BRB No. 09-0848 BLA

GOEBEL SWINEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING & PROCESSING	)	DATE ISSUED: 09/24/2010
	)	
and	)	
	)	
METLIFE INSURANCE COMPANY of CONNECTICUT c/o TRAVELERS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order – Award of Modification of Thomas F. Phalen, Jr., Administrative Law Judge United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Modification (2006-BLA-6134) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) on a living miner's subsequent claim filed on February 26, 2002, 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).[1] The administrative law judge found the evidence of record sufficient to establish thirty-two years of coal mine employment and that the new evidence established a totally disabling respiratory impairment and, thereby, established both a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and a basis for modification at 20 C.F.R. §725.310. Turning to the medical opinion evidence of record, the administrative law judge found that it established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[2] The administrative law judge stated that a determination that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203 was subsumed in his finding of legal pneumoconiosis at Section 718.202(a)(4). The

[1] Claimant filed his first claim for benefits on June 2, 1997. That claim was denied on October 1, 1997, because claimant failed to establish any of the elements of entitlement. Claimant filed a subsequent claim on February 26, 2002, the claim now before us on appeal. That claim was denied by the district director on July 18, 2003. On August 25, 2003 claimant petitioned for modification, which was denied by the district director on January 6, 2004. On January 26, 2004 claimant requested a formal hearing before an administrative law judge on his case. A hearing was held before Administrative Law Judge William S. Colwell, on June 28, 2005. As a result of that hearing, Judge Colwell remanded the case to the district director on April 17, 2006, because claimant's lay representative, Carolyn Sue Davis, had been disqualified from appearing in a representative capacity before the Office of Administrative Law Judges. Judge Colwell found that Ms. Davis "did not devote adequate effort in developing the evidence in this case or in representing the [c]laimant…." The administrative law judge found that Ms. Davis "has…placed [c]laimant in a worse position than if she had never represented him…." Judge Colwell, therefore, remanded the case and ordered the district director "to place…[c]laimant in the position he was in before Ms. Davis began representing …[c]laimant." Decision and Order at 2 n.3; Director's Exhibit 36-273. Judge Colwell did not address the merits of claimant's modification request. Subsequently, pursuant to Judge Colwell's Order, the district director provided claimant with a complete copy of the record in his case, including a copy of the medical examination report of Dr. Forehand, and advised him that his case would be forwarded to the Office of Administrative Law Judges for a hearing pursuant to claimant's request for modification. District Director's Letter dated December 30, 2005.

[2] The administrative law judge found that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(4).

administrative law judge further found that the evidence of record established total disability and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2) and (c).[3] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the evidence was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4) and that claimant's total disability was due to legal pneumoconiosis at Section 718.204(c). Employer also contends that the administrative law judge's finding regarding the date from which benefits commence was in error. Claimant responds, contending that the administrative law judge's decision awarding benefits should be affirmed. Claimant contends that the administrative law judge's findings were more than sufficiently explained, and that employer is merely seeking a reweighing of the evidence. Employer reiterates its arguments in a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's appeal.[4]

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.[5] 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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[3] "Legal pneumoconiosis" is defined to include any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[4] By Order issued on June 29, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments on this claim. Both the Director, Office of Workers' Compensation Programs, and employer contend that the amendments, which became effective on March 23, 2010, do not apply in this case because the claim was filed before January 1, 2005. We agree. Because this claim was filed before January 1, 2005, the 2010 amendments do not apply.

[5] Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

If claimant 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., Inc.*, 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 any element of entitlement at 20 C.F.R. Part 718. Consequently, claimant had to submit new evidence establishing one of the elements of entitlement in order to have his claim reviewed on the merits. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). In considering whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering claimant's request for modification at Section 725.310, the administrative law judge determined that "total disability [was established] by a preponderance of the newly submitted evidence" and that claimant had, therefore, established a change in an applicable condition of entitlement pursuant to Section 725.309.[6] Decision and Order at 18.

In finding that legal pneumoconiosis was established at Section 718.202(a)(4), the administrative law judge found that, although the previously submitted evidence did not establish legal pneumoconiosis, it was unpersuasive, given that pneumoconiosis is a latent and progressive disease. Decision and Order at 23. Turning to the new evidence, the administrative law judge determined that Dr. Rosenberg found that claimant did not have legal pneumoconiosis, while both Drs. Forehand and Alam found that claimant had legal pneumoconiosis.[7] In weighing the medical opinions, the administrative law judge

[6] This finding is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The administrative law judge found that Dr. Hussain did not provide an opinion regarding the existence of legal pneumoconiosis. Decision and Order at 21.

credited the opinions of Drs. Forehand and Alam over Dr. Rosenberg's opinion because he found them to be more credible.

Employer contends, however, that the administrative law judge erred in his weighing of the medical opinion evidence at Section 718.202(a)(4) on the issue of legal pneumoconiosis. Specifically, employer contends that the administrative law judge mischaracterized Dr. Rosenberg's opinion as diagnosing asthma, and attributing claimant's respiratory impairment to it, when, in fact, the doctor diagnosed "extrinsic restriction related to diaphragmatic paralysis and excess weight and further opined that the claimant does not have intrinsic restriction related to an intrapulmonary process such as pneumoconiosis."[8] Employer's Reply Brief at 3. Employer contends that Dr. Rosenberg concluded that the aforementioned factors were the causes of claimant's respiratory impairment. Employer contends that the administrative law judge's failure to correctly analyze Dr. Rosenberg's opinion, as to the cause of claimant's respiratory impairment, requires that the administrative law judge's decision awarding benefits be vacated and the case remanded to the administrative law judge for a proper consideration of Dr. Rosenberg's opinion, along with the other medical opinions. Further, employer contends that the administrative law judge impermissibly shifted the burden of proving the cause of claimant's respiratory impairment to employer, rather than leaving it on claimant, when he rejected Dr. Rosenberg's opinion, because the doctor "did not

[8] Dr. Rosenberg offered several medical reports and depositions. Dr. Rosenberg first stated that claimant did not have pneumoconiosis, but noted "some restriction." Employer's Exhibit 1. Next, he noted a "functional restriction" but as he read claimant's x-ray as negative, stated: "…clearly his restriction is not related to coal mine dust exposure, or the presence of coal workers' pneumoconiosis." Employer's Exhibit 2. He then concluded that claimant has neither legal nor medical pneumoconiosis. *Id*. Responding to Dr. Forehand's report, Dr. Rosenberg stated: "From a functional perspective, [claimant] does have significant restriction but this is not definitely disabling (although it may be), since …" pulmonary function studies were invalid, in his opinion. Employer's Exhibit 3, p. 2. He stated that claimant's restriction was due to "extrinsic causes. (Diaphragmatic pressure)." *Id*. In his final report, Dr. Rosenberg stated that claimant's impairment could not be assessed due to the invalid pulmonary function study results, but stated that claimant could perform his last coal mine employment. Employer's Exhibit 4. He concluded: "No indication of [chronic obstructive pulmonary disease (COPD)] and any treatment he is receiving for airways disease with bronchodilators is for asthma." *Id*. at 3. In his final deposition, Dr. Rosenberg stated that, in the past, claimant's PO_2 had increased with exercise, therefore the impairment was not due to fibrotic scarring; that simple pneumoconiosis does not cause restriction, and that all of the pulmonary function study results he had viewed were invalid. Employer's Exhibits 5, 15-16, 17-18.

convincingly state that coal dust was not a factor [in causing claimant's respiratory impairment] to the satisfaction of the administrative law judge." Employer's Brief at 20. We agree.

As employer contends, the administrative law judge mischaracterized the opinion of Dr. Rosenberg. Specifically, employer contends that, in his evaluation of Dr. Rosenberg's opinion, the administrative law judge stated that Dr. Rosenberg opined that claimant's respiratory impairment was due to "asthma," when, in fact, Dr. Rosenberg opined that claimant's respiratory impairment was due to "extrinsic restriction related to diaphragmatic paralysis and excessive weight [which accounted for his pulmonary function study results], and that claimant had disabling heart disease, noting that he had received a "pacemaker/defibrillator."[9] Decision and Order at 10-11; Employer's Exhibit 2. The administrative law judge's finding regarding Dr. Rosenberg's opinion must, therefore, be vacated and the case remanded for the administrative law judge to accurately assess Dr. Rosenberg's opinion, in its totality, when weighing the medical opinion evidence at Section 718.202(a)(4). *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984).

Next, employer contends that the administrative law judge erred in crediting Dr. Forehand's opinion of legal pneumoconiosis,[10] without addressing how his findings supported his conclusions or resolving any conflicts between his assessment of the pulmonary function study evidence and that of Dr. Rosenberg, particularly, their disagreement regarding the validity of the 2007 pulmonary function study, and whether

[9] Although the administrative law judge described Dr. Rosenberg's complete findings in his summary of the medical evidence, Decision and Order at 9-11, he did not discuss the opinion in its totality in weighing the medical opinion evidence on the issue of legal pneumoconiosis. Decision and Order at 21.

[10] In his 2005 report, Dr. Forehand diagnosed coal workers' pneumoconiosis, coronary artery disease, and a "work-limiting, totally and permanently disabling respiratory impairment," which he attributed to claimant's coal mine dust exposure. He further stated that the 2005 pulmonary function study revealed a restrictive ventilatory pattern, although he noted that the study revealed results of questionable validity. Dr. Forehand examined claimant again on January 23, 2007 and submitted a report. Claimant's Exhibit 1. He diagnosed coal workers' pneumoconiosis, with a totally disabling respiratory impairment arising from his coal mine employment, coronary artery disease history, and no evidence of significant lung disease due to smoking. Regarding claimant's 2007 pulmonary function study, he stated that the results were valid and qualifying and revealed a restricted ventilatory pattern with no response to bronchodilator.

the results on the pulmonary function studies supported a finding of a coal dust-induced lung disease. *Id*. We agree.

In finding that Dr. Forehand's "legal pneumoconiosis opinion [was] based on the objective findings of the pulmonary function studies," Decision and Order at 22, the administrative law judge failed to fully discuss Dr. Forehand's opinion or explain why his finding regarding claimant's pulmonary function studies was more credible than that of Dr. Rosenberg, especially in light of the fact that the doctors disagreed as to whether claimant's 2007 pulmonary function study was valid. Such conflicts in the evidence require that the administrative law judge address them and provide the bases for his findings and conclusions regarding his weighing of the evidence. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because the administrative law judge has not sufficiently discussed and resolved the conflicts between the opinions of Drs. Forehand and Rosenberg, specifically their interpretation of claimant's pulmonary function studies, we must vacate the administrative law judge's finding regarding Dr. Forehand's opinion and remand for further consideration of that opinion.

Employer also contends that the administrative law judge erred in crediting Dr. Alam's opinion, finding legal pneumoconiosis,[11] because it was based solely on the length of claimant's coal mine employment, "[t]he reason I say that the patient has…chronic bronchitis, emphysema and chronic dyspnea is because of his coal dust exposure…which is a significant [sic] long time to develop symptoms pertaining to emphysema and chronic bronchitis." Decision and Order at 22; Claimant's Exhibit 2. We agree.

An exposure history alone cannot establish that coal dust contributed to impairment. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, because the administrative law judge indicated that he credited Dr. Alam's finding of legal pneumoconiosis based on claimant's length of coal mine employment,

[11] Dr. Alam diagnosed coal workers' pneumoconiosis, chronic dyspnea, chronic bronchitis and emphysema due to coal dust exposure, with severe restricted lung disease, with no other reason to explain his disease other than coal dust exposure. Claimant's Exhibit 2. He found a permanent pulmonary disability. *Id*. He opined that claimant does not have any reason other than his lengthy coal mine employment to explain his restrictive lung disease, and therefore "the most likely reason" for the restriction was coal dust exposure. Dr. Alam further noted that he considered other factors, such as x-ray results, findings on physical examination, and objective test results. *Id*.

we must vacate the administrative law judge's decision and remand the case for the administrative law judge to consider whether Dr. Alam's opinion is supported by additional factors. *See Williams*, 338 F.3d at 515, 22 BLR at 2-651; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

Additionally, employer contends that the administrative law judge failed to consider the qualifications of the physicians in weighing their opinions. We agree. While the administrative law judge listed the qualifications of the physicians in his summary of the medical opinion evidence,[12] Decision and Order at 9-12, he did not discuss how these qualifications affected his weighing of the opinions. Although an administrative law judge is not required to defer to the opinion of a physician with superior qualifications, he should consider the physician's qualifications in determining the reliability of his opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998). Accordingly, on remand, the administrative law judge should consider the qualifications of the physicians in determining the reliability of their opinions.

In conclusion, we vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4), and we remand the case for reconsideration of the medical opinion evidence on the issue of legal pneumoconiosis at Section 718.202(a)(4). Moreover, in light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4), based on his weighing of the medical opinion evidence thereunder, *see* discussion *supra*, we also vacate his finding of disability causation at Section 718.204(c) because it is based on his credibility determinations at Section 718.202(a)(4). Further, in light of our remand for reconsideration of the evidence relevant to legal pneumoconiosis and disability causation, we also vacate the administrative law judge's finding regarding the date from which benefits commence, and remand for reconsideration of that issue, if reached.[13] *See* 20 C.F.R. §§725.309(d)(5), 725.503(d).

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[12] The record reflects, and the administrative law judge noted, that Dr. Rosenberg is Board-certified in Internal, Pulmonary and Occupational Medicine. Decision and Order at 9; Employer's Exhibit 1. Dr. Forehand is Board-certified in Pediatrics and Allergy/Immunology. Decision and Order at 11; Director's Exhibit 36-12. Dr. Alam is Board-certified in Pulmonary and Critical Care Medicine. Decision and Order at 12; Claimant's Exhibit 2.

[13] The administrative law judge found that, because he could not determine "the month of onset of [c]laimant's total disability due to pneumoconiosis[,]" the date from which benefits commence was February 2002, the "beginning [of] the month in which he filed his application for benefits. Decision and Order at 28. We note, however, that the

Accordingly, the administrative law judge's Decision and Order – Award of Modification is affirmed in part, and vacated in part, and the case is remanded for further consideration 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

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administrative law judge's reconsideration of the evidence may affect his finding regarding the date from which benefits commence.