BRB No. 09-0819 BLA

CHARLES REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE S ENERGY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 09/29/2010
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5456) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on January 10, 2006.[1] After crediting claimant with fourteen and one-half years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2006 claim on the merits. The administrative law judge found that both the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Weighing all of the relevant evidence together, the administrative law judge found that it established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut that presumption, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed three previous claims. Director's Exhibits 1-3. The first claim, filed on April 23, 1981, was denied by an administrative law judge because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The Board and the United States Court of Appeals for the Fourth Circuit subsequently affirmed the denial of benefits, *Reed v. Triple S Energy*, BRB No. 92-1218 BLA (July 28, 1993) (unpub.); *Reed v. Triple S Energy*, No. 93-2026 (4th Cir. Dec. 12, 1994) (unpub.), and the district director denied claimant's request for modification on December 17, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1981 claim. The second claim, filed in June of 1999, was denied on November 2, 1999, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. The third claim, filed on January 29, 2004, was denied on November 8, 2004, for failure to establish any element of entitlement. Director's Exhibit 3.

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 9. Accordingly, the Board will apply the law of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

On appeal, employer contends that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge properly found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). In a reply brief, employer reiterates its previous contentions.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, 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).

Impact of the Recent Amendments

By Order dated June 7, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director has responded.

The recent amendments to the Act, which became effective on March 23, 2010, apply to claims filed after January 1, 2005. The Director correctly states that, although the amendments apply to claimant's claim based on its filing date, the amendments do not affect the adjudication of the claim, because there is no evidence, and no allegation that, claimant had at least fifteen years of coal mine employment.[3]

[3] Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). On his most recent claim for benefits, claimant alleged only fourteen and one-half years of coal mine employment. Director's Exhibit 5.

Section 725.309

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Total Disability

Employer contends that the administrative law judge committed numerous errors in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). Employer initially argues that the administrative law judge failed to adequately explain her findings. We disagree. After finding that the new pulmonary function study evidence established total disability, the administrative law judge found that the medical opinions of Drs. Rasmussen, Forehand, Fino, and Castle also supported a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 22-23. The administrative law judge, therefore, provided an adequate explanation for her findings.

Employer next contends that the administrative law judge erred in her consideration of the new pulmonary function study evidence. The record includes the results of four new pulmonary function studies conducted on February 6, 2006, August 31, 2006, March 6, 2007, and August 23, 2007. When claimant performed the latter three studies, he was older than 71 years of age, the maximum age in the tables set forth in Appendix B to 20 C.F.R. Part 718.[4] The administrative law judge accurately noted that pulmonary function studies performed on a miner who is older than 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008). Using this method, the administrative law judge accurately noted that all four of the new pulmonary function studies produced qualifying values. Decision and Order at 11, 22. The administrative

[4] Although the Department of Labor has provided tables with qualifying values for miners, according to gender, height, and age, the tables do not provide values for miners older than 71. 20 C.F.R. Part 718, Appendix B.

law judge, therefore, found that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge erred in not providing it with an opportunity to submit rebuttal evidence regarding the pulmonary function studies that were performed after claimant turned 72 years of age. In the case of such older miners, the Board has recognized that an opposing party may offer medical evidence to prove that pulmonary function tests that yield qualifying values are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Meade*, 24 BLR at 1-47. However, as the Director notes, it was not necessary in this case for the administrative law judge to reopen the record, because all of the physicians who submitted new medical opinions, Drs. Forehand, Fino, and Castle, reviewed the pulmonary function study results in question, and opined that claimant suffers from a totally disabling pulmonary impairment.[5] Director's Exhibits 15, 20; Employer's Exhibit 4.

Employer accurately notes that the administrative law judge erred in considering Dr. Rasmussen's March 4, 2004 medical report as new evidence, since this report, in which Dr. Rasmussen opined that claimant was totally disabled, was submitted in connection with claimant's prior 2004 claim. *See* Director's Exhibit 3. However, the administrative law judge's error is harmless, since all of the physicians who submitted new opinions, Drs. Forehand, Fino, and Castle, opined that claimant is totally disabled from a pulmonary standpoint. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986). Consequently, the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence. Decision and Order at 23.

Employer also contends that the administrative law judge failed to consider that claimant's respiratory impairment is attributable to obesity. However, as the Director accurately notes, the cause of a miner's pulmonary impairment is not relevant to the issue of whether a miner is totally disabled pursuant to 20 C.F.R. §718.204(b). Disability causation is a separate element of entitlement. *See* 20 C.F.R. §718.204(c).

Finally, employer argues that the new medical opinions of Drs. Forehand, Castle, and Fino cannot support a change in an applicable condition of entitlement because these physicians previously opined that claimant was totally disabled in medical reports submitted in connection with claimant's prior claims. We disagree. As the Director

[5] Dr. Forehand opined that claimant has insufficient residual ventilatory capacity to return to his last coal mine job. Director's Exhibit 15. Dr. Fino opined that claimant suffers from "interstitial pulmonary fibrosis – asbestosis" and is "clearly disabled." Director's Exhibit 20. Based on claimant's most recent pulmonary function study results, Dr. Castle opined that claimant is totally disabled. Employer's Exhibit 6 at 24.

notes, employer fails to appreciate that the earlier determinations by previous fact-finders, that the evidence did not establish total disability, must be accepted as correct. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361, 20 BLR 2-227, 2-332 (4th Cir. 1996). In the adjudication of claimant's prior claims, fact-finders found that the earlier opinions of Drs. Forehand, Castle, and Fino, when considered in conjunction with the other evidence, did not establish total disability pursuant to 20 C.F.R. §718.204(b). However, in connection with claimant's current claim, Drs. Forehand, Castle, and Fino have provided new medical opinions based on new physical examinations and new objective evidence. Consequently, contrary to employer's contention, these physicians are not offering the "same" opinions, but rather, are offering new opinions based on new evidence. *See* 20 C.F.R. §725.309(d)(3). The administrative law judge, therefore, did not err in relying upon the new medical opinions of Drs. Forehand, Castle, and Fino to support a finding of a change in an applicable condition of entitlement.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge properly considered the merits of claimant's 2006 claim.

The Existence of Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). "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 an the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). This definition "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.* Coal workers' pneumoconiosis is explicitly included in the definition of clinical pneumoconiosis. In this case, the administrative law judge determined that asbestosis, with which claimant was also diagnosed, also constitutes a form of clinical pneumoconiosis. Because employer does not challenge this finding, it is affirmed.[6]

[6] There is evidence that the medical community accepts asbestosis as a form of pneumoconiosis. *See* Dorland's Illustrated Medical Dictionary 163 (31st ed. 2007) (defining asbestosis as "a form of pneumoconiosis (silicatosis) caused by inhaling fibers of asbestos."). In this case, employer's physician, Dr. Castle, acknowledges that

Skrack v. Island Creek Co., 6 BLR 1-710 (1983).

The administrative law judge initially considered whether the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered seven interpretations of four x-rays taken on April 14, 2004, February 6, 2006, August 31, 2006, and March 6, 2007.[7] The administrative law judge accorded less weight to all three of the negative interpretations of these x-rays because she found that the physicians interpreting these x-rays, Drs. Wiot and Castle, "applied criteria that are not included in the regulations." Decision and Order at 18. Because employer does not challenge the administrative law judge's basis for according less weight to the negative interpretations rendered by Drs. Wiot and Castle, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

The administrative law judge properly found that the remaining four x-ray interpretations are positive for clinical pneumoconiosis, each having been interpreted as having a profusion of 1/0 or greater for either coal workers' pneumoconiosis, asbestosis, or both. Decision and Order at 18; Director's Exhibits 3, 15, 19, 20. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

---

asbestosis is recognized as a form of pneumoconiosis, stating, "Asbestosis is a disease that is brought about by the inhalation of asbestos fibers. Asbestos is a fibrogenic type of process that results in the development of an interstitial lung disease that has entirely different manifestations than does [sic] many *of the other types of pneumoconioses*." Employer's Exhibit 6 at 9 (emphasis added). Courts have also recognized that asbestosis is a form of pneumoconiosis. *See Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1982); *Boone v. Employers Mut. Liab. Ins. Co. of Wis.*, 152 F.Supp. 41, 43 n.3 (E.D. La. 1957). Finally, the Mine Safety and Health Administration requires mine operators to report occupational illnesses that occur at a mine site, including asbestos, which is listed as an example of a pneumoconiosis. 30 C.F.R. §§50.20, 50.20-6(b)(7)(ii).

[7] Dr. Alexander interpreted the April 14, 2004 x-ray as positive for pneumoconiosis, but Dr. Wiot interpreted the x-ray as negative for the disease. Director's Exhibit 3. Drs. Forehand and Alexander interpreted the February 6, 2006 x-ray as positive for pneumoconiosis, Director's Exhibits 15, 19, but Dr. Wiot interpreted the x-ray as negative for the disease. Employer's Exhibit 2. Dr. Fino interpreted the August 31, 2006 x-ray as positive for pneumoconiosis, Director's Exhibit 20, but Dr. Castle interpreted the March 6, 2007 x-ray as negative for the disease. Employer's Exhibit 4.

The administrative law judge also addressed whether the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the medical opinions of Drs. Rasmussen, Forehand, Fino, and Castle. While Drs. Rasmussen and Forehand diagnosed coal workers' pneumoconiosis, Director's Exhibits 3, 15, Drs. Fino and Castle diagnosed claimant with asbestosis and asbestos-related pleural disease. Director's Exhibit 20; Employer's Exhibits 4, 6. The administrative law judge found that there is "a consensus" that claimant "suffers from occupational pneumoconiosis in the form of coal workers' pneumoconiosis, asbestosis, or both, together with pleural plaques consistent with asbestosis exposure." Decision and Order at 21. The administrative law judge, therefore, found that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). To the extent that employer contends that the administrative law judge erred in not addressing the cause of claimant's asbestosis at Section 718.202(a)(4), this contention has no merit.[8] Once claimant establishes the existence of asbestosis, a form of clinical pneumoconiosis, the etiology of that disease is appropriately addressed at 20 C.F.R. §718.203. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 21. Because it is supported by substantial evidence, this finding is affirmed.

The Cause of Claimant's Clinical Pneumoconiosis

Because claimant established ten or more years of coal mine employment, the administrative law judge properly found that claimant was entitled to a rebuttable presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 21. The administrative law judge further found that employer failed to establish rebuttal of his presumption. *Id.* at 22. Because employer does not challenge these findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

[8] Employer notes that Dr. Rasmussen's statement, that asbestos was present in older mining equipment, Claimant's Exhibit 4, does not establish that claimant was exposed to asbestos when he worked as a miner. Employer's Brief at 13. Employer also notes that claimant did not testify that he was exposed to asbestos during his coal mine employment. *Id.* at 15.

Total Disability Due to Pneumoconiosis

Employer finally contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9] In considering whether the evidence established that claimant's total disability is due to pneumoconiosis, the administrative law judge stated:

> Looking at all the evidence of record, and particularly the recent medical opinions, I find that Claimant has established disability causation. For the reasons set forth above, I find that Claimant has presumptively established that, to the extent that he suffers from asbestosis or asbestos-related pleural disease, those diseases constitute pneumoconiosis under the regulations, and the [Section 718.203(b)] presumption has not been rebutted. Likewise, as fully discussed above, there now is a consensus that the Claimant is totally disabled on a pulmonary basis and that the disability is primarily due to pneumoconiosis, either in the form of asbestosis with asbestos-related pleural disease, coal workers' pneumoconiosis, or a combination of the two. Thus, I find that Claimant has established causation of total disability by pneumoconiosis under the criteria set forth in [S]ection 718.204.

Decision and Order at 24.

Employer contends that the administrative law judge mischaracterized the opinions of Drs. Fino and Castle. In support of its argument, employer notes that Dr. Fino opined that claimant's disability is not caused in whole or in part by his coal dust

---

[9] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

exposure, Director's Exhibit 20, and Dr. Castle opined that claimant is not disabled due to "a coal mine dust induced lung disease." Employer's Exhibit 4. However, employer ignores the fact that Drs. Fino and Castle based these statements on a belief that claimant's asbestosis did not arise out of his coal mine employment, a finding contrary to that of the administrative law judge. Dr. Fino did not directly address whether claimant's asbestosis contributed to his total disability. Dr. Castle opined that claimant's respiratory impairment was due to his asbestos-related pulmonary disease and obesity. *Id.* at 26.

Employer also contends that the opinions of Drs. Rasmusssen and Forehand, that claimant's total disability is due to his coal workers' pneumoconiosis, are not sufficiently reasoned. Director's Exhibit 15; Claimant's Exhibit 4. We disagree. The issue of whether a medical report is adequately reasoned and documented is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Justus v. Director, OWCP*, 6 BLR 1-1127 (1984). Implicit in an administrative law judge's reliance upon a particular physician's opinion is a finding that the opinion is both reasoned and documented. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985). We find no error in the administrative law judge's reliance upon the opinions of Drs. Rasmussen and Forehand to support a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because it is supported by substantial evidence, the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge