BRB No. 09-0808 BLA

HENRY BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILLER BROTHERS COAL, INCORPORATED	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	DATE ISSUED: 08/31/2010
	)	
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 - Granting Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 - Granting Benefits (2008-BLA-05672) of Administrative Law Judge Richard K. Malamphy rendered on a miner's claim filed on August 22, 2007, pursuant to the Black Lung Benefits Act (the Act), 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In a Decision and Order dated August 6, 2009, the administrative law judge credited claimant with at least thirty-seven years of coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c).[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), (c), asserting that he failed to properly consider whether claimant established his entitlement to benefits based on a reasoned and documented medical opinion. Employer also asserts that the administrative law judge mischaracterized the opinion of Dr. Westerfield. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response unless specifically requested to do so by the Board.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Elements of Entitlement

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

[1] In discussing the issue of disability causation, the administrative law judge referenced 20 C.F.R. §718.203 and not the applicable regulation at 20 C.F.R. §718.204(c).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer argues on appeal that the administrative law judge erred in awarding benefits because he did not render specific findings as to whether the medical opinions were reasoned and documented under each of the subsections of 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), and (c). Employer contends that the administrative law judge resolved the conflict in the evidence in this case by engaging in a mere "nose count" of the medical experts, without any consideration as to whether the physicians had adequately explained their opinions as to the etiology of claimant's chronic obstructive pulmonary disease (COPD) or their diagnoses of total disability. Employer's Petition for Review and Brief at 7. Employer's assertions of error have merit.

In addressing the existence of pneumoconiosis, the administrative law judge noted that there was no x-ray or biopsy evidence for the disease pursuant to 20 C.F.R. §718.202(a)(1)-(2), and that claimant was not eligible for any of the presumptions set forth at 20 C.F.R. §718.202(a)(3), for establishing that he has pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered five medical opinions by Drs. Westerfield, Ammisetty, Hardin, Broudy and Dahhan. After summarizing each opinion, the administrative law judge noted that Drs. Westerfield, Ammisetty and Hardin have diagnosed legal pneumoconiosis[3] "based on [claimant's] extensive coal dust exposure, [his] short smoking history, and the presence of COPD." Decision and Order at 8; *see* Director's Exhibit 12; Claimant's Exhibits 1, 2. The administrative law judge further noted that Drs. Broudy and Dahhan diagnosed asthma "as indicated by the reversibility of lung impairment with the use of bronchodilators" and stated that "it is a disease of the general population." Decision and Order at 8. The administrative law judge then summarily concluded:

> Three physicians have related [claimant's] COPD to coal dust exposure in view of the minimal history of smoking. Drs. Broudy and Dahhan indicate that the smoking history is not significant but relate the pulmonary

[3] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

> impairment to asthma. However, Drs. Broudy and Dahhan have not ruled out coal dust exposure as a factor.
>
> Therefore, the undersigned concludes that the miner has legal pneumoconiosis as manifested by COPD.

Id. Thus, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We agree with employer that the administrative law judge has failed to explain how he resolved the conflict in the medical opinion evidence and appears to base his conclusion that claimant established the existence of legal pneumoconiosis on a "nose count" of the physicians, three against two. Employer's Petition for Review and Brief at 7. Before finding the medical reports of record to be sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge must first determine if the reports are reasoned and documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because the administrative law judge did not consider whether the physicians' opinions were reasoned and documented, and did not explain how he resolved the conflict in the medical opinion evidence as to whether claimant has legal pneumoconiosis, the administrative law judge has failed to comply with the Administrative Procedure Act (APA).[4] *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Thus, we vacate his finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for further consideration.

On remand, the administrative law judge must examine the conflicting medical opinions of Drs. Westerfield,[5] Ammisetty, Hardin, Broudy and Dahhan "in light of the

[4] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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).

[5] Employer asserts that Dr. Westerfield's "written opinion on legal pneumoconiosis was significantly damaged by his later deposition testimony," because Dr. Westerfield described only that claimant's symptoms and obstruction were compatible with coal dust exposure and did not demonstrate any medical certainty in his diagnosis. Employer's Brief in Support of Petition for Review at 11. On remand, the administrative law judge should address employer's argument that Dr. Westerfield's

studies conducted and the objective indications upon which the medical opinion or conclusion is based" and explain whether the diagnoses contained therein constituted reasoned medical judgments under 20 C.F.R. §718.202(a)(4). *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In resolving the conflict in the evidence, the administrative law judge must take into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *Id*.; s*ee also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge must determine the weight to accord each opinion and explain the basis for his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Employer also challenges the administrative law judge's finding that claimant is totally disabled and that his disability is due to pneumoconiosis. Employer's Brief in Support of Petition for Review at 7-9. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that "[n]one of the post-bronchodilation studies showed qualifying values nor did the most recent pre-bronchodilator study." Decision and Order at 9. The administrative law judge found that none of the arterial blood gas tests was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. In evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge summarily stated:

> All of the physicians in this case indicate that [claimant] has a pulmonary impairment that is totally disabling without appropriate treatment. Drs. Broudy and Dahhan suggest that with proper treatment of asthma, [claimant] might be able to return to previous employment.
>
> Drs. Hardin, Ammisetty, and Westerfield report that pulmonary impairment precludes further employment.

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opinion is equivocal and insufficiently reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

> The overall medical consensus is that from a pulmonary standpoint, this [claimant] cannot return to his previous work. Therefore, the criteria in [20 C.F.R.] §718.204(b)(2)(iv) has been met.

Decision and Order at 10-11. Thus, the administrative law judge concluded that claimant satisfied his burden of proof to establish total disability.

Employer contends that the administrative law judge erred in failing to address whether each opinion was reasoned and documented, prior to finding that claimant satisfied his burden of proof to establish total disability. Employer also contends that the administrative law judge erred in counting Dr. Westerfield's opinion among those who determined that claimant was totally disabled.

The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides for a finding of total disability if a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Because the administrative law judge has not specifically addressed whether any of the physicians' opinions diagnosing total disability were reasoned and documented, and sufficient to satisfy claimant's burden of proof, we are unable to affirm his finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 577, 22 BLR at 2-123. In light of our decision to remand this case, we instruct the administrative law judge to render credibility findings as discussed, *supra*, and explain the basis for his finding that claimant is totally disabled, in accordance with the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-162.

Additionally, employer maintains that Dr. Westerfield's opinion does not support a finding of total disability. In his December 3, 2007 medical report, Dr. Westerfield stated that claimant had a Class II impairment rating based on the fifth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. Director's Exhibit 12. Dr. Westerfield did not address whether claimant's respiratory impairment would preclude him from performing his usual coal mine employment. However, during his deposition on February 6, 2009, Dr. Westerfield provided testimony on the issue of total disability, stating that claimant is not totally disabled from his respiratory disease. Employer's Exhibit 1 at 17-18. On remand, the administrative law judge is instructed to determine whether Dr. Westerfield's opinion is supportive of a finding that claimant has a totally disabling respiratory or pulmonary impairment that

would preclude him from performing his usual coal mine work and to further resolve, as necessary, any conflict in the medical opinions as to this issue.[6]

With regard to the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge stated, "In view of my finding of legal pneumoconiosis, the allegation that asthma of unknown origin is the major factor in disability can not be accepted." Decision and Order at 13. Because we have vacated the administrative law judge's finding of legal pneumoconiosis, we must also vacate his finding pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must determine, as necessary, whether claimant satisfied his burden of proving that he is totally disabled due to pneumoconiosis. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). In so doing, the administrative law judge must explain the basis for his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

II. Amendments to the Act

By Order dated May 20, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Bailey v. Miller Brothers Coal, Inc.*, BRB No. 09-0808 BLA (May 20, 2010) (unpub. Order). In pertinent part, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of underground coal mine employment or coal mine employment in substantially similar conditions, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In addition, if the presumption is invoked, the burden of proof shifts to employer to show

[6] On remand, the administrative law judge should also reconsider the pulmonary function study evidence. The administrative law judge determined that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i), based in part on the fact that the pulmonary function studies were non-qualifying after a bronchodilator was administered. Contrary to the administrative law judge's analysis, however, the Department of Labor has specifically stated that the use of a bronchodilator "does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." *See* 45 Fed. Reg. 13682 (1980).

either that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. *Id*. Both employer and the Director have responded.

Employer states that, while Section 1556 is applicable because claimant filed his claim on August 22, 2007, claimant is not entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis because there is no evidence of fifteen years of *underground* coal mine employment or work in substantially similar conditions as compared to claimant's thirty-seven years of employment listed as strip mining. Employer's Supplemental Brief at 4. Employer also contends that even if the claimant is able to establish fifteen years of underground coal mine employment or employment for fifteen years in substantially similar conditions, the administrative law judge's errors in finding that claimant established the existence of legal pneumoconiosis and total disability require that the case be remanded to the administrative law judge and the record reopened, in order for employer to respond to the changes in the law.

The Director maintains that the rebuttable presumption is applicable based on the filing date of the claim. However, if the Board affirms the administrative law judge's award of benefits, the Director contends that it is not necessary to remand this case for consideration of the recent amendments. If the award of benefits cannot be affirmed, the Director maintains that the case must be remanded for consideration as to whether claimant is entitled to the Section 411(c) presumption. The Director asserts that the administrative law judge must first determine, on remand, whether claimant has established that at least fifteen years of his coal mine employment occurred underground or in substantially similar conditions at a surface mine. The Director also contends that the administrative law judge must reopen the record on remand to permit the parties to submit additional evidence to address the change in the law.

Based upon the parties' responses, and our review, we conclude that this case is affected by Section 1556. Because this case was filed after January 1, 2005 and was pending after March 23, 2010, and because we have vacated the administrative law judge's award of benefits, on remand, the administrative law judge must determine whether claimant is entitled to invocation of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge must first address whether claimant has established at least fifteen years of underground coal mine employment or work in surface mining in substantially similar conditions.[7] If so, and if claimant is

[7] Although the administrative law judge found thirty-seven years of coal mine employment, the Section 411(c) requirement is more specific as to the nature of the employment, and the administrative law judge must make a specific determination on remand as to whether claimant established at least fifteen years of underground coal mine employment or work in surface mining in substantially similar conditions.

determined to be totally disabled, the administrative law judge may find that claimant has invoked the presumption. Thereafter, he must consider whether the medical evidence is sufficient to rebut the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, msut allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be proffered in accordance with the evidentiary limitations set forth at 20 C.F.R. §725.414. If evidence exceeding the evidentiary limitations is submitted, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Alternatively, if on remand the administrative law judge finds that claimant is not entitled to benefits based on the Section 411(c)(4) presumption, then the administrative law judge must reconsider claimant's entitlement pursuant to 20 C.F.R. Part 718, as instructed in this opinion.

Accordingly, the administrative law judge's Decision and Order - Granting Benefits is vacated, 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