BRB No. 03-0784 BLA

ROBERT LEE SMITH, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 09/29/2004
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Jasper, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 – Awarding Benefits (2002-BLA-0242) of Administrative Law Judge Gerald M. Tierney 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).[1] In addressing claimant's modification request, the administrative law judge stated that the prior claim was denied in 1999 because claimant failed to establish total respiratory disability.[2] *See* 20 C.F.R. §725.310 (2000); Decision and Order at 2. The administrative law judge reviewed the medical evidence of record and found that the newly submitted evidence is sufficient to establish a mistake in a determination of fact as it supports a finding that claimant is totally disabled. Decision and Order at 2, 5. In addition, the administrative law judge found that the evidence supports a finding that there was a mistake in his prior determination regarding claimant's usual coal mine employment. Decision and Order at 4-5. Consequently, he found that claimant met his burden of establishing a mistake in a determination of fact in the prior Decision and Order. He then reviewed the remainder of the elements of entitlement and found that the evidence of record was sufficient to establish the existence of pneumoconiosis and that claimant's total respiratory disability was due to pneumoconiosis. Decision and Order at 5-6. Accordingly, the administrative law judge awarded benefits, commencing as of June 1997.

On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis and an award of benefits. Employer contends that the administrative law judge erred in finding that claimant's usual coal mine employment was different than previously determined and, thus, established a mistake of fact. In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant suffers from total respiratory disability and that the disability is due to pneumoconiosis. Lastly, employer

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial application for benefits on June 16, 1997. Director's Exhibit 1. In a Decision and Order issued on July 19, 1999, the administrative law judge denied benefits, finding that claimant established the existence of pneumoconiosis but failed to establish total respiratory disability. Director's Exhibit 41. On August 16, 2000, the Board affirmed the administrative law judge's denial of benefits. *Smith v. Drummond Company, Inc.*, BRB No. 99-1185 BLA (Aug. 16, 2000)(unpub.); Director's Exhibit 51. By Order dated March 6, 2001, the United States Court of Appeals for the Eleventh Circuit dismissed claimant's appeal as untimely filed. *Smith v. Director, OWCP and Drummond Company, Inc.*, No. 00-15592-AA (11th Cir. Mar. 6, 2001)(unpub.); Director's Exhibit 55. Claimant then filed a request for modification on June 22, 2001. Director's Exhibit 56.

contends that the administrative law judge erred in finding June 1997 as the date from which benefits commence. In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence.

The Director, Office of Workers' Compensation Programs (the Director), has filed a brief stating that he will not respond on the merits of entitlement. The Director, however, addresses the issue of the date of the modification, seeking to correct a misstatement by the administrative law judge that the one year time period in which to file a request for modification ran from August 16, 2000, the date of the Board's affirmance of the administrative law judge's Decision and Order, rather than March 6, 2001, the date of the United States Court of Appeals for the Eleventh Circuit's dismissal of claimant's appeal. The Director states that this error is harmless though because claimant's request for modification was filed within one year of the Board's decision.[3] The Director also challenges the administrative law judge's date of onset finding, arguing that the administrative law judge erred in failing to adequately explain his finding that the evidence of record establishes a mistake of fact and its subsequent impact on the determination of the date of onset.

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).

Initially, we reject employer's contention that the administrative law judge failed to adequately explain his determination of a change in claimant's usual coal mine employment. *See* Employer's Brief at 16-17. The administrative law judge noted that in his prior decision, he found that claimant's usual coal mine employment was as a "face boss" with Shoal Creek mine,[4] based on claimant's testimony that he worked at Shoal Creek for eighteen months. Decision and Order at 4. However, based on claimant's more detailed testimony from the 2002 hearing, the administrative law judge found that claimant's job at Shoal Creek mine consisted of two separate jobs, the most recent position as a "face boss," lasting for six months, and his prior position in coal mine

[3] As claimant's request for modification was filed within one year of the Board's Decision and Order, we need not address the administrative law judge's reference to the date of the Eleventh Circuit's dismissal of claimant's appeal as untimely. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] The administrative law judge noted that at the 2002 hearing Shoal Creek mine was transcribed as "Shuttle Creek." Decision and Order at 4.

construction, which lasted for twelve months. Decision and Order at 4; Hearing Transcript at 12-18, 37-38. Based on this testimony, the administrative law judge found that claimant's employment at Shoal Creek mine did not qualify as his usual coal mine employment because it was not held for a substantial period of time. *Id*. Rather, the administrative law judge rationally found that claimant's usual coal mine employment was as a "face boss" at Mary Lee 2 mine, a position that claimant held for the twenty years prior to his employment at Shoal Creek. Decision and Order at 5; *Daft v. Badger Coal Co.*, 7 BLR 1-124 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534 (1982). The administrative law judge further found that claimant's employment at Mary Lee 2 mine included not only supervisory duties but also assisting the workers in hanging 80 to 120 pound burlap curtains, handling oil drums, carrying powder kegs and also shoveling coal on the belt line, and, thus, was "exertional and required at least a moderate degree of manual labor." Decision and Order at 5; Hearing Transcript at 19-25; *see generally Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Moreover, we hold that error, if any, in the administrative law judge's determination that claimant's job as a "face boss" at Mary Lee 2 mine constituted his usual coal mine employment, is harmless as the exertional requirements credited by the administrative law judge for work at Mary Lee 2 mine are comparable to the requirements claimant testified to having in his position in mine construction and as a "face boss" at Shoal Creek. *See* Hearing Transcript at 13-18. Thus, as the administrative law judge's decision to credit claimant's employment as a "face boss" at Mary Lee 2 mine as his usual coal mine employment is not inherently irrational, this finding is affirmed. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); s*ee generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

With regard to the administrative law judge's finding that the evidence is sufficient to establish total respiratory disability and, thus, sufficient to support modification, employer contends that the administrative law judge relied on evidence not contained in the record and, therefore, his findings regarding the existence of a totally disabling respiratory impairment are in violation of the Administrative Procedure Act (APA). The Administrative Procedure Act, 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). Employer also contends that the administrative law judge did not consider all of the relevant evidence contained in the record, *i.e.*, the pulmonary function study and blood gas study results, and the medical reports which found that claimant was not totally disabled.

In finding that the newly submitted medical evidence is sufficient to establish total respiratory disability and, thus a mistake in a determination of fact, the administrative law judge found that total disability was proven by the medical opinion evidence that

considered the results of a methacholine challenge test.[5] Decision and Order at 2. In particular, the administrative law judge credited the medical opinion of Dr. Westerman, the physician who administered the test, as a diagnosis of total respiratory disability, based on the physician's opinion that it was unlikely that claimant could continue to work in the underground mines. Dr. Westerman stated that based on the results of the methacholine challenge test, it would be unlikely that claimant could return to the work of an underground coal miner as a combination of exertion, fumes and dust would likely lead to significant bronchospastic disease and limit claimant's work capacity. Decision and Order at 2-3; Director's Exhibits 59, 63. Thus, Dr. Westerman opined that claimant, "with the symptoms he currently experiences is totally disabled when considering work in the coal mines." Director's Exhibit 63. The administrative law judge further found that Dr. Westerman's opinion was supported by the opinion of Dr. Russakoff, which included a review of Dr Westerman's medical report. Decision and Order at 3. In his report, Dr. Russakoff stated that claimant does have an intermittent impairment and that claimant would be totally disabled from a pulmonary standpoint for work in an environment with dust and fumes. Decision and Order at 3; Employer's Exhibit 3.

Addressing the other opinions of record, the administrative law judge found that Dr. Goldstein reported abnormalities on claimant's blood gas study and pulmonary function study, but did not address the issue of total disability. Decision and Order at 3; Employer's Exhibit 4. The administrative law judge further found that Dr. Goldstein did not review the methacholine challenge test, which was the basis of the opinions supportive of a finding of a total respiratory disability. *Id*. The administrative law judge then found that Dr. Hasson's opinion, that claimant is not totally disabled, was not persuasive enough to outweigh the opinions of Drs. Westerman and Russakoff. Decision and Order at 3-4; Director's Exhibit 64. Consequently, based on the opinions of Drs. Westerman and Russakoff, the administrative law judge found that the medical opinion evidence was sufficient to establish total respiratory disability. Decision and Order at 4.

Contrary to employer's contention, it was not error for the administrative law judge to credit the medical opinion of Dr. Westerman even though it was based on a medical test which was not admitted into the record. There is nothing in the Act or the regulations governing this case which require that the materials on which a physician, as a medical expert, bases his opinion be admitted into the record, provided that they are of the type of evidence which a reasonable expert would normally use in formulating a professional opinion. *See Peabody Coal Co. v. Director, OWCP* [*Durbin*], 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999); *see generally* Fed. R. Evid. 703. Consequently, the

[5] Dr. Westerman, in his September 13, 2001 medical report, stated that a "methacholine challenge test" is a "bronchoprovocation study." Director's Exhibit 63.

administrative law judge was not required to discredit the medical opinion of Dr. Westerman because it was based on evidence not submitted into the record. *Id*.

However, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total respiratory disability as he has not adequately explained whether the medical opinions of record are sufficient to establish a total respiratory disability under the regulations in accordance with 20 C.F.R. §718.204(b) (2000). Specifically, the administrative law judge must determine whether claimant has a respiratory or pulmonary impairment which prevents or prevented claimant from performing his usual coal mine employment and from engaging in employment in the immediate area of his residence requiring comparable skills and abilities. 20 C.F.R. §718.204(b)(1) (2000). In determining whether the relevant medical opinions are sufficient to establish total disability, a diagnosis that claimant should not return to a dusty environment is not a sufficient basis, in and of itself, to establish total respiratory disability. S*ee Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Consequently, on remand, the administrative law judge must determine whether the opinions of Drs. Westerman and Russakoff are supportive of a finding that claimant's respiratory impairment is totally disabling such that it prevents claimant from performing his usual coal mine work. *Id*.

In addition, the administrative law judge must weigh Dr. Hasson's opinion, that claimant does not have a totally disabling pulmonary impairment caused by his pneumoconiosis, in light of the underlying documentation relied upon by Dr. Hasson which included his consideration of the methacholine challenge test. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Specifically, the administrative law judge must provide a more complete discussion of how the change in Dr. Hasson's opinion regarding the existence of pneumoconiosis impacts the credibility of his opinion regarding total disability. However, we affirm the administrative law judge's discrediting of the opinion of Dr. Goldstein, as the administrative law judge reasonably found that the physician did not address the issue of the presence, or extent, of a totally disabling respiratory or pulmonary impairment. Decision and Order at 3-4; Employer's Exhibit 4; 20 C.F.R. §718.204(b)(2)(iv); *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee*, 9 BLR 1-4.

If, on remand, the administrative law judge finds the medical opinion evidence sufficient to demonstrate total respiratory disability, he must again weigh this evidence with the like and unlike evidence at Section 718.204(c)(1)-(3) (2000), which he found insufficient to demonstrate total respiratory disability, *see* Decision and Order at 2, 5, to determine whether claimant has established a totally disabling respiratory impairment by a preponderance of the evidence. *Fields*, 10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Employer also challenges the administrative law judge's finding that the medical evidence of record establishes the existence of pneumoconiosis under Section 718.202(a), arguing that the administrative law judge erred in not reweighing the x-ray evidence on modification. Contrary to employer's contention, it was not error for the administrative law judge to decline to reconsider the x-ray evidence of record. The administrative law judge in his prior decision found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see* 1999 Decision and Order at 3; Director's Exhibit 41, and, the new evidence which employer argues the administrative law judge failed to consider on modification is supportive of that finding. Therefore, error, if any, in the administrative law judge's failure to specifically weigh the x-ray evidence on remand is harmless. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

However, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand the case for the administrative law judge to more fully discuss his rationale thereunder. Specifically, on remand, the administrative law judge must apply the proper legal standard for determining the existence of legal pneumoconiosis under Sections 718.201 and 718.202(a)(4), as a medical opinion which only diagnoses a temporary worsening of pulmonary symptoms upon exposure to coal dust, but no permanent effect, is not sufficient to support a finding of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4); *Henley v. Cowan and Company, Inc.*, 21 BLR 1-147 (1999). Consequently, on remand, the administrative law judge must provide a specific determination as to whether the medical opinions of record are sufficient to establish the existence of pneumoconiosis under the proper regulatory standard. *Id.*

Moreover, the administrative law judge must reconsider the opinion of Dr. Goldstein, that claimant does not suffer from pneumoconiosis, because his prior evaluation of this opinion was based upon the fact that Dr. Goldstein was not privy to the results of the methacholine challenge test relied upon by the other physicians, rather than, determining whether this opinion was reasoned and documented based on its own underlying documentation. Decision and Order at 5; Employer's Exhibit 4; *see Clark*, 12 BLR 1-149; *Lafferty*, 12 BLR 1-190; *Fields*, 10 BLR 1-19. However, we affirm the administrative law judge's finding that Dr. Hasson's most recent opinion, that claimant does not suffer from pneumoconiosis, is not "sufficiently persuasive" as the administrative law judge rationally found that this opinion is inconsistent with Dr. Hasson's earlier opinions, wherein he diagnosed the existence of pneumoconiosis. Decision and Order at 5, 6; Director's Exhibits 14, 29, 39, 64; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

Furthermore, we reject employer's contention that the administrative law judge must weigh all like and unlike medical evidence relevant to the existence of

pneumoconiosis because the Eleventh Circuit has not adopted the holdings of the United States Courts of Appeals for the Third and Fourth Circuits in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000)(requiring that all types of relevant evidence of record be weighed together in determining whether claimant has established the existence of pneumoconiosis under Section 718.202(a)). *See* 20 C.F.R. §718.202(a)(1)-(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

If, on remand, the administrative law judge finds the evidence sufficient to establish pneumoconiosis, he must also address whether the medical opinions of record affirmatively establish that claimant's pneumoconiosis is a substantially contributing factor to claimant's total respiratory disability. 20 C.F.R. §718.204(c); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Lastly, as we have vacated the administrative law judge's award of benefits, we decline to address employer's contentions regarding the administrative law judge's determination of June 1, 1997 as the date from which benefits commence since this determination is premature. If, however, on remand, the administrative law judge finds the evidence sufficient to again award benefits, he must then consider and fully discuss the relevant, credible evidence to determine the date from which claimant's pneumoconiosis progressed to the point of being totally disabling. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see generally Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). Specifically, pursuant to Section 725.503(b), benefits are payable from the month of onset of total disability due to pneumoconiosis. Thus, an administrative law judge is required to consider all relevant evidence of record and identify the pertinent date. If the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis, then benefits commence as of the miner's filing date, unless credible, uncontradicted medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. *Id*. In determining the proper date of onset, the administrative law judge must be mindful of the fact that the instant case involves a request for modification and, thus, his finding regarding the grounds supporting modification impact the date from which benefits may commence. *See generally Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings 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