Id*. In a letter dated September 9, 2004, Dr. Alam indicated that claimant is suffering from "chronic pulmonary problems" and hypoxemia, that his chest x-ray was read as positive for coal workers' pneumoconiosis (CWP) and that the lung biopsy showed deposition of dust. *Id*.

Dr. Baker examined claimant on March 22, 2003. Director's Exhibit 11. Based upon a positive x-ray reading and claimant's history of coal mine employment, Dr. Baker diagnosed CWP. *Id*. Dr. Baker also indicated that claimant has chronic obstructive pulmonary disease (COPD), a mild obstructive impairment, hypoxemia, and chronic bronchitis. *Id*. Dr. Baker opined that these conditions were related to coal dust exposure and smoking. *Id*. In his responses to a questionnaire submitted to him by claimant's counsel, Dr. Baker stated that claimant has a moderate impairment that is totally disabling. *Id*.

Dr. Forehand examined claimant on May 23, 2006 and in his report of the examination, he diagnosed CWP, cigarette smoker's lung disease, and a totally disabling respiratory impairment. Director's Exhibit 69. Dr. Forehand further indicated that coal dust exposure played a more significant role in causing claimant's respiratory impairment than cigarette smoking. *Id*.

Dr. Wiot reviewed a CT scan obtained on September 24, 2002. Director's Exhibit 60. He determined that there was no evidence of CWP. *Id*.

Dr. Dahhan examined claimant on February 1, 2003 and August 3, 2006. Director's Exhibits 34, 79. In the report of the 2003 examination, Dr. Dahhan stated that claimant did not have either clinical or legal pneumoconiosis. Director's Exhibit 34. Dr. Dahhan indicated in his report of the 2006 examination that claimant has a mild reversible obstructive impairment that is not totally disabling. Director's Exhibit 79.

Dr. Fino examined claimant on December 4, 2003. Director's Exhibit 36. Dr. Fino diagnosed hypoxemia and a pulmonary impairment, both caused by obesity. *Id*. In a subsequent deposition, Dr. Fino reiterated his conclusions. Director's Exhibit 55. Dr. Fino also submitted a letter in which he stated, based upon his review of additional x-rays, pulmonary function studies, and blood gas tests, that claimant does not have "a coal dust associated occupational lung disease." Director's Exhibit 61.

The administrative law judge considered these medical opinions pursuant to Section 718.202(a)(4) and separately addressed whether they supported a finding of clinical or legal pneumoconiosis.[3] With respect to Dr. Alam's diagnosis of clinical pneumoconiosis, the administrative law judge found that it was entitled to little weight, as "he relied heavily upon the transbronchial biopsy results which noted only the presence of anthracotic pigment." Decision and Order at 25. Similarly, the administrative law judge gave little weight to the diagnoses of clinical pneumoconiosis made by Drs. Forehand and Baker, because they "expressly relied on [c]laimant's positive x-ray and coal dust exposure for their conclusions that [c]laimant ha[s] [CWP]." *Id*. Based upon these findings, the administrative law judge concluded that claimant did not establish the existence of clinical pneumoconiosis at Section 718.202(a)(4).

With respect to the issue of legal pneumoconiosis, the administrative law judge acknowledged that Drs. Alam and Baker made findings consistent with the disease. Decision and Order at 26. The administrative law judge further stated:

> In reviewing the most recently submitted physician evidence from Drs. Forehand and Dahhan, however, there is no diagnosis of legal pneumoconiosis in their assessment of [c]laimant. Therefore, in weighing the evidence, and giving the most weight to the newly submitted evidence, I find that [c]laimant has not proven legal pneumoconiosis by a preponderance of the evidence based on the evidence presented in the current claim under the provisions of [Section] 718.202(a)(4).

[3] Under 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." Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2), as including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Id. The administrative law judge then set forth a "full review" of the issue of pneumoconiosis and stated that, because the evidence in the prior claims was from 1997 and earlier, he gave great weight to the evidence filed with the 2003 claim and the 2006 request for modification. *Id*. at 26-27. The administrative law judge concluded, "claimant has established the existence of pneumoconiosis by a preponderance of the evidence pursuant to [Section] 718.202(a)(1), but not under [Section] 718.202(a)(2)-(4)." *Id*. at 27.

Claimant argues that the administrative law judge erred in finding that Dr. Alam relied solely upon the biopsy results in diagnosing clinical pneumoconiosis. Claimant also contends that the administrative law judge did not accurately characterize the opinions of Drs. Forehand and Baker when he determined that they relied solely upon x-ray readings and claimant's history of coal mine employment to diagnose clinical pneumoconiosis. Claimant's contentions have merit. In addition to the factors identified by the administrative law judge, Drs. Alam, Forehand and Baker referred to their examinations of claimant, his coal mine employment history, his use of cigarettes, and the objective studies that they obtained. Director's Exhibits 9, 11, 44, 69. Moreover, contrary to the administrative law judge's finding, Dr. Alam did not indicate that the presence of anthracotic pigment, standing alone, established that claimant has coal workers' pneumoconiosis. Rather, he stated that, in combination with claimant's history of coal dust exposure and pulmonary function study results, the presence of anthracotic material in the miner's lungs supported a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 44. We must vacate, therefore, the administrative law judge's decision to discredit the diagnoses of clinical pneumoconiosis made by Drs. Alam, Forehand and Baker and remand this case to the administrative law judge for reconsideration of whether these opinions are sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4). *See Cornett v. Benham Coal Co.*, 227 F.2d 569, 22 BLR 2-107 (6th Cir. 2000).

Claimant further argues that the administrative law judge erred in determining that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant contends that the administrative law judge did not accurately characterize Dr. Forehand's opinion and did not adequately explain his decision to accord greatest weight to the most recent evidence. These contentions also have merit.

The administrative law judge determined that Dr. Forehand's opinion did not contain a diagnosis of legal pneumoconiosis. Decision and Order at 26. Contrary to the administrative law judge's finding, however, Dr. Forehand stated that claimant had a totally disabling respiratory impairment, to which coal dust exposure was a significant contributor, a diagnosis that is consistent with the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibit 69. Because the administrative law

judge did not accurately characterize Dr. Forehand's opinion, we vacate his finding that claimant failed to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See Tackett v. Director, OWCP*, 7 BLR at 1-705. Accordingly, the administrative law judge must reconsider whether Dr. Forehand's opinion contains a diagnosis of legal pneumoconiosis.

In addition, we cannot affirm the administrative law judge's decision to give greatest weight to the most recent opinions on the issue of legal pneumoconiosis. The opinions of Drs. Alam and Baker dated from 2004 and 2003 respectively. Director's Exhibits 11, 44. The most recent medical opinions were submitted by Drs. Forehand and Dahhan in 2006. Director's Exhibits 69, 79. Although an administrative law judge may reasonably determine that evidence that is significantly more recent is entitled to additional weight because it is more representative of a miner's current condition, when the period is less significant, the administrative law judge must determine whether the later evidence is consistent with the principle that pneumoconiosis is a latent and progressive disease. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). On remand, therefore, the administrative law judge must perform this analysis prior to using recency as a factor in weighing the medical opinion evidence under Section 718.202(a)(4). If the administrative law judge determines that Dr. Alam's opinion regarding the existence of clinical and/or legal pneumoconiosis is reasoned and documented, he must consider the weight to which it is entitled, based upon Dr. Alam's status as claimant's treating physician under 20 C.F.R. §718.104(d).

Because the administrative law judge's findings under Section 718.202(a)(1), (4) affected his determination that claimant did not establish total disability due to pneumoconiosis, we also vacate the administrative law judge's finding pursuant to Section 718.204(c). On remand, if the administrative law judge determines that claimant has established the existence of pneumoconiosis, the administrative law judge must reconsider the medical opinions relevant to Section 718.204(c), including Dr. Alam's letter dated September 9, 2004, which the administrative law judge omitted from consideration. Decision and Order at 34; Director's Exhibit 44. If the administrative law judge determines that Dr. Alam's opinion regarding total disability causation is reasoned and documented, he must consider the weight to which it is entitled, based upon Dr. Alam's status as claimant's treating physician under Section 718.104(d).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits on Modification of Subsequent Claim is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings 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