BRB No. 10-0510 BLA

OKEY L. MILLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/29/2011
	)	
WOLF CREEK COLLIERIES	)	
	)	
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 Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5595) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim[1] 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).[2] After crediting claimant with at least eleven years of coal mine employment,[3] as stipulated by the parties, the administrative law judge found that the medical evidence developed since the denial of claimant's prior claim did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[4] Thus, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(1)-(4), or total disability pursuant to Section 718.204(b)(2)(iv).[5] Employer

---

[1] Claimant filed two previous claims, both of which were finally denied. His second claim, filed on July 9, 1990, was denied on December 12, 1990, and again on March 7, 1991, because claimant did not establish any element of entitlement. Director's Exhibit 2 at 8, 80, 183. Claimant filed his third and current claim on May 19, 2004. Director's Exhibit 5.

[2] The recent amendments to 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*)), which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim, filed on May 19, 2004. Decision and Order at 1 n.1.

[3] The record indicates that claimant's coal mine employment was in Kentucky. Hearing Transcript at 26-27; Director's Exhibit 6. 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, 1-202 (1989)(*en banc*); Decision and Order at 2 n.2.

[4] Because the new evidence did not establish pneumoconiosis or total disability, the administrative law judge found that claimant necessarily could not establish that his pneumoconiosis arose out of coal mine employment, or that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §§718.203(b), 718.204(c). Decision and Order at 12, 15.

[5] Claimant does not challenge the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief, but notes that the administrative law judge erred by finding that a physician's opinion that coal mine dust exposure plays a minor role in claimant's pulmonary problems was legally insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(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. 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 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. 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 any element of entitlement. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

Existence of Pneumoconiosis

Pursuant to Section 718.202(a)(1), the administrative law judge considered whether seven interpretations of two new x-rays established the existence of pneumoconiosis. Drs. Miller and Alexander, Board-certified radiologists and B readers, interpreted the July 13, 2004 x-ray as positive for pneumoconiosis.[6] Director's Exhibit 23 at 3; Claimant's Exhibit 1. Drs. Halbert, West, and Poulos, Board-certified radiologists and B readers, interpreted the same x-ray as negative for pneumoconiosis.

Therefore, we affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Dr. Barrett, a Board-certified radiologist and B reader, reviewed the July 13, 2004 x-ray to assess its film quality only. Director's Exhibit 13 at 1.

Director's Exhibit 12 at 1; Employer's Exhibits 1, 2. Dr. Miller interpreted the August 29, 2006 x-ray as positive for pneumoconiosis, while Dr. Broudy, a B reader, interpreted the x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 3.

Considering the x-ray readings and the readers' radiological qualifications, the administrative law judge accorded greater weight to the larger number of readings by dually-qualified readers, and found that the July 13, 2004 x-ray was negative for pneumoconiosis. Decision and Order at 9-10. Turning to the August 29, 2006 x-ray, the administrative law judge credited the positive reading by Dr. Miller, because his dual qualifications were superior to those of Dr. Broudy. *Id*. at 10. The administrative law judge declined to accord greater weight to the more recent, positive x-ray, noting that the "August 2006 film is more recent by only two years." *Id*. Based on this analysis of the x-rays, the administrative law judge found that the preponderance of the new x-ray evidence "is not positive for pneumoconiosis." *Id*.

Claimant contends that the administrative law judge erred by not applying the later evidence rule to find that the existence of pneumoconiosis was established, based on the significantly more recent, positive x-ray of August 2006. Claimant contends that the two x-rays of record are separated by over two years, a time gap large enough that the administrative law judge should have credited the more recent positive x-ray, as consistent with the principle that pneumoconiosis may be a progressive disease. Claimant's Brief at 13. In support, claimant cites *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666, 1-668 (1983), a case in which the Board held that an administrative law judge permissibly accorded greater weight to a positive x-ray that was taken seven months after the negative x-rays of record.

An administrative law judge may, but need not, credit more recent x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). Thus, to the extent claimant argues that the administrative law judge was required to credit the 2006 x-ray over the 2004 x-ray, we reject claimant's argument. There is merit, however, in claimant's contention that the administrative law judge did not explain why he determined that the two-year gap separating the negative and the positive x-ray in this case had no bearing on the weight he accorded them. Different lengths of time between early negative and later positive x-rays have been deemed relevant to the application of the later evidence rule.[7] In this case, absent an explanation from the administrative law

[7] *See e.g. Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986)(positive x-rays were one, two, and three years more recent than the earlier negative x-ray); *Pate v. Ala. By-Products Corp.*, 6 BLR 1-636, 1-639 (1983)(positive x-ray was three years more recent than earlier negative x-ray); *Tokarcik*, 6 BLR at 1-668 (positive x-ray was seven months more recent); *Edwards v. Director, OWCP*, 6 BLR 1-

judge, it is not clear why he found that the two-year gap between the negative and the positive x-ray was not significant. *See* 20 C.F.R. §718.201(c). Therefore, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(1), and remand this case for him to reconsider the new x-ray evidence, and to explain the basis for his finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Pursuant to Section 718.202(a)(2), the administrative law judge found that the existence of pneumoconiosis was not established because the record contains no new biopsy or autopsy evidence. As claimant contends, however, the record contains biopsy evidence, which claimant submitted as a medical treatment record. *See* 20 C.F.R. §725.414(a)(4); Director's Exhibit 20; Claimant's Prehearing Report at 4. Specifically, on June 23, 2004, Dr. Dennis, a pathologist, reviewed a wedge biopsy of claimant's left lung, and identified "[f]ibrous tissue proliferation, macular development, black pigment deposition, anthracosilicotic changes . . . with silica particle impregnation and fibrous connective tissue proliferation compatible with coal workers' pneumoconiosis, cannot exclude progressive massive fibrosis."[8] Director's Exhibit 20 at 10. Employer concedes that Dr. Dennis's report is in evidence, but asserts that the administrative law judge's failure to consider it was harmless error, because the report is "vague and equivocal." Employer's Brief at 3. We disagree that the administrative law judge's oversight was harmless. The administrative law judge did not consider biopsy evidence which, if credited, is sufficient to establish at least simple clinical pneumoconiosis.[9] Further, the Board is not authorized to determine the credibility of the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we must vacate the

---

265, 1-266 (1983)(holding that an administrative law judge erred in not addressing a five-year gap between a negative x-ray and a later positive x-ray); *cf. Martin v. Director, OWCP*, 6 BLR 1-535, 1-537 (1983)(holding that an administrative law judge permissibly declined to give greater weight to a positive x-ray that was two months more recent).

[8] Dr. Dennis further described the tissue sample as revealing "nodular deposition of fibroblastic tissue within the lung tissue and extension of the fibrous connective tissue from the thickened pleura into the lung. Nodules are greater than 1.5 [centimeters in] diameter. This is a macular nodular expression of fibroblastic proliferation and black pigment deposition with silica particle impregnation as well." Director's Exhibit 20 at 10.

[9] Clinical pneumoconiosis is defined as "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 and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

administrative law judge's finding pursuant to Section 718.202(a)(2), and remand this case for him to consider whether the new biopsy evidence establishes the existence of pneumoconiosis.

Pursuant to Section 718.202(a)(3), the administrative law judge found that clamant could not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 because there was no evidence of complicated pneumoconiosis. However, the record contains Dr. Dennis's biopsy report. In the biopsy of the left lung, Dr. Dennis reported changes that he characterized as compatible with coal workers' pneumoconiosis, described nodules greater than 1.5 centimeters in diameter, and stated that he could not exclude "progressive massive fibrosis." Director's Exhibit 20 at 10. For the reasons stated above, we decline employer's request to hold that the administrative law judge's oversight was harmless because Dr. Dennis's report is vague and equivocal.[10] *See Anderson*, 12 BLR at 1-113; Employer's Brief at 7. Thus, we vacate the administrative law judge's finding that the existence of complicated pneumoconiosis was not established pursuant to Section 718.202(a)(3), and remand this case for him to consider all of the relevant evidence on that issue. *See Gray v. SLC Coal Co.*, 176 F.3d 352, 389, 21 BLR 2-615, 2-629 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge considered whether the new medical opinions from Drs. Mettu and Broudy established the existence of legal pneumoconiosis.[11] Dr. Mettu, who is Board-certified in Internal Medicine and Pulmonary Disease, diagnosed claimant with chronic bronchitis due to both smoking and

[10] The Sixth Circuit has held that a physician diagnosing a lung nodule by autopsy must either opine that the nodule would show as an opacity of greater than one centimeter if seen on an x-ray, or opine that the nodule constitutes a "massive lesion" under 20 C.F.R. §718.304(b). *Gray v. SLC Coal Co.*, 176 F.3d 352, 390, 21 BLR 2-615, 2-630 (6th Cir. 1999). A diagnosis of "progressive massive fibrosis" can constitute a diagnosis of "massive lesions." *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006). On remand, the administrative law judge must evaluate the credibility of Dr. Dennis's opinion, and must consider all relevant evidence regarding whether claimant has established that he has complicated pneumoconiosis. *See Gray*, 176 F.3d at 389, 21 BLR at 2-629.

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

coal mine dust exposure. Employer's Exhibit 4 at 11-14. Dr. Mettu opined that claimant's smoking plays a "major role" in his pulmonary impairment, and that coal mine dust exposure plays a "minor role," in that coal mine dust exposure has aggravated the underlying pulmonary problems. *Id*. at 14-15. Dr. Broudy, who is also Board-certified in Internal Medicine and Pulmonary Disease, opined that claimant does not have pneumoconiosis, but suffers from chronic bronchitis that is due solely to smoking. Employer's Exhibit 3 at 3.

The administrative law judge discounted Dr. Broudy's opinion, because it was based on an inaccurate smoking history of thirty-eight pack years, when the administrative law judge found that claimant has a twenty-five pack-year history. Decision and Order at 12. Further, the administrative law judge found that Dr. Mettu's diagnosis did not fall within the definition of legal pneumoconiosis, because the doctor opined that claimant's coal mine dust exposure played a minor role in his lung disease. Decision and Order at 11. Specifically, the administrative law judge found that Dr. Mettu's description of a minor causal role did "not meet the regulatory requirement that the pulmonary impairment be significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id*.

Claimant and the Director contend that the administrative law judge erred in finding that Dr. Mettu did not diagnose legal pneumoconiosis, because he used the term "minor" to describe the contribution of coal mine dust exposure to claimant's chronic bronchitis, relative to the contribution of smoking. We agree. In order to establish the existence of legal pneumoconiosis, claimant need only establish that coal mine dust exposure contributed "at least in part" to his chronic respiratory or pulmonary impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Dr. Mettu specified that smoking was the primary cause of claimant's impairment, but that coal mine dust exposure aggravated the underlying condition. Given this aspect of Dr. Mettu's opinion, the administrative law judge did not explain why he determined that Dr. Mettu's diagnosis does not fall within the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, we vacate the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and remand this case for him to reconsider Dr. Mettu's opinion. In reconsidering Dr. Mettu's opinion, on remand, the administrative law judge must take into account Dr. Mettu's qualifications, the explanation of his medical opinion, the documentation underlying his judgment, and the sophistication and bases of his diagnosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Additionally, in determining whether Dr. Mettu's opinion establishes legal pneumoconiosis, the administrative law judge must consider Dr. Mettu's deposition testimony addressing whether the aggravation from coal mine dust exposure was permanent. Employer's

Exhibit 4 at 14; *see Henley v. Cowan & Co.,* 21 BLR 1-147, 1-150-51 (1999)(deferring to the Director's interpretation that "a transient aggravation of a non-occupational pulmonary condition" does not establish legal pneumoconiosis under Section 718.201).

Pursuant to Section 718.107, the administrative law judge found that the record contained no other medical evidence regarding the existence of pneumoconiosis, such as digital x-rays or CT scans. Claimant notes that the record contains a reading of a CT scan taken on April 30, 2004 by Dr. Kendall. Dr. Kendall, whose qualifications are not of record, observed interstitial nodular infiltrates in the mid and upper lung zones which he stated "may be related to coal worker[s'] pneumoconiosis." Director's Exhibit 20 at 1. As we are remanding this case for the administrative law judge to reconsider the existence of pneumoconiosis, we instruct him, on remand, to consider the April 30, 2004 CT scan reading.

Total Disability

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the two new medical opinions with respect to total disability. Dr. Broudy opined that claimant is not totally disabled, based on a non-qualifying[12] pulmonary function study that was "at the lower limits of normal," a diffusing capacity study that was "mildly to moderately reduced," and non-qualifying blood gas studies. Employer's Exhibit 3 at 2, 3. In his report, Dr. Mettu opined that claimant is totally disabled due to a moderate pulmonary impairment, based on a non-qualifying pulmonary function study, considering that claimant's usual coal mine employment required him to stand for eight hours a day and carry thirty pounds 1,000 feet, eight times a day. Director's Exhibit 57 at 2. At his deposition, Dr. Mettu reiterated that claimant is totally disabled, and testified that he based his opinion on abnormal pulmonary function studies indicating an obstructive impairment that would prevent claimant from performing his work requirements. Employer's Exhibit 4 at 16-17.

The administrative law judge accorded Dr. Mettu's opinion full probative weight, finding that it was well-reasoned, despite its being based on non-qualifying pulmonary function studies, as it "is based on medically acceptable clinical and laboratory diagnostic techniques." Decision and Order at 15. The administrative law judge also accorded Dr. Broudy's opinion full probative weight, finding that it, too, was well-reasoned, as it was "based on medically acceptable clinical and laboratory diagnostic techniques." *Id*. The administrative law judge concluded that Dr. Mettu's opinion was outweighed by

[12] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

"contrary probative evidence," specifically, Dr. Broudy's opinion and the non-qualifying objective studies. *Id*.

Claimant contends that the administrative law judge erred by effectively discounting Dr. Mettu's opinion because he based his opinion on non-qualifying objective studies. We agree with claimant. The administrative law judge considered that it would be error for him to discount Dr. Mettu's disability opinion because it was based on non-qualifying objective studies. Decision and Order at 15, *citing Cornett*, 227 F.3d at 577, 22 BLR at 2-123. The administrative law judge then found that Dr. Mettu's opinion was outweighed by the non-qualifying objective studies and Dr. Broudy's opinion. *Id*. In so doing, the administrative law judge did not resolve the conflict in the opinions of Drs. Broudy and Mettu as to whether claimant has a totally disabling respiratory impairment, finding both opinions "well-reasoned" and "entitled to full probative weight." Because the administrative law judge did not resolve the conflict in the medical opinions, his finding that Dr. Mettu's opinion was outweighed by Dr. Broudy's opinion and the non-qualifying objective studies had the practical effect of giving less weight to Dr. Mettu's opinion because it was based on non-qualifying studies, contrary to Section 718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 577, 22 BLR at 2-123.

Therefore, we must vacate the administrative law judge's finding that total respiratory disability was not established, and remand the case for him to reassess the relevant medical opinion evidence. On remand, the administrative law judge must consider all of the relevant evidence and determine the exertional requirements of claimant's usual coal mine employment, then analyze the physicians' opinions in light of those exertional requirements, and determine whether claimant has established total respiratory disability at Section 718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 577-78, 22 BLR at 2-123-24. If the administrative law judge finds that the new medical opinion evidence establishes today disability, he must then weigh together all of the relevant new evidence in determining whether claimant has established total disability pursuant to Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

Because we have vacated the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis or total disability, we also vacate the administrative law judge's finding that a change in an applicable condition of entitlement was not established pursuant to Section 725.309(d). On remand, the administrative law judge must reconsider whether the new evidence establishes a change in an applicable condition of entitlement and, if so, he must then determine whether all of the evidence of record establishes each element of entitlement.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge