BRB No. 02-0797 BLA

DONALD J. BLACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 09/05/2003
	)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2001-BLA-971) of Administrative Law Judge Michael P. Lesniak 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). The relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on June 19, 1997. Director's Exhibit 31. The district director issued an initial finding dated September 9, 1997, in which it was determined that claimant had failed to establish both the existence of pneumoconiosis and that he was suffering from a totally disabling respiratory or pulmonary impairment. Claimant took no further action until filing a second application

for benefits on February 7, 2000. Director's Exhibit 1.

In the Decision and Order that is the subject of this appeal, the administrative law judge accepted the parties' stipulation to twenty-five years of coal mine employment and noted that the initial issue before him was whether claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) since the denial of his first claim.[1] The administrative law judge determined that the newly submitted evidence of record supported a finding that claimant has endobronchial silicosis caused by dust exposure in coal mine employment. The administrative law judge further found that because this condition falls within the definition of pneumoconiosis set forth in 20 C.F.R. §718.201, claimant has established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2) and (a)(4). The administrative law judge determined, therefore, that claimant demonstrated a material change in conditions and considered the second application for benefits on the merits.

The administrative law judge found that the evidence of record was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge's findings under Sections 718.202(a)(2), (a)(4), 718.204(b) and (c) must be vacated, as the administrative law judge did not properly weigh the relevant evidence of record and did not provide an adequate explanation of his findings. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to the regulation pertaining to duplicate claims, set forth in 20 C.F.R. §725.309, do not apply to claims filed before January 19, 2001. 20 C.F.R. §725.2. In addition, the amended quality standards apply only to medical evidence developed by the parties after January 19, 2001. 20 C.F.R. §§718.101(b), 718.102-107.

[2] The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(3) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed, as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rational, and is 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).

The administrative law judge found, based upon the newly submitted biopsy and medical opinion evidence, that claimant is suffering from endobronchial silicosis caused by dust exposure in coal mine employment – a condition that meets the definition of legal pneumoconiosis set forth in Section 718.201. Decision and Order at 24; Director's Exhibits 25, 28; Claimant's Exhibits 2, 5, 12. Employer argues initially that the administrative law judge erred in finding legal pneumoconiosis established pursuant to Section 718.202(a)(2), as the biopsy obtained by Dr. Kaplan on July 15, 1999, involved bronchial tissue, rather than lung tissue, as is required by 20 C.F.R. §718.106(a) (2000).[3] Director's Exhibit 28. The administrative law judge considered the biopsy evidence under Section 718.202(a)(2) without making a finding as to whether this evidence comported with the relevant quality standards. Accordingly, we vacate the administrative law judge's determination that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(2) and remand the case to the administrative law judge for consideration of whether the biopsy evidence in this case meets the quality standards set forth in Section 718.106(a) (2000) or, alternatively, whether the evidence is appropriately considered under the terms of 20 C.F.R. §718.107 (2000).[4]

Employer also argues that the administrative law judge erred in failing to properly apply the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), when considering whether claimant established the existence of pneumoconiosis by a

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[3] 20 C.F.R. §718.106 (2000) contains the quality standards applicable to reports of an autopsy or a biopsy. Under its terms, such reports must include "a detailed gross macroscopic and microscopic description of *the lungs*." 20 C.F.R. §718.106(a) (2000) (emphasis supplied). The regulation also describes the type of documents that must be produced when "a surgical procedure has been performed to obtain a portion of *the lung*." *Id*. (emphasis supplied).

[4] 20 C.F.R. §718.107 (2000) provides that:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis, or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107(a) (2000).

preponderance of the evidence.[5] The court's decision in *Williams* requires an administrative law judge to weigh all relevant evidence together to determine whether a claimant has established the existence of pneumoconiosis under Section 718.202(a). In the present case, the administrative law judge rationally determined that the x-ray evidence pertains to the diagnosis of clinical pneumoconiosis and, therefore, does not conflict with the evidence indicating that claimant has legal pneumoconiosis in the form of endobronchial silicosis. Decision and Order at 25; 20 C.F.R. §§718.201, 718.202(a); *Williams*, 114 F.3d 22, 21 BLR 2-104.

Employer is correct, however, in maintaining that the administrative law judge did not fully consider all of the medical opinion evidence relevant to whether claimant has endobronchial silicosis caused by dust exposure in coal mine employment. The administrative law judge thoroughly and accurately summarized the medical opinion evidence at the outset of his Decision and Order and included excerpts highlighting the disagreement among the physicians of record as to whether pneumoconiosis is present in any form. Nevertheless, when the administrative law judge rendered his findings on the issue of legal pneumoconiosis, he did not resolve several of the conflicts in the evidence. Decision and Order at 8-12, 13-22, 24.

As employer argues, the administrative law judge did not properly address the medical opinions of Drs. Naeye, Branscomb, and Spagnolo. The administrative law judge discredited Dr. Naeye's opinion because the doctor limited his inquiry to whether claimant suffered from clinical pneumoconiosis. Decision and Order at 24; Director's Exhibit 25. In the text of his report, however, Dr. Naeye stated that he did not see any evidence of the free silica or associated fibrosis typically seen in a coal dust induced condition in the biopsy taken from claimant's bronchial tube – a statement that is probative of the existence of endobronchial silicosis. Director's Exhibit 25.

