BRB No 99-1254 BLA

ROBERT H. SHUMAN	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	
CONSOLIDATION COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order on Remand-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Velva M. Shuman, Lay Representative, Fairmont, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Edward Waldman (Henry L. Solano, 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, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (96-BLA-1028) of Administrative Law Judge Michael P. Lesniak rendered on a 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). This case is before the Board for the second time.

Claimant's initial application for benefits filed on August 29, 1978 was finally denied on December 30, 1982. Director's Exhibit 27; *Shuman v. Consolidation Coal Co.*, 5 BLR 1-445 (1982)(Miller, J., dissenting). On June 4, 1995, claimant filed the current application for benefits, which is a duplicate claim because it was filed more than one year after the previous denial. 20 C.F.R. §725.309(d).

The administrative law judge credited claimant with "at least" thirty years of coal mine employment, and found that the evidence developed since the prior denial established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), thereby demonstrating a material change in conditions as required by 20 C.F.R. §725.309(d). [1998] Decision and Order at 13; *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). The administrative law judge also found that the existence of pneumoconiosis arising out of coal mine employment was established by the x-ray and medical opinion evidence weighed separately pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). Finally, the administrative law judge concluded that the evidence of record established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established by x-ray evidence pursuant to Section 718.202(a)(1), but vacated the administrative law judge's finding pursuant to Section 718.204(b) and remanded the case for him to reweigh the disability causation opinions and provide valid reasons for the relative weight accorded to those opinions. *Shuman v. Consolidation Coal Co.*, BRB No. 98-0624 BLA (Mar. 10, 1999)(unpub.).

On remand, the administrative law judge again found that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, the administrative law judge awarded benefits as of June 1, 1995, the month during which claimant filed his claim. *See* 20 C.F.R. §725.503(b).

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[1] Because the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1), the Board did not address employer's challenge to the finding of pneumoconiosis based on the medical opinions at Section 718.202(a)(4). The Board affirmed as unchallenged on appeal the administrative law judge's findings that total disability and a material change in conditions were established, and rejected employer's contention that Dr. Devabhaktuni's opinion was unreasoned and legally insufficient to support a finding of total disability due to pneumoconiosis pursuant to Section 718.204(b).

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence pursuant to Section 718.204(b). Employer argues further that the regulation applied by the administrative law judge in finding the onset date of disability to be June 1, 1995, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant has not responded to employer's appeal. However, the Director, Office of Workers' Compensation Programs (the Director), responds, arguing that 20 C.F.R. §725.503(b) is a valid regulation and does not conflict with the APA. Employer has filed a brief in reply to the Director's argument.

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).

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In this case, the administrative law judge evaluated the evidence within the subsections (a)(1) and (a)(4) of Section 718.202 to find the existence of pneumoconiosis established. The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established, based solely on the x-ray evidence pursuant to Section 718.202(a)(1). Thereafter, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh all evidence relevant to the existence of pneumoconiosis together, rather than merely within discrete subsections of Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR (4th Cir. 2000). Because the administrative law judge made some of the same errors in finding pneumoconiosis established at Section 718.202(a)(4), which he made in finding causation established at Section 718.204(b), we

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[2] The Board held that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Altmeyer, Fino, and Renn at Section 718.204(b). [1999] *Shuman*, slip op. 4-7. The administrative law judge gave the same reasons for discounting those opinions at Section 718.202(a)(4), but the Board did not address Section 718.202(a)(4). *See* n.1, *supra*.

must vacate the administrative law judge's finding that the existence of pneumoconiosis was established and remand this case for him to reweigh the medical opinion evidence at subsection (a)(4) and weigh together the x-ray and medical opinion evidence under Section 718.202(a), consistently with *Compton*.

