BRB No. 95-1562 BLA

PAUL CRAWFORD Claimant-Respondent v. SHAMROCK COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Charley Greene Dixon, Jr., Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Helen H. Cox (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-1157) of

Administrative Law Judge Donald W. Mosser awarding benefits on a claim[1] filed pursuant to the provisions of Title IV

[1] Claimant is Paul Crawford, the miner, whose initial application for benefits filed on June 10, 1983 was denied in a decision and order issued on December 31, 1986. Director's Exhibits 1, 33. Administrative Law Judge Joel R. Williams credited claimant with nineteen years of coal mine employment, found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), but concluded that the evidence failed to establish total respiratory disability pursuant to Section 718.204(c) and, accordingly, denied benefits. Director's Exhibit 33. Both the Board and the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, affirmed the denial of benefits. *Crawford v. Shamrock Coal Co*., BRB No. 87-0351 (Aug. 30, 1988) (unpub.); *Crawford v. Shamrock Coal Co*., No. 88-3883 (6th Cir. Aug. 7, 1989)(unpub.). Claimant subsequently filed a second claim for benefits which was treated as a request for modification because it was filed within one year of the Sixth Circuit court's decision affirming the denial of benefits. Director's Exhibit 52; *see* 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board on modification for the second time. The administrative law judge initially determined that this case involved a request for modification pursuant to 20 C.F.R. §725.310, found a change in conditions established, and concluded that the evidence established the existence of totally disabling pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a), 718.203(b), and 718.204. Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings pursuant to Sections 725.310 and 718.202(a)(4), but vacated his findings pursuant to Section 718.204 and remanded the case for him to consider all relevant evidence regarding total disability, causation, and the date for the commencement of benefits. *Crawford v. Shamrock Coal Co*., BRB No. 93-1028 BLA (Sep. 29, 1994)(unpub.). On remand, the administrative law judge again found total disability due to pneumoconiosis established pursuant to Section 718.204 and, accordingly, awarded benefits as of August 1, 1989.

On appeal, employer challenges the administrative law judge's weighing of the evidence pursuant to Section 718.204. Claimant responds, urging affirmance. In a response limited to employer's challenge to the administrative law judge's reliance on the more recent medical evidence, the Director, Office of Workers' Compensation Programs (the Director), urges the Board to reject employer's argument.[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 rational, and is in accordance with 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).

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge failed to consider all relevant evidence regarding the exertional requirements of claimant's usual coal mine employment before finding that he was unable to perform heavy labor. Employer's Brief at 17. Employer's argument has merit. In finding total respiratory disability established, the administrative law judge

[2] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

credited as well-reasoned and most recent Dr. Myers' 1991 opinion that claimant was "limited from performing arduous manual labor" by his "moderately severe restrictive defect in ventilation." Decision and Order on Remand at 9-10; Claimant's Exhibit 1. In so doing, the administrative law judge noted claimant's testimony that his job as a heavy equipment operator in a strip mine required heavy labor, [1986] Hearing Transcript at 23; [1992] Hearing Transcript at 17, and therefore concluded that Dr. Myers' opinion established claimant's inability "to perform the arduous manual labor required by his previous coal mine employment." Decision and Order on Remand at 10.

Claimant, on Department of Labor Form CM-913, "Description of Coal Mine Work," indicated that his job as a heavy equipment operator involved operating a bulldozer at a surface mine to remove rock and dirt from the coal bed. Director's Exhibit 7. He further indicated that this job required him to sit for ten hours a day and involved no standing, crawling, lifting, or carrying. *Id*. At the 1986 hearing, claimant testified that his job required heavy labor, but also stated in response to questioning by employer's counsel that his work movements consisted of manipulating levers to operate hydraulic controls. [1986] Hearing Transcript at 23, 29. At the same hearing, a vocational consultant testified that the Department of Labor Dictionary of Occupational Titles rates the physical demands of a heavy equipment operator job as "medium," which the consultant explained is an activity level requiring the lifting of twenty-five to fifty pounds. [1986] Hearing Transcript at 46-47.