Dr. Branscomb opined, based upon a review of the medical reports of record, that regardless of whether silica was present in the bronchial tissue, claimant does not suffer from a coal dust induced condition due to the absence of "any fibrotic lesions with characteristics justifying a diagnosis of silicosis or coal workers' pneumoconiosis, endobronchial or otherwise." Employer's Exhibit 5. Dr. Spagnolo stated "I do not believe a definitive diagnosis of an endobronchial 'silicotic nodule' is justified in this case based upon the description of the airway by Dr. Kaplan during bronchoscopy and the microscopic findings by the pathologists." Employer's Exhibit 3. The administrative law judge noted that Drs. Branscomb and Spagnolo ruled out the presence of

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

endobronchial silicosis but concluded that "a weighing of all the evidence indicates that the claimant does have endobronchial silicosis." Decision and Order at 24.

As employer maintains, absent an explicit rationale for this determination, it cannot be ascertained whether the administrative law judge has properly resolved the conflicts in the evidence pertaining to the existence of legal pneumoconiosis.[6] Moreover, the administrative law judge's reliance upon Dr. Kaplan's status as a treating physician does not provide an alternative ground upon which to affirm the administrative law judge's findings under Section 718.202(a). Without having rendered complete findings with respect to the other relevant medical reports of record, the administrative law judge's determination that Dr. Kaplan's opinion is more persuasive than the other medical opinions of record cannot be affirmed. Because the administrative law judge did not fully address the opinions of Drs. Naeye, Branscomb, and Spagnolo and did not provide the rationale underlying his ultimate determination with respect to the weight of the evidence, we must vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) and, therefore, a material change in conditions under Section 725.309(d) (2000). On remand, the administrative law judge must reconsider the relevant medical evidence and set forth his findings, including the underlying rationale, in detail as is required by the Administrative Procedure Act, 5 U.S.C.§557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Turning to the issue of total disability, employer argues that the administrative law judge did not properly weigh the medical opinions of record pursuant to Section 718.204(b)(2)(iv). Employer contends specifically that the administrative law judge did not provide an adequate explanation for his decision to credit the opinions of Drs. Kaplan, Schaaf, Perper, and Rizkalla over the opinions in which Drs. Fino, Spagnolo, Branscomb, Naeye, and Bush stated that claimant is not suffering from a totally disabling respiratory or pulmonary impairment. Employer also asserts that the administrative law judge did not address the flaws in the opinion in which Dr. Schaaf indicated that claimant is totally disabled. Finally, employer argues that the administrative law judge did not consider all aspects of Dr. Kaplan's opinion when relying upon it to find total disability established under Section 718.204(b)(2).

[6] Contrary to employer's argument, however, the administrative law judge acted within his discretion in according little weight to Dr. Bush's opinion on the ground that Dr. Bush focused upon whether the biopsy material supported a diagnosis of clinical pneumoconiosis. Decision and Order at 24; Director's Exhibit 28;

These contentions have merit. In determining that claimant proved that he is suffering from a totally disabling pulmonary impairment, the administrative law judge found that the medical opinions of Drs. Kaplan, Schaaf, Perper, and Rizkalla contained reasoned and documented diagnoses of total pulmonary disability, as these physicians acknowledged that the objective testing showing only a mild obstructive impairment and supported their opinions with references to claimant's symptoms, his use of bronchodilators, his recurrent pulmonary infections, and his complaints of shortness of breath. Decision and Order at 26; Director's Exhibits 24, 25, 28; Claimant's Exhibit 4, 8, 12, 16; Employer's Exhibit 12B. The administrative law judge stated that he did not find the contrary opinions of Drs. Fino, Spagnolo, Branscomb, Naeye, and Bush, "persuasive given the factors stated above." Decision and Order at 26; Director's Exhibit 25; Employer's Exhibits 3, 5, 7, 12, 17. As employer contends, the administrative law judge did not explain why the factors, upon which the physicians who diagnosed a totally disabling impairment relied, provided a basis for discrediting the opinions of the other physicians of record when these physicians analyzed the same factors, but came to a different conclusion. Accordingly, we must vacate the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(b)(2). *See Tackett*, 12 BLR 1-11; *Wojtowicz*, 12 BLR 1-162; *Justice*, 11 BLR 1-91.

On remand, the administrative law judge must reconsider all of the relevant medical opinions of record and set forth his findings with respect to each opinion, including the underlying rationales. In so doing, the administrative law judge must determine whether each physician's opinion is reasoned and is adequately supported by the documentation to which the physician refers. *Lango v. Director, OWCP*, 104 F.3d 73, 21 BLR 2-12 (3d Cir. 1997). Specifically, with respect to Dr. Kaplan's opinion, the administrative law judge must address the significance of the physician's conflicting statements regarding the presence of a totally disabling respiratory or pulmonary impairment.[7] *Justice*, 11 BLR 1-91; *see also Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

Employer also argues that the administrative law judge erred in finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to Section

[7] Dr. Kaplan indicated that claimant should not return to work in a dusty environment and that claimant could not perform his usual coal mine employment as a result of a "[c]ombination of aging and impairment." Employer's Exhibit 1 at 20-21. On its face, it is unclear whether Dr. Kaplan's opinion actually includes a determination that claimant has been rendered unable to perform his coal mine employment due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(a), (b). *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988).

718.204(c). Because we have vacated the administrative law judge's findings under Sections 718.202(a) and 718.204(b)(2), upon which the administrative law judge relied in assessing the evidence relevant to the cause of claimant's total disability, we must also vacate the administrative law judge's findings pursuant to Section 718.204(c). Decision and Order at 26-27. On remand, if this issue is reached, the administrative law judge must reconsider whether the evidence of record is sufficient to establish total disability due to pneumoconiosis in light of his weighing of the medical evidence on remand, setting forth his conclusions and the rationale underlying his findings. *See Tackett*, 12 BLR 1-11; *Wojtowicz*, 12 BLR 1-162; *Justice*, 11 BLR 1-91.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge 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