BRB No. 99-0668 BLA

LEONARD E. SARGENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BULLION HOLLOW ENTERPRISES, INCORPORATED	)	DATE ISSUED:
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Leonard E. Sargent, Big Stone Gap, Virginia, *pro se.*

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (98-BLA-0251) of Administrative Law Judge Pamela Lakes Wood on 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). The administrative law judge considered the instant claim, a duplicate claim which was filed on May 9, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718.[i] After crediting claimant with thirty-one and one quarter years of coal mine employment, the administrative law judge found that the new evidence associated with the instant duplicate claim was sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge thus found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).[ii] The administrative law judge

also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that there was insufficient evidence to rebut the presumption. The administrative law judge then determined that the evidence of record was sufficient to establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(c), (b). Consequently, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's findings under Sections 725.309, 718.202(a)(4) and 718.204(b). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating he does not presently intend to participate in the proceedings on appeal, but responds to employer's statement in its brief that pneumoconiosis is not a progressive disease. Employer has filed a reply brief in which it disagrees with the Director's position that pneumoconiosis is a progressive disease as a matter of law.

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).

On appeal, employer first challenges the administrative law judge's finding under Section 725.309. Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises,[iii] has held in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.2d 402, 19 BLR 2-223 (4th Cir. 1995), that in addressing whether the material change in conditions requirement of Section 725.309(d) has been satisfied, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See also LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

In considering whether a material change in conditions was established in the instant case, the administrative law judge stated that the previous, 1991 claim was denied because claimant failed to establish the existence of pneumoconiosis *and* total disability. Decision and Order at 8. The administrative law judge found a material change in conditions established because she found the newly submitted evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and total disability at Section 718.204(c)(1)-(4). However, the administrative law judge was mistaken that the element of total disability was previously adjudicated against claimant. In the Decision and Order addressing claimant's prior, 1991 claim, Administrative Law Judge George A. Fath considered the claim on the merits under Part 718, and found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Judge Fath did not reach the issue of total disability, and denied benefits. *Id.*

Claimant appealed. The Board affirmed Judge Fath's finding on the merits that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and, consequently, affirmed Judge Fath's denial of benefits. *Sargent v. Bullion Hollow Enterprises, Inc.*, BRB No. 94-3840 BLA (Sep. 26, 1995)(unpublished).

In a recent decision, the Board held that an element of entitlement which was not specifically addressed in an administrative law judge's denial of a prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." *See Caudill v. Arch of Kentucky, Inc.*, BLR , BRB No. 98-1502 BLA (Sept. 29, 2000)(*en banc*). Therefore, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions under Section 725.309 in accordance with *Ross*. *Id*. Consequently, we vacate the administrative law judge's finding that the newly submitted evidence establishing total disability under Section 718.204(c) was sufficient to establish a material change in conditions under Section 725.309.

Furthermore, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). The Board has held that a determination that the miner's physical condition has worsened is a requisite part of the duplicate claims analysis under *Ross*. *See Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997). Employer correctly argues that the administrative law judge in the instant case failed to apply this standard in finding the new evidence sufficient to establish the existence of pneumoconiosis. *See* Decision and Order at 8-11. Employer correctly states that the record contains evidence directly addressing this issue, namely, the opinions of Drs. Dahhan and Castle.[iv] In addition, there is merit to employer's contention, for the reasons discussed *infra*, that the administrative law judge improperly weighed the opinions on the merits under Section 718.202(a)(4), which tainted the administrative law judge's credibility determinations with regard to the new evidence. Consequently, we vacate the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309. On remand, the administrative law judge must apply the standard set forth in *Flynn* when considering whether the new evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).[v] *See Flynn, supra*.

Inasmuch as we have vacated the administrative law judge's finding that claimant established a material change in conditions, we vacate the administrative law judge's findings on the merits. In order to avoid repetition of error on remand, we herein address employer's arguments with regard to the administrative law judge's credibility determinations under Sections 718.202(a)(4) and 718.204(b). We agree with employer that the administrative law judge failed to properly weigh the medical opinion evidence under Section 718.202(a)(4), both on the merits and when considering the new evidence pursuant to Section 725.309, and improperly weighed the evidence when considering the evidence of record at Section 718.204(b). The medical opinion evidence of record consists of the opinions of three physicians: Drs. Paranthaman, Dahhan and Castle. Director's Exhibits

10, 25, 32; Employer's Exhibits 1, 3, 5. All three doctors submitted opinions in the prior, 1991 claim, as well as in the instant claim. *Id*. Dr. Paranthaman, who examined claimant on June 10, 1997 and October 8, 1991, opined that claimant has chronic obstructive pulmonary disease attributable to the combined effects of cigarette smoking for twenty-five pack years and coal dust exposure for thirty-five years. Director's Exhibits 10, 32. In contrast, Drs. Dahhan and Castle opined that claimant does not have pneumoconiosis, but rather suffers from chronic obstructive lung disease entirely attributable to cigarette smoking. Director's Exhibits 25, 32; Employer's Exhibits 1, 3, 5. Additionally, while Drs. Dahhan and Castle are in agreement with Dr. Paranthaman that claimant has a totally disabling pulmonary impairment, Drs. Dahhan and Castle indicate that the total disability is due to cigarette smoking and is not attributable in any way to coal dust exposure. *Id*.

In challenging the administrative law judge's weighing of these opinions on the merits under Sections 718.202(a)(4) and 718.204(b), employer argues that the administrative law judge erred in crediting Dr. Paranthaman's opinion over those of Drs. Dahhan and Castle on the basis that Dr. Paranthaman gave significant weight to the miner's coal dust exposure while Drs. Dahhan and Castle did not. Decision and Order at 13-15. Employer's contention has merit. In crediting Dr. Paranthaman's opinion on this basis under Sections 718.202(a)(4) and 718.204(b), the administrative law judge improperly substituted her own opinion for the experts' opinions as to which of two relevant factors, namely, coal dust exposure or cigarette smoke exposure, is more significant in diagnosing pneumoconiosis. *Id*. Such an assessment is a medical conclusion to be drawn by medical experts, not the administrative law judge.[vi] *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Furthermore, employer is correct that the administrative law judge failed to explain adequately why she found Dr. Paranthaman's opinion well reasoned and well documented. Whether a medical opinion is reasoned and documented is for the administrative law judge to decide, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), but the administrative law judge must provide an adequate explanation for her decision. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987). We agree with employer that the administrative law judge erred in the instant case by simply crediting Dr. Paranthaman's opinion as well reasoned and well documented under Sections 718.202(a)(4) and 718.204(b), without considering factors bearing on the relative merits of the opinions of Dr. Paranthaman and the conflicting opinions of Drs. Dahhan and Castle, in contravention of the Administrative Procedure Act (APA), 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 decisions of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We, therefore, vacate the administrative law judge's credibility findings under Sections 718.202(a)(4) and 718.204(b).[vii]

On remand, the administrative law judge must consider the opinions of Drs.

Paranthaman, Dahhan and Castle, providing adequate reasons which comport with the APA for resolving the conflict posed by this evidence. *See Hicks, supra; Akers, supra*. If on remand the administrative law judge finds the new evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), she must reconsider the evidence on the merits thereunder. If the administrative law judge finds the new evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), claimant has failed to establish a material change in conditions under Section 725.309 as a matter of law, obviating the need for the administrative law judge to proceed further. *See Caudill, supra*. If on remand, the administrative law judge reaches the merits of the claim, and reaches the issue of disability causation at Section 718.204(b), she must specifically consider whether Dr. Paranthaman's opinion establishes that claimant's coal dust exposure was a "necessary cause" of his total disability.[viii] *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

i.Claimant filed an initial claim for benefits on June 15, 1973, which the district director finally denied on January 7, 1980 for claimant's failure to establish the existence of pneumoconiosis and the presence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 32. Claimant took no further action until filing a second, duplicate claim on September 12, 1991. *Id*.

The district director denied the 1991 duplicate claim, finding that none of the requisite elements of entitlement under 20 C.F.R. Part 718 was established. *Id*. In a Decision and Order dated January 30, 1994, Administrative Law Judge George A. Fath credited claimant with thirty-one and one quarter years of coal mine employment, and found that in light of newly submitted positive x-ray evidence and qualifying pulmonary function studies, claimant established a material change in conditions under 20 C.F.R. §725.309. *Id*. Judge Fath then considered the 1991 claim on the merits under Part 718. Judge Fath considered all of the relevant evidence of record and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Fath denied benefits. *Id.* Claimant appealed without the assistance of counsel. In a Decision and Order dated September 26, 1995, the Board affirmed Judge Fath's finding on the merits that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) and, consequently, affirmed Judge Fath's denial of benefits. *Sargent v. Bullion Hollow Enterprises, Inc.*, BRB No. 94-3840 BLA (Sept. 26, 1995)(unpublished). Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on May 9, 1997. Director's Exhibit 1.

ii.The administrative law judge also found that the new evidence, as well as the entire record of evidence, was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a) (2), and that claimant could not establish the existence of the disease in this case pursuant to 20 C.F.R. §718.202(a)(3), since none of the presumptions enumerated thereunder applied. Decision and Order at 6-7, 9; *see* 20 C.F.R. §§718.304, 718.305, 718.306. These findings are affirmed as unchallenged on appeal, as is the administrative law judge's

finding that claimant established thirty-one and one quarter years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

iii.This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

iv.Drs. Dahhan and Castle submitted opinions in both the prior, 1991 claim and in the instant claim, indicating that claimant's respiratory condition did not worsen because, both before and after the instant claim was filed, his respiratory condition was due entirely to his approximately fifty year habit of cigarette smoking, with coal dust exposure having no effect whatsoever. Director's Exhibits 25, 32; Employer's Exhibits 1, 3. Drs. Dahhan and Castle thus indicated that claimant's condition did not worsen because he did not have pneumoconiosis or a disease related to coal dust exposure before, and did not develop such a condition later. *Id*.

v.In arguing that claimant's condition did not worsen, employer points to the fact that claimant had no further exposure to coal dust after 1991, and that Drs. Dahhan and Castle testified at their depositions that, if a miner does not have pneumoconiosis when he leaves coal mining, he will not develop the disease absent further coal dust exposure. Employer asserts that these opinions are supported by an overwhelming amount of scientific data indicating that pneumoconiosis does not progress from no disease to some disease without continued exposure. We note that the Director, Office of Workers' Compensation Programs (the Director), has indicated in his letter in response to employer's brief that he takes issue with this position. The Director is correct that courts have long recognized the progressive nature of pneumoconiosis. *See e.g., Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

vi.Furthermore, it has been recognized that coal dust exposure alone does not constitute evidence of pneumoconiosis, but merely provides a reason to expect that evidence of the disease might be found. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

vii.We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence of record establishes total disability on the merits pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 14.

viii.Dr. Paranthaman opined that claimant's totally disabling impairment is attributable to his chronic obstructive pulmonary disease, which in turn is due in part to cigarette smoking as well as coal dust exposure. Director's Exhibits 10, 32.