Additionally, if the administrative law judge finds the existence of pneumoconiosis established, he must determine whether employer has rebutted the Section 718.203(b) presumption that the pneumoconiosis arose out of coal mine employment. Subsequent to the filing of briefs in this appeal, the Board held that, although a physician's comments regarding the source of the pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis at Section 718.202(a)(1), they are relevant to whether the pneumoconiosis arose out of coal mine employment and must therefore be considered by the administrative law judge at Section 718.203(b). *Cranor v. Peabody Coal Co*., 22 BLR 1-1, 1-4-6 (1999)(*en banc*). In this case, the x-ray classification forms, medical opinions, and testimony of Drs. Renn, Fino, Wiot, and Altmeyer contain comments that the pneumoconiosis diagnosed by x-ray was not coal workers' pneumoconiosis. In light of the Board's recent holding that a comment indicating that the diagnosis is not coal workers' pneumoconiosis must be considered under Section 718.203(b), we must vacate the administrative law judge's previous finding and instruct him to consider whether the comments of Drs. Renn, Fino, Wiot, and Altmeyer support a finding of rebuttal pursuant to Section 718.203(b). *See Cranor, supra*.

Pursuant to Section 718.204(b), employer contends that the administrative law judge's disability causation finding does not comply with the APA. Employer's Brief at 4. Based on our review of the administrative law judge's decision, we hold that he referred sufficiently to the evidence and explained his reasoning adequately to permit review. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998). Therefore, we reject employer's contention that the administrative law judge violated the APA.

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[3] In awarding benefits, the administrative law judge appeared to believe that employer is bound in this claim by its 1980 stipulation in claimant's denied Part 727 claim that the x-ray evidence established the existence of "coal workers' pneumoconiosis." [1980] Tr. at 6; Decision and Order on Remand at 5 n.4. However, an issue determined by stipulation is not binding in subsequent litigation. *See Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (*en banc*)(issue must be actually litigated and decided); *Donnell v. Bath Iron Works Corp*., 22 BRBS 136, 139 (1989). Therefore, in weighing the evidence pursuant to Sections 718.202(a) and 718.203(b), the administrative law judge should not rely upon employer's 1980 stipulation.

Employer argues further that the administrative law judge did not provide valid reasons for his relative weighing of the medical opinions. Employer's Brief at 7-15. The administrative law judge credited Dr. Devabhaktuni's opinion that claimant's total disability is due in part to pneumoconiosis because the administrative law judge found Devabhaktuni's opinion more consistent with the x-ray evidence, the pulmonary function and blood gas studies, and claimant's history of at least thirty years of coal dust exposure, than were the opinions of Drs. Altmeyer, Renn, and Fino that claimant's total disability is unrelated to coal dust exposure. Decision and Order on Remand at 5. These are valid considerations, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), but in this case, whether the x-rays, objective studies, and histories better support one physician's disability causation opinion than another's will depend upon whether the administrative law judge finds that all of the relevant evidence weighed together establishes the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b). *See Compton, supra*; *Cranor, supra*. Consequently, we vacate the administrative law judge's finding pursuant to Section 718.204(b) and instruct him to consider whether pneumoconiosis, if found established on remand, is at least a contributing cause of claimant's totally disabling respiratory impairment. *See Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195-96, 19 BLR 2-304, 2-320 (4th Cir. 1995); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990).

Employer contends that if entitlement is found established on remand, the administrative law judge may not find the onset date of disability to be the date the claim was filed. Employer's Brief at 19-22; Employer's Reply Brief at 1-7. We disagree. Employer asserts that the provision of 20 C.F.R. §725.305(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). As the Director asserts, since 20 C.F.R. §725.503(b) specifically provides that the onset date of disability is to be determined by the date that the claim is filed when the record does not contain evidence which can establish the onset date of disability, 20 C.F.R. §725.503(b), the APA is inapplicable to 20 C.F.R. §725.503(b). 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R.

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[4] Drs. Altmeyer, Renn, and Fino opined that all of the medical data pointed to the absence of coal workers' pneumoconiosis or any respiratory impairment arising out of coal mine employment, and stated that claimant is totally disabled due to the effects of smoking.

§725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge