BRB No. 01-0712 BLA

CHARLES R. BROWN	)	
	)	
Claimant-	)	
Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
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.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Barry H. Joyner (Eugene Scalia, 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (95-BLA-2525) of Administrative Law Judge Michael P. Lesniak 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] This case is before the Board for the second time. In his original Decision and Order, the administrative law judge found that the instant case, filed October 19, 1994, involves a duplicate claim pursuant to 20 C.F.R. §725.309 (2000).[2] Based on employer's concession that claimant now suffers from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that a material change in conditions was established pursuant to Section 725.309 (2000). Addressing the merits of the claim, the administrative law judge found that the medical evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his original application for benefits with the Social Security Administration on June 1, 1973, which he elected to have reviewed by the Department of Labor in 1978. Director's Exhibit 27 at Director's Exhibit 1. This claim was denied by the district director on July 21, 1980. Director's Exhibit 27 at Director's Exhibit 26. No further action was taken on this claim.

Claimant filed his second application for benefits on January 23, 1983, which was denied by the district director on May 2, 1984. Director's Exhibit 27 at Director's Exhibits 2, 27. The case was transferred to the Office of Administrative Law Judges on June 15, 1984. Director's Exhibit 27 at Director's Exhibit 37. Following a formal hearing, Administrative Law Judge Sheldon R. Lipson denied benefits in a Decision and Order issued on January 22, 1988. Judge Lipson found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). However, benefits were denied based on Judge Lipson's determination that the medical evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Claimant appealed and the Board affirmed the denial of benefits in a Decision and Order issued May 11, 1990. *Brown v. Consolidation Coal Co.*, BRB No. 88-0593 BLA (May 11, 1990)(unpub.).

§§718.202(a)(1), (a)(4) and 718.203(b) (2000). In addition, the administrative law judge found the evidence established that claimant's pneumoconiosis was a contributing cause of his total disability pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits commencing as of October 1, 1994.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Brown v. Consolidation Coal Co.*, BRB No. 97-1016 BLA (Apr. 29, 1998)(unpub.). Initially, while noting that the administrative law judge erroneously weighed the CT scan evidence with the chest x-ray evidence, the Board, nonetheless, affirmed the administrative law judge's finding that the preponderance of the x-ray evidence was positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *Brown*, slip op. at 3. The Board also affirmed the administrative law judge's finding that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b). *Id*. Lastly, the Board affirmed the administrative law judge's finding that the opinion of Dr. Jaworski was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000), as within a reasonable exercise of his discretion. *Brown*, slip op. at 4.

Employer thereafter sought review of this case by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the case arises. The Fourth Circuit court vacated the award of benefits and remanded the case for further consideration of the relevant medical evidence. *Consolidation Coal Co. v. Brown*, No. 98-1923 (4th Cir. Sept. 26, 2000)(unpub.). The court remanded the case for consideration of all of the evidence relevant to the issue of the existence of pneumoconiosis under Section 718.202(a), in light of its recent holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Particularly, the court instructed the administrative law judge to give his reasons for crediting or discrediting each piece of relevant evidence.

On remand, the administrative law judge found the weight of the medical evidence as a whole sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and *Compton*. Decision and Order on Remand at 8-9. The administrative law judge further found that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment under Section 718.203(b). Decision and Order on Remand at 9. Lastly, the administrative law judge found that the medical opinions of Drs. Schroering and Jaworski related that claimant's pulmonary disability was due to pneumoconiosis and, therefore, were sufficient to establish causation pursuant to

Section 718.204(c).[3] Decision and Order on Remand at 10. Accordingly, the administrative law judge awarded benefits commencing as of October 1, 1994, the month in which claimant filed his most recent claim.

In its current appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish entitlement to benefits, arguing that the administrative law judge failed to weigh and adequately discuss the relevant, conflicting evidence of record. Employer also contends that the onset regulation, as set forth at 20 C.F.R. §725.503(b), is contrary to the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) and also violates §7(c) of the Administrative Procedure Act, because it impermissibly shifts the burden of proof to employer to establish the date on which claimant became totally disabled due to pneumoconiosis.

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), responds, but declines to address employer's arguments regarding the weighing of the medical evidence of record on the merits of entitlement. However, with regard to the issue of the administrative law judge's determination of October 1, 1994 as the date from which benefits commence, the Director urges that the Board reject employer's contention, arguing that Section 725.503(b) is not invalid inasmuch as it does not impermissibly shift the burden of persuasion to employer.

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 applicable 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).

On appeal, employer contends that the administrative law judge failed to adequately explain his rationale for finding that the medical evidence was

[3] The regulations pertaining to total disability causation, previously set forth in 20 C.F.R. §718.204(b) (2000), are now set forth at 20 C.F.R. §718.204(c) (2001).

sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer argues that the administrative law judge failed to adequately explain his rationale for crediting the medical opinion of Dr. Jaworski, that claimant suffers from pneumoconiosis, inasmuch as the administrative law judge did not fully address and resolve the conflicts within Dr. Jaworski's medical reports. In addition, employer contends that the administrative law judge did not consider all of the relevant evidence as he failed to provide a valid basis for discrediting the CT scan evidence of record and the medical opinions of Drs. Renn, Fino and Morgan. Employer further contends that the administrative law judge's decision does not comport with the remand instructions of the Fourth Circuit court. These contentions have merit.

In remanding this case for further consideration, the Fourth Circuit court instructed the administrative law judge to "give his reasons for crediting or discrediting each piece of relevant evidence, including the CT scan evidence, ventilatory and arterial blood gas studies, x-ray evidence, and various physicians' opinions." *Brown*, No. 98-1923, slip op. at 3. Based on a review of the record, the administrative law judge has not adequately discussed the bases for his crediting of the opinions of Drs. Harron, Reynolds, Schroering and Jaworski, that claimant is suffering from pneumoconiosis. The administrative law judge noted that these opinions were based on claimant's x-rays, physical examination and his coal dust exposure, without elaborating on how this evidence supports the physicians' conclusions. Decision and Order on Remand at 8. Rather, the administrative law judge provided a detailed analysis of the opinions of Drs. Renn, Fino and Morgan, that claimant is not suffering from pneumoconiosis, and the bases for his discrediting these opinions. Decision and Order on Remand at 8; *see* Director's Exhibits 23, 27; Employer's Exhibits 3, 5, 9, 10. However, inasmuch as claimant bears the burden of proof in establishing all of the elements of entitlement under Part 718, *see Ondecko*, *supra*, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis and remand the case for the administrative law judge to provide cogent reasons for his crediting and discrediting the evidence of record. *Ondecko, supra; Brown*, No. 98-1923, slip op. at 2-3.

Specifically, in accordance with the Fourth Circuit court's instructions, the administrative law judge must fully discuss his rationale for crediting the opinion of Dr. Jaworski, in light of the inconsistencies in the physician's various medical reports.[4] *See* Director's Exhibits 11, 23A; Claimant's Exhibit 1; Employer's

[4] The record contains multiple reports from Dr. Jaworski. In the initial report, dated November 11, 1993, Dr. Jaworski opined that claimant is suffering

Exhibit 1. In addressing the relative probative weight of the medical opinion evidence, the administrative law judge must examine the validity of the reasoning of the medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, the detail or thoroughness of the analysis in the physician's opinion is another factor to be considered by the administrative law judge in determining the weight to accord the various medical opinions. *See Compton, supra*; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, n.9, 21 BLR 2-323, 2-335, n.9 (4th Cir. 1995), citing *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 19 BLR 2-23 (4th Cir. 1997) (lists factors to be considered by the

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from exertional dyspnea most likely due to chronic obstructive pulmonary disease and that "we may be dealing with interstitial lung disease of unknown etiology." Director's Exhibit 23A. In August 1994, following a review of additional evidence, including the March 8, 1994 CT scan, Dr. Jaworski opined that claimant has a component of mild emphysema as shown by claimant's history, physical examination results, *i.e.*, intermittent wheezing, pulmonary function study and x-ray and CT scan findings. Claimant's Exhibit 1. Dr. Jaworski also noted that the x-ray demonstrated a few scattered "q" opacities consistent with simple coal workers' pneumoconiosis. *Id*. However, he found the predominant pattern to be small irregular opacities in the lower lung zones, characteristic of idiopathic pulmonary fibrosis or possibly asbestosis, which he found to be even better visualized on the high resolution CT scan. *Id*. In his conclusion, Dr. Jaworski again diagnosed exertional dyspnea with a marked reduction of exercise tolerance and exercise reduced hypoxemia, which would be totally disabling. *Id*. In addition, Dr. Jaworski opined that the etiology of claimant's shortness of breath is probably his idiopathic pulmonary fibrosis, or asbestosis, but also chronic obstructive lung disease due to cigarette smoking and coal dust exposure may contribute to some degree. *Id*. In a report dated December 6, 1994, Dr. Jaworski diagnosed interstitial lung disease of uncertain etiology, with the predominant x-ray findings consistent with irregular opacities. Director's Exhibit 11. In addition, Dr. Jaworski diagnosed probable, mild simple pneumoconiosis by x-ray evidence. *Id*. The record also contains approximately monthly office notes from Dr. Jaworski dated between December 10, 1993 and April 28, 1995, wherein Dr. Jaworski diagnoses a respiratory condition, most often idiopathic pulmonary fibrosis. However, there is no explicit diagnosis of coal workers' pneumoconiosis or other respiratory condition related to claimant's coal dust exposure. Director's Exhibit 23A. Finally, Dr. Jaworski's January 1995 deposition testimony reiterates the opinions set forth in his written reports. Employer's Exhibit 1.

administrative law judge). Consequently, on remand, the administrative law judge must weigh the medical opinion evidence of record and determine whether these opinions are reasoned opinions, stating the specific bases for his findings. *See Hicks, supra; Underwood, supra; Fields, supra*.

In addition, we find merit in employer's argument that the administrative law judge did not comply with the Fourth Circuit's Order to consider all of the relevant evidence. On remand, the administrative law judge must reweigh the CT scan evidence and provide an adequate rationale for the weight it is accorded. While the Board held in its prior Decision and Order it is not proper for the administrative law judge to weigh the CT scan evidence with the x-ray evidence under Section 718.202(a)(1), *Brown*, BRB No. 97-1016 BLA, slip op. at 3; *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); contrary to the administrative law judge's suggestion, merely because a test is not specifically provided for in the regulations, does not cause the test to be any less credible than such evidence as is addressed in the regulations. Rather, the administrative law judge is required to consider all relevant evidence in making his determinations, including those tests not specifically addressed in the regulations. 20 C.F.R. §718.107; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). In remanding the case for reconsideration of all of the evidence under Section 718.202(a), the Fourth Circuit court clearly held that "the ALJ should give his reasons for crediting or discrediting each piece of relevant evidence, including the CT scan evidence, ventilatory and arterial blood gas studies, x-ray evidence, and various physicians' opinions." *Brown*, No. 98-1923, slip op. at 3; *see Compton, supra*. Consequently, on remand, the administrative law judge must consider and discuss the totality of the evidence relevant to the credibility of the CT scan evidence, including, but not limited to, the medical reports and deposition testimony of Drs. Renn, Morgan and Jaworski, in which the physicians provide their assessments of the probative value of CT scan evidence in comparison to standard x-ray evidence.[5] 20 C.F.R. §718.107; *Walker, supra*; Claimant's Exhibits 1, 5; Employer's Exhibits 1, 3, 9, 10.

Once the administrative law judge has considered all the relevant evidence under Section 718.202(a)(1)-(4), he must then weigh all of this evidence together,

[5] On remand, the administrative law judge must consider all of the interpretations of the March 8, 1994 CT scan, including the reports of Drs. Jaworski and Almasy, Claimant's Exhibits 4, 5, which were not included in the administrative law judge's discussion of the CT scan evidence in his prior decision. *See* Decision and Order on Remand at 8.

including the x-ray evidence, CT scan evidence and medical opinion evidence, in determining whether claimant has established the existence of pneumoconiosis by a preponderance of the evidence. *Compton, supra.*

Employer also challenges the administrative law judge's finding that the medical evidence is insufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b). Specifically, employer contends that the administrative law judge failed to provide an on-the-record discussion of the specific evidence he credited at Section 718.203(b). We agree.

The administrative law judge, in finding that the Section 718.203(b) presumption had not been rebutted, relied on his weighing of the medical evidence pursuant to Section 718.202(a). *See* Decision and Order on Remand at 9. He did not, however, separately discuss the weight or credibility of the evidence relevant to the rebuttal of this presumption. *Id*. Inasmuch as we have vacated the administrative law judge's findings pursuant to Section 718.202(a), *see* discussion, *supra*, we further vacate his findings at Section 718.203(b) and remand the case for further consideration of the evidence. On remand, the administrative law judge must weigh the relevant evidence to determine whether it is sufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment and, not, whether it affirmatively establishes that claimant's pneumoconiosis arose from his coal mine employment. 20 C.F.R. §718.203(b).

Furthermore, in light of our holding which vacates the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(4), we likewise vacate the administrative law judge's determination that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c) inasmuch as this finding was based, at least in part, on his Section 718.202(a) findings. *See* Decision and Order on Remand at 10. Pursuant to Section 718.204(c), claimant must prove by a preponderance of the evidence that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c). Consequently, if on remand, the administrative law judge again finds that claimant has established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a) and 718.203(b), he must then determine whether the evidence also establishes causation in accordance with Section 718.204(c). *Id.*

Lastly, inasmuch 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 October 1, 1994 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).

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated 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

PETER A. GABAUER, Jr.
Administrative Appeals Judge