BRB No. 07-0944 BLA

J.V.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIKEVILLE COAL COMPANY	)	DATE ISSUED: 08/22/2008
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant appeals the Decision and Order denying benefits (06-BLA-6133) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a subsequent claim filed on November 4, 2005, 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). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and accepted the parties' stipulations to nineteen years of coal mine employment and that employer is the responsible operator. The administrative law judge also found that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309 as the evidence established total disability at 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against claimant. The administrative law judge also found total disability established on the merits at Section 718.204(b). However, the administrative law judge found that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(4) on the merits.[1] Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1), and that the medical opinions of Drs. Agarwal and Rasmussen did not establish legal pneumoconiosis at Section 718.202(a)(4). Claimant further asserts that the administrative law judge failed to identify the probative weight he placed on Dr. Dahhan's opinion, which claimant argues is hostile to the Act. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds by letter, agreeing with claimant that the administrative law judge's legal pneumoconiosis finding at Section 718.202(a)(4) is flawed, and urging remand of the case for reconsideration of that issue.[2]

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,

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[1] The administrative law judge further found that because the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4), he could not find that pneumoconiosis arose, at least in part, out of coal mine employment pursuant to 20 C.F.R. §718.203(b) or that pneumoconiosis was totally disabling pursuant to 20 C.F.R. §718.204(c).

[2] The administrative law judge's finding that pneumoconiosis could not be established at to 20 C.F.R. §718.202(a)(2) and (3) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Likewise, the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309 and that total disability was established on the merits pursuant to 20 C.F.R. §718.204(b) are affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

and in accordance with applicable law.[3] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

At the outset, we note that claimant has failed to challenge, with sufficient specificity, the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). The Board's circumscribed scope of review requires that a party challenging the Decision and Order below demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. Because claimant has failed to do this, we affirm the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Claimant argues that the administrative law judge erred in finding that legal pneumoconiosis was not established at Section 718.202(a)(4), on the ground that "neither Dr. Agarwal nor Dr. Rasmussen addressed legal pneumoconiosis." *See* Decision and Order at 10. Claimant contends that this is error because both doctors, in fact, found that claimant has chronic obstructive pulmonary disease due to coal mine employment, *i.e.*, legal pneumoconiosis. Claimant contends, therefore, that the administrative law judge's finding in this regard must be vacated and the case remanded for further consideration of the medical opinion evidence at Section 718.202(a)(4). We agree.

[3] The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

A review of the record shows that Dr. Agarwal diagnosed emphysema with a severe obstructive component due to a combination of forty-nine years of smoking and nineteen years of coal mine employment, stating:

> Cause of chronic obstructive pulmonary disease is smoking…contribution from coal mine dust is small. However, in view of 19 years of coal dust exposure and severe loss of lung function, even a small contribution from coal mining is substantial.

Claimant's Exhibit 5. Dr. Rasmussen opined that claimant had "copd/emphysema" due to both coal dust exposure and smoking. Director's Exhibit 12. Dr. Rasmussen also stated that coal dust exposure and smoking cause identical forms of emphysema, and that the effects are not distinguishable. *Id*.

In discussing this evidence, the administrative law judge stated that claimant relied on "the opinions of Drs. Agarwal and Rasmussen in an attempt to show that claimant has legal pneumoconiosis." Decision and Order at 9. The administrative law judge further stated that while Dr. Agarwal found that claimant had "severe obstructive airway disease and hypoxemia," which "may be elements of legal pneumoconiosis," Decision and Order at 10, neither "Dr. Agarwal nor Dr. Rasmussen addressed legal pneumoconiosis." *Id*.

Legal pneumoconiosis is broadly defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201; *see also* 30 U.S.C. §902(b). A disease "arising out of coal mine employment" includes "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201. A medical opinion diagnosing chronic pulmonary or respiratory disease caused or aggravated by coal dust exposure may, if credited, constitute an opinion establishing legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2- 261 (6th Cir. 2005); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

As the opinions of Drs. Agarwal and Rasmussen diagnose a chronic respiratory impairment related to coal mine employment, the administrative law judge erred in finding that they did not address legal pneumoconiosis. Consequently, we agree with claimant and the Director that the administrative law judge's findings with respect to the opinions of Drs. Agarwal and Rasmussen on the issue of legal pneumoconiosis are flawed and we vacate those findings. On remand, the administrative law judge must reconsider whether these opinions are reasoned and, whether they, when considered with the other medical opinion evidence, establish legal pneumoconiosis at Section

718.202(a)(4). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 516, 22 BLR 2-625, 2-651-2 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Additionally, claimant contends that the administrative law judge never commented on how much probative weight he accorded to the opinion of Dr. Dahhan. Because the administrative law judge erroneously found that the opinions of Drs. Agarwal and Rasmussen did not address the issue of legal pneumoconiosis, he did not, consider and weigh them against the remaining medical opinion evidence on the issue. If, on remand, the administrative law judge determines that the opinions of Drs. Agarwal and Rasmussen are reasoned, he must then consider and weigh them, along with all of the medical opinion evidence relevant to the issue of legal pneumoconiosis at Section 718.202(a)(4), to determine which opinions are entitled to the greatest weight.[4] *See Clark*, 12 BLR at 1-155. If the administrative law judge finds legal pneumoconiosis established at Section 718.202(a)(4), he must then address whether it is totally disabling at 20 C.F.R. §718.204(c). *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[4] In addition to the opinion of Dr. Dahhan, who found that claimant's chronic obstructive pulmonary disease was due to smoking, not coal mine employment, the record also contains the opinion of Dr. Rosenberg, who found that claimant's chronic obstructive pulmonary disease was due to smoking, not coal mine employment.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge