BRB No. 02-0188 BLA

CECIL PARSONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	DATE ISSUED: 09/30/2004
and	)	
	)	
ZEIGLER COAL	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest	)	ON RECONSIDERATION

Appeal of the Decision and Order - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Thomas A. Moak (Stumbo, Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), for the Association of Bituminous Contractors, Inc., Washington, D.C., as *amicus curiae*, in support

of employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration and Suggestion for Reconsideration *En Banc* pursuant to 20 C.F.R. §803.407, requesting the Board to reconsider its Decision and Order of December 13, 2002, in the above-captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] In our earlier decision, the majority upheld the administrative law judge's determination that the law of the United States Court of Appeals for the Fourth Circuit was applicable, and affirmed his findings that the weight of the new evidence submitted in support of this duplicate claim established the existence of pneumoconiosis and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[2] The majority also affirmed the administrative law judge's finding that the weight of the evidence of record, old and new, established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge's award of benefits was affirmed. One member of the Board concurred in the holding that the law of the Fourth Circuit was applicable, but dissented from the majority's affirmance of the administrative law judge's findings on the merits, noting that while the administrative law judge provided at least one valid reason for each of his credibility determinations, he also provided invalid reasons for crediting or discounting the conflicting medical opinions. The dissent concluded that the administrative law judge's errors could not be considered harmless, as they may have affected his overall weighing of the evidence. *Parsons v. Wolf Creek Collieries*, BRB No. 02-0188 BLA (Dec. 13, 2002)(Dolder, J., concurring and dissenting)(unpub.).

On reconsideration, employer contends that the Board erred in affirming the award of

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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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2.

benefits, arguing that the administrative law judge's weighing of the evidence does not comply with intervening or other controlling authority. Employer also argues that, pursuant to the dissent, a remand is compelled because there is no way to know how much of a role the invalid reasons which the administrative law judge provided for his credibility determinations played in the final outcome. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's argument that the administrative law judge's findings impermissibly presumed that pneumoconiosis was latent and progressive. Claimant did not file a separate response, but adopted and supported the Director's position. The Board, by Order dated March 8, 2004, scheduled oral argument in this case, and employer and the Director subsequently filed briefs in support of their positions.[3] Oral argument was held in Charleston, West Virginia on April 13, 2004.

After consideration of the arguments made by the parties on reconsideration, we grant employer's Motion for Reconsideration *en banc*. Initially, we reject employer's contention that the administrative law judge's reliance on more recent medical evidence to find legal pneumoconiosis and disability causation established at Sections 718.202(a)(4) and 718.204(c), respectively, creates, in effect, a one-size-fits-all irrebuttable presumption of latency and progressivity which does not comply with controlling authority. Employer maintains that the amended provisions at 20 C.F.R. §718.201(c), recognizing pneumoconiosis as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure, were upheld by the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002)(*NMA*), with the narrowing construction that the disease *can* be latent and progressive, but is not in the majority of cases. Employer concedes that complicated pneumoconiosis and silicosis are latent and progressive diseases, but asserts that the rulemaking record is devoid of proof that legal pneumoconiosis possesses these characteristics in the absence of further coal dust exposure. Employer thus argues that claimant must prove by a preponderance of the evidence that he suffers from one of the rare forms of the disease that could, and in fact, did, progress. Contrary to employer's arguments, however, while the amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a

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[3]The issue identified for oral argument was whether, in light of the amended provisions at 20 C.F.R. §718.201(c) and the scientific proof contained in the rulemaking record, it was proper for the administrative law judge to rely on the progressive and latent nature of pneumoconiosis to credit the more recent medical evidence and thus find the existence of pneumoconiosis. Administrative Appeals Judge Judith S. Boggs did not participate in this decision.

preponderance of the evidence and without the benefit of any presumption of latency or progressivity, the regulations and the *NMA* decision do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. 20 C.F.R. §§718.201, 718.202, 718.203; *NMA*, 292 F.3d 849; *see Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). As we explained in *Workman v. Eastern Associated Coal Corp.*, BRB No. 02-0727 BLA (Aug. 19, 2004)(Motion for Recon.)(*en banc*)(published), because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature. Additionally, the *NMA* court upheld the validity of Section 718.201 as amended, finding that it was supported by its underlying medical and scientific literature, *NMA*, 292 F.3d at 863, 869; *see also Shores*, 358 F.3d at 490, 23 BLR at 2-26; and employer in the present case has not produced the type and quality of medical evidence that would invalidate the regulation. Consequently, where the administrative law judge engages in a proper evidentiary analysis, he may, in his discretion, rely on the more recent medical evidence. *Cf. Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Turning to the merits of this claim, employer maintains that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Zaldivar and Tuteur, and for according enhanced weight to the opinions of Drs. Kim and Lafferty, which may have tainted his overall weighing of the evidence. Employer thus contends that a remand is compelled for the administrative law judge to correct his errors and reassess the conflicting medical opinions of record. Employer's arguments have merit.

Contrary to Fourth Circuit precedent, the administrative law judge assigned little weight to the opinion of Dr. Tuteur based, in part, on his status as a non-examining physician, while mechanically according enhanced weight to the opinion of Dr. Lafferty based on his status as claimant's treating physician.[4] *See Consolidation Coal Co. v. Held*,

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[4]While a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians. Moreover, treating physician status is irrelevant when considering the relative credentials of the various physicians. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002)(Gregory, CJ., dissenting). In the present case, although the administrative law judge determined that Dr. Lafferty's opinion was well-documented and well-reasoned, and

314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002)(Gregory, CJ., dissenting). Employer also correctly notes that Dr. Kim's credentials are not contained in the record, yet the administrative law judge gave great weight to Dr. Kim's opinion based, in part, on the physician's "excellent qualifications," Decision and Order at 25, without following proper procedures for taking judicial notice of such qualifications. Further, the administrative law judge erroneously discounted Dr. Zaldivar's opinion, in part, because he found the physician's deposition testimony to be both hostile to the Act, when it was not, and inconsistent with an earlier report, when Dr. Zaldivar could reasonably change his initial diagnoses of simple and complicated pneumoconiosis to a diagnosis of sarcoidosis after reviewing additional evidence and the physician fully explained his reasons for so doing.[5] Decision and Order at 19-20, 25-26; Employer's Exhibits 1, 9. In view of the foregoing, we vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4), 718.204(c) and 725.309 (2000), and remand this case to the administrative law judge for a reevaluation and weighing of all relevant evidence, consistent with *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).

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indicated that in his capacity as treating physician, Dr. Lafferty was in a better position to understand the nature of claimant's medical condition, Decision and Order at 25, 27, 28, it appears that the administrative law judge also automatically accorded less weight to the opinions of non-examining physicians, *see* Decision and Order at 26, and more weight to those physicians who examined claimant more than once, *see* Decision and Order at 25, 30, 35.

[5]The administrative law judge accurately summarized Dr. Zaldivar's deposition testimony that, after reviewing the entire medical file, it was now the physician's opinion that claimant suffered from sarcoidosis rather than pneumoconiosis. Dr. Zaldivar reasoned that because claimant had only two more years of coal dust exposure after 1988, when x-rays showed very little dust deposition, this was not enough additional exposure to cause the large masses seen on x-rays taken in 1999 and 2000. Decision and Order at 19-20; Employer's Exhibit 9. The administrative law judge concluded that Dr. Zaldivar's explanation was tantamount to saying that pneumoconiosis is not a latent and progressive disease, and, thus, the opinion was hostile to the Act. Decision and Order at 26. Dr. Zaldivar, however, did not opine that pneumoconiosis is never latent and progressive. 20 C.F.R. §718.201(c); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

Accordingly, the relief requested by employer on reconsideration is denied in part and granted in part. 20 C.F.R. §§801.301(c), 802.409. The Board's original Decision and Order is reaffirmed in part and modified in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

While I concur in the majority's decision to reject employer's arguments regarding the latency and progressivity of legal pneumoconiosis and claimant's burden of proof, I respectfully dissent from the majority's decision to remand this case for a reassessment and weighing of the evidence on the merits. For the reasons previously set forth in the majority decision on appeal, I would continue to affirm the administrative law judge's findings on the merits and his award of benefits.

REGINA C. McGRANERY
Administrative Appeals Judge