BRB No. 06-0164 BLA

RUSSELL F. GILLIAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH COAL COMPANY	)	
	)	DATE ISSUED: 09/22/2006
Employer-Respondent	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ralph D. Carter (Barret, Haynes, May, Carter & Davidson, P.S.C.), Hazard, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (04-BLA-5725) of Administrative Law Judge Daniel J. Roketenetz rendered on a subsequent 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).[1] The administrative law judge

[1] Claimant's first claim for benefits, filed on January 27, 1998, was denied on May 27, 1998 because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed his current claim for benefits on September 25, 2002. Director's Exhibit 3.

credited claimant with seventeen years of coal mine employment[2] and found that the evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore concluded that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). However, the administrative law judge found that claimant did not establish the existence of pneumoconiosis or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Dr. Baker diagnosed claimant with chronic obstructive pulmonary disease (COPD), hypoxemia, and chronic bronchitis, all due to smoking and coal mine dust exposure. Director's Exhibit 10 at 4; Claimant's Exhibit 1 at 4-8, 11. Claimant's treating physicians, Drs. McCormick and Sandlin, diagnosed claimant with COPD due to smoking and coal dust exposure. Director's Exhibit 12. By contrast, Dr.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 4. 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*).

Jarboe opined that claimant does not have pneumoconiosis but has emphysema due solely to smoking.[3] Employer's Exhibit 1.

The administrative law judge granted "no weight" to Dr. Jarboe's opinion because he found that Dr. Jarboe relied on evidence that was not submitted into the record. Decision and Order at 11. The administrative law judge accorded "less weight" to Dr. Baker's opinion because he found it inconsistent as to both the existence of pneumoconiosis and the length of claimant's smoking history. Decision and Order at 12. Additionally, the administrative law judge found the reports of Drs. McCormick and Sandlin unreasoned and undocumented. The administrative law judge therefore found that claimant did not establish the existence of pneumoconiosis by a preponderance of the medical opinion evidence.

Claimant contends that the administrative law judge erred in finding that Dr. Baker's opinion was inconsistent as to the existence of pneumoconiosis, when Dr. Baker diagnosed legal pneumoconiosis in both his report and his deposition testimony. Claimant's Brief at 3. Claimant's contention has merit. In his report, Dr. Baker read claimant's x-ray as negative for pneumoconiosis, but, as noted, diagnosed COPD, hypoxemia, and chronic bronchitis, due to smoking and coal dust exposure. Director's Exhibit 10 at 3, 4. On an attached questionnaire, Dr. Baker checked "No" in response to whether claimant has an occupational lung disease caused by his coal mine employment. Director's Exhibit 10 at 5. On the same page, Dr. Baker also indicated that claimant is totally disabled by a severe impairment due to both smoking and coal dust exposure. Director's Exhibit 10 at 5. Dr. Baker was later deposed and explained that by checking "No," he meant that claimant does not have clinical pneumoconiosis on his x-ray. Claimant's Exhibit 1 at 3, 12-13. Dr. Baker reiterated that claimant has COPD, hypoxemia, and chronic bronchitis, each with a dual etiology of smoking and coal dust exposure. Claimant's Exhibit 1 at 4-8, 11. Consequently, substantial evidence does not support the administrative law judge's finding that Dr. Baker was inconsistent as to the existence of pneumoconiosis. *See* 33 U.S.C. §921(b)(3).

Claimant argues further that the administrative law judge did not adequately explain his finding that Dr. Baker gave inconsistent smoking histories. Claimant's Brief at 3. We agree. Dr. Baker recorded a twenty-year history of smoking one pack per day. Director's Exhibit 10 at 2. At his deposition, Dr. Baker initially stated that claimant had a "ten pack year history of smoking" and sixteen years of coal dust exposure. Claimant's Exhibit 4 at 4. Later, when explaining his diagnosis of legal pneumoconiosis, Dr. Baker

[3] The record reflects that Drs. Jarboe, McCormick, and Baker are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 14; Claimant's Exhibit 1; Employer's Exhibit 1.

stated that with sixteen years of coal dust exposure and "twenty years of cigarette smoking," claimant has equivalent exposures to both. Claimant's Exhibit 4 at 11. Focusing only on Dr. Baker's testimony, the administrative law judge discounted Dr. Baker's opinion "due to the inconsistencies in Dr. Baker's . . . reported smoking histories . . . ." Decision and Order at 12. The administrative law judge did not consider that Dr. Baker recorded twenty years of smoking in his report. *See Hess v. Clinchfield Coal Co*., 7 BLR 1-295, 1-297 (1984); Director's Exhibit 10 at 2; Claimant's Exhibit 4 at 11. As discussed above, substantial evidence does not support the finding that Dr. Baker's opinion was inconsistent on the existence of pneumoconiosis, therefore we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for him to reconsider Dr. Baker's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

On remand, the administrative law judge should also reconsider the opinions of Drs. McCormick and Sandlin. The administrative law judge found these opinions unreasoned and undocumented in part because the objective studies in the doctors' treatment records were non-qualifying and non-conforming.[4] As claimant argues, however, the April 18, 2000 pulmonary function study contained in the treatment records associated with these reports was qualifying. Director's Exhibit 12. Moreover, the presence of a totally disabling respiratory impairment is not at issue in this case. The issue in dispute is the etiology of claimant's impairment. *See* 20 C.F.R. §718.201(a)(2). Therefore, on remand the administrative law judge should reconsider the credibility of the diagnoses of pneumoconiosis rendered by Drs. McCormick and Sandlin. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Pursuant to 20 C.F.R. §718.204(c), claimant contends that the administrative law judge erred in his analysis of the medical opinions when he found that claimant did not establish that his total disability is due to pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was not established, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and instruct him to reconsider this issue, if reached.

Additionally, employer contends that the administrative law judge erred in according no weight to Dr. Jarboe's testimony that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis. Because employer argues in support of the denial of benefits, we will address its contention. *See King v. Tennessee Consolidated Coal Co*., 6 BLR 1-87, 1-91 (1983). The record indicates that

[4] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

employer did not submit a written report from Dr. Jarboe, but deposed Dr. Jarboe and submitted the deposition as its sole "affirmative case" medical report pursuant to 20 C.F.R. §725.414(a)(3)(i).[5] The administrative law judge gave Dr. Jarboe's testimony "no weight" because Dr. Jarboe's report was not of record. Decision and Order at 11. Employer concedes that it did not submit a written report from Dr. Jarboe, but argues that the administrative law judge should have considered Dr. Jarboe's testimony to the extent that it was based on admitted evidence. Employer's Brief at 22. Review of Dr. Jarboe's deposition reflects that he discussed the evidence upon which he based his opinion, and much of what Dr. Jarboe mentioned appears to be evidence that was admitted into the record. Employer's Exhibit 1 at 7-8, 10-15. Therefore, on remand, the administrative law judge should reconsider Dr. Jarboe's deposition testimony in light of the definition of a medical report set forth at 20 C.F.R. §725.414(a)(1), (c). If the administrative law judge determines that Dr. Jarboe considered evidence which was not admitted into the record, he should exercise his discretion to determine how the doctor's opinion may properly be considered. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

[5] Although a "medical report" is defined as a "written assessment of the miner's respiratory or pulmonary condition," 20 C.F.R. §725.414(a)(1), the regulation provides that a physician who has not prepared a medical report "may testify in lieu of such medical report," and the testimony will be considered a medical report, so long as it complies with the evidentiary limitations. 20 C.F.R. §725.414(c).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge