BRB No. 10-0249 BLA

| | | |
|---|---|---|
| EARON A. HARDISON | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PEABODY COAL COMPANY | ) | DATE ISSUED: 12/23/2010 |
| | ) | |
| and | ) | |
| | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| 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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (07-BLA-5542) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the second time. In the original Decision and Order dated March 13, 2008, the administrative law judge accepted the parties' stipulation that claimant has at least 23 years of coal mine employment and the existence of clinical pneumoconiosis, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge also found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and (c). The administrative law judge therefore found that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv). *E.A.H.* [*Hardison*] *v. Peabody Coal Co.*, BRB No. 08-0513 BLA, slip op. at 7 (Apr. 16, 2009)(unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration of the evidence thereunder. *E.A.H.* [*Hardison*], BRB No. 08-0513 BLA, slip op. at 4. The Board also vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and instructed the administrative law judge to reconsider this issue on remand. *E.A.H.* [*Hardison*], BRB No. 08-0513 BLA, slip op. at 8. Further, the Board instructed the administrative law judge to consider whether the evidence established that claimant's

[1] Claimant filed his first claim on November 27, 1992. Director's Exhibit 1. It was finally denied by a claims examiner on April 27, 1993 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his second claim on November 9, 2001. *Id*. On April 19, 2005, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order denying benefits because claimant failed to establish a change in an applicable condition of entitlement. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim on June 9, 2006. Director's Exhibit 3.

disability was due to clinical pneumoconiosis, as the parties stipulated to the existence of this disease.[2] *Id*.

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[3] The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge therefore found that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in this appeal.[4]

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated May 