Because the administrative law judge did not consider all the evidence regarding the exertional requirements of claimant's usual coal mine employment in making his finding, *see Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), as required by the Administrative Procedure Act (APA), 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984), we vacate his finding pursuant to Section 718.204(c)(4). In addition, as employer contends, the administrative law judge did not consider whether Dr. Myers' opinion was documented and reasoned in light of the physician's reliance on a non-qualifying pulmonary function study[3] that had been partially invalidated. Employer's Brief at 16; Claimant's Exhibit 1; Employer's Exhibit 1; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *see also Lafferty*, *supra*. Therefore, we must remand the case for further consideration.

[3] Dr. Myers stated that the test's values "would meet the criteria for disability under Federal Black Lung Regulation 718, Appendix B." Claimant's Exhibit 1.

We reject, however, employer's argument that the recency of the medical evidence, a factor cited by the administrative law judge in weighing Dr. Myers' opinion, is irrelevant to a determination of whether claimant is totally disabled. Employer's Brief at 13, n.3. As the Director contends, an administrative law judge may in certain circumstances accord greater weight to more recent medical evidence, as pneumoconiosis is a progressive disease and a recent medical opinion may therefore better reflect claimant's current condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Thorn v. Itmann Coal Co*., 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); see also Cooley v. Island Creek Coal Co., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

We also reject employer's contention that Dr. Myers' opinion is legally insufficient to establish total respiratory disability because the physician was unable to separate the pulmonary and non-pulmonary causes of claimant's functional impairment. Employer's Brief at 15. Although in 1985 Dr. Myers stated that he was unable to assess the degree of claimant's respiratory impairment because of the presence of multiple non-pulmonary impairments, Director's Exhibit 28, his most recent opinion addresses the severity of claimant's respiratory impairment, the relevant inquiry at Section 718.204(c). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16, 2-21 (6th Cir. 1993); *Carson v. Westmoreland Coal Co*., 19 BLR 1-16, 1-21 (1994).

Pursuant to Section 718.204(b), the administrative law judge applied the causation standard enunciated in *Adams*, *supra*, in finding claimant's total disability due in part to pneumoconiosis. Decision and Order on Remand at 10. Therefore, we reject employer's assertion that the administrative law judge applied the wrong disability causation test. Employer's Brief at 20. As employer correctly contends, however, the administrative law judge failed to provide an adequate rationale for his treatment of the evidence regarding claimant's smoking history.

Dr. Myers opined that claimant was totally disabled due to chronic obstructive pulmonary disease and silicosis.[4] Drs. Wright and Anderson opined that claimant's respiratory impairment, though not disabling in their view, resulted from his cigarette smoking habit, the recorded histories of which vary from one-half to two packs per day for between fifteen and thirty-two years. Director's Exhibits 11, 13, 28, 29, 55;

[4] Dr. Myers opined that claimant's silicosis resulted from "his entire exposure history both within the mines and during his work in road and bridge construction." Claimant's Exhibit 1.

Claimant's Exhibit 1. The administrative law judge found that Dr. Myers' opinion established total disability due to pneumoconiosis because "although the record does contain evidence of a significant smoking history, such evidence is not sufficient to convince me that the claimant's pneumoconiosis was not a contributing cause of his total disability." Decision and Order on Remand at 10.

Because the administrative law judge has not explained what evidence regarding claimant's smoking history he considered or how much weight he assigned to it in the disability causation inquiry,[5] *see Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Wojtowicz*, *supra*; *Congleton*, *supra*, we vacate the administrative law judge's finding pursuant to Section 718.204(b).

Therefore, we remand this case for the administrative law judge to consider all the relevant evidence of record regarding the exertional requirements of claimant's coal mine employment in determining whether the documented and reasoned medical opinion evidence establishes total respiratory pursuant to Section 718.204(c)(4). *See Budash*, *supra*; *Onderko*, *supra*. If the administrative law judge finds that it does, and again concludes that all the relevant evidence weighed together establishes total respiratory disability, *see Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), he must then evaluate all the relevant evidence to determine whether claimant's total disability is due, at least in part, to pneumoconiosis pursuant to Section 718.204(b). *See Adams*, *supra*.

[5] We note that earlier in his decision, the administrative law judge discredited certain medical reports supportive of total respiratory disability because he believed that the physicians did not consider claimant's full smoking history. Decision and Order on Remand at 9.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge