BRB No. 13-0454 BLA

RICKY J. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE	)	DATE ISSUED: 04/28/2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5460) of Administrative Law Judge Stephen M. Reilly awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(2012) (the Act).[1] This case involves a claim filed on November 20, 2008.

After crediting claimant with 30.68 years of coal mine employment,[2] the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge, therefore, found that claimant affirmatively established his entitlement to benefits under 20 C.F.R. Part 718. In addition, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did

[1] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Black Lung Benefits Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Unless otherwise indicated, the relevant version of all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 2. 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).

[3] "Clinical pneumoconiosis" consists of "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer also contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Baker, Alam, Broudy and Dahhan.

Dr. Baker diagnosed a severe pulmonary impairment, and opined that that claimant "would not have the respiratory capacity to do the work of a coal miner." Director's Exhibit 8. Dr. Alam also diagnosed a severe pulmonary impairment, and opined that claimant is "completely disabled from a pulmonary point of view." Claimant's Exhibit 4. Although Dr. Dahhan diagnosed a "mild ventilatory impairment," he opined that claimant was not totally disabled from a pulmonary standpoint. Employer's Exhibits 3, 4 at 13. Dr. Broudy similarly opined that claimant retained the pulmonary capacity to perform his previous coal mine employment. Employer's Exhibit 6 at 23.

After finding that claimant's coal mine employment required moderate to heavy manual labor, Decision and Order at 3, the administrative law judge considered the conflicting medical opinion evidence. The administrative law judge initially accorded "little weight" to Dr. Broudy's opinion because he found that the doctor failed to fully

consider the exertional requirements of claimant's coal mine employment. Decision and Order at 18. The administrative law judge also accorded less weight to Dr. Broudy's opinion because the doctor failed to take into account that claimant's pulmonary function study results were "very close to being qualifying." *Id.* In regard to the remaining medical opinion evidence, the administrative law judge stated:

> I give some weight to Dr. Dahhan's opinion. It is not clear that he fully considered the exertional requirements of [claimant's] last coal mine employment. However, unlike Dr. Broudy, Dr. Dahhan considered other factors outside of [the] regulatory qualification of pulmonary function testing in making this decision. These included diffusion capacity and residual volume. I therefore give some weight to Dr. Dahhan's opinion.
>
> I give some weight to Dr. Baker's opinion. He considered [claimant's] overall lung function in assessing the level of impairment. Dr. Baker therefore concluded that [claimant] would not be able to perform his last coal mining job.
>
> I give greater weight to Dr. Alam's opinion and the associated medical records. Dr. Alam diagnosed a significant impairment and noted both that [claimant] would benefit from retirement and that he was unable to perform daily activities due to breathing issues. This opinion is based upon [claimant's] inability as observed over several years. I give this opinion great weight because it is based upon Dr. Alam's extensive relationship with [claimant].

Decision and Order at 19.

Having accorded "greater weight" to Dr. Alam's opinion, "some weight" to the opinions of Drs. Baker and Dahhan, and "little weight" to Dr. Broudy's opinion, the administrative law judge found that the weight of the medical opinion evidence supported a finding of total disability. Decision and Order at 19. Based upon the weight of the medical opinion evidence, and the "support of [the] pulmonary function studies,"[5] the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.*

[5] Although the administrative law judge noted that the weight of the pulmonary function study evidence failed to "meet the regulatory requirements," he nonetheless found that, because claimant performed moderate to heavy manual labor, this evidence supported a finding of total disability. Decision and Order at 18.

Employer contends that the administrative law judge erred in his consideration of Dr. Alam's opinion. We agree. In crediting Dr. Alam's opinion, the administrative law judge erred in relying, in part, upon the doctor's statement, in a January 6, 2008 treatment note, that claimant's planned retirement from coal mine employment would be helpful to him. Decision and Order at 18-19; Director's Exhibit 11 at 27. A physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge, in crediting Dr. Alam's opinion, erred in relying, in part, upon the doctor's recitation of claimant's symptoms. The administrative law judge noted that Dr. Alam, in a February 6, 2008 treatment note, recorded that claimant's "breathing [was] so bad that he couldn't do any daily activities at home."[6] Decision and Order at 18-19; Director's Exhibit 11 at 29. A mere recitation of symptoms is not a finding of the existence, or a conclusion as to the degree or severity, of an impairment based on those symptoms. *See Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984); *Bushilla v. North American Coal Corp*., 6 BLR 1-365 (1983). Consequently, the administrative law judge erred in relying upon these statements to support a finding of total disability.

Employer also argues that the administrative law judge erred in according greater weight to Dr. Alam's opinion, based upon his status as claimant's treating physician, without addressing the reasoning underlying his assessment of claimant's pulmonary impairment. We agree. An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, the opinions of treating physicians get the deference they deserve based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). In a July 8, 2009 medical report, Dr. Alam opined that claimant "is completely disabled from a pulmonary point of view *because [of] his FEV1 which is around 40-50% [of] predicted.*" Claimant's Exhibit 4 (emphasis added). Dr. Alam based this assessment on the results of a 2007 pulmonary function study, which he interpreted as showing "severe restriction with airflow obstruction." Claimant's Exhibit 3. In an August 17, 2011 medical report, Dr. Alam noted that claimant's "FEV1 has never improved." *Id.*

[6] In his summary of the doctor's opinion, the administrative law judge also stated that Dr. Alam "opined that [claimant] is 'unable to do any exertional work.'" Decision and Order at 18. However, as employer accurately notes, Dr. Alam's full statement was that "[claimant's] main issue is that he is unable to do any exertional work." Claimant's Exhibit 4. Because Dr. Alam's statement appears in a paragraph addressing claimant's symptoms and complaints, it appears to be a listing of claimant's complaints, rather than the doctor's own assessment of claimant's work limitations.

Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, in crediting Dr. Alam's opinion, the administrative law judge erred in not addressing the validity of the specific reasoning that Dr. Alam provided for his opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99 (6th Cir. 1983). Specifically, the administrative law judge did not address Dr. Alam's basis for opining that claimant is totally disabled from a pulmonary standpoint, namely, the FEV1 results from claimant's pulmonary function studies. On remand, the administrative law judge is instructed to consider whether Dr. Alam's diagnosis of a totally disabling pulmonary impairment is reasoned and documented, taking into consideration the objective evidence, underlying documentation, and rationale provided by Dr. Alam in support of his opinion.[7] *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer also contends that the administrative law judge mischaracterized the opinions of Drs. Dahhan and Broudy. Employer specifically argues that the administrative law judge erred in finding that Drs. Dahhan and Broudy failed to "fully consider" the exertional requirements of claimant's last coal mine employment. We agree. The administrative law judge found that claimant last worked as a utility man at the preparation plant, where he operated "the thickener," repaired machinery, worked at the tipple, and swept the floor. Decision and Order at 3. The administrative law judge found that claimant performed moderate to heavy manual labor. *Id.* Dr. Dahhan testified that he was aware that claimant worked at a preparation plant as a repairman and cleaned up. Employer's Exhibit 4 at 13. Dr. Dahhan also testified that he was familiar with work at a preparation plant, as well as the type of work and general labor that claimant described. *Id.* When asked whether he was "familiar with what goes on in a tipple," Dr. Broudy stated that he had "toured an underground mine and [had] seen the tipple operation." Employer's Exhibit 6 at 23. Thus, contrary to the administrative law judge's characterization, Drs. Dahhan and Broudy each indicated an awareness of the physical requirements of claimant's last coal mine employment. On remand, the administrative

[7] Employer accurately notes that the administrative law judge, in considering whether the pulmonary function study evidence established total disability, accorded the greatest weight to the September 2, 2011 pulmonary function study, which produced non-qualifying results, both before and after the administration of a bronchodilator. Decision and Order at 6-7; Employer's Exhibit 2. Employer accurately notes that the September 2, 2011 pulmonary function study produced FEV1 values that were 62% of predicted, both before and after the administration of a bronchodilator. These results are higher than the FEV1 values relied upon by Dr. Alam to support his opinion that claimant is totally disabled.

law judge is instructed to consider this testimony in weighing the conflicting medical opinion evidence.[8]

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration. On remand, when considering whether the medical opinion evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If, on remand, the administrative law judge finds that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) (iv), he must weigh all the evidence together, both like and unlike, to determine whether claimant has established that he is totally disabled pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc).

In light of our decision to vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's award of benefits under 20 C.F.R. Part 718, *Trent*, 11 BLR at 1-27, as well as the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). On remand, if claimant establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), he is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[9] 30 U.S.C. §921(c)(4). If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's

[8] The administrative law judge also accorded less weight to Dr. Broudy's opinion because the doctor failed to take into account that the pulmonary function study results were "very close to being qualifying." *Id.* Employer, however, accurately notes that Dr. Broudy testified that claimant retained the pulmonary capacity to perform his previous coal mine employment, whether or not claimant's pulmonary function studies were above or below the disability standards. Employer's Exhibit 6 at 23.

[9] Because employer does not challenge the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, this finding is affirmed. Decision and Order at 22; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

In this case, the administrative law judge found that employer failed to establish rebuttal of the Section 411(c)(4) presumption by either method. In the interest of judicial economy, we will address the administrative law judge's determination that employer failed to establish rebuttal. The administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis. Decision and Order at 16-17. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1); *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge found that the opinions of Drs. Dahhan and Broudy, that claimant's disabling pulmonary impairment did not arise out of his coal mine employment, could not satisfy employer's burden on rebuttal because neither physician considered the contribution of legal pneumoconiosis to claimant's disability. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 22. Because employer does not challenge this finding, it is affirmed. *Skrack*, 6 BLR at 1-711. We, therefore, affirm the administrative law judge's finding that employer cannot satisfy its burden to establish rebuttal. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

In summary, if the administrative law judge, on remand, finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption, and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge, on remand, finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of

[10] We, therefore, need not address employer's contention that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant will be entitled to benefits.

Accordingly, the administrative law judge's Decision and Order awarding 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.

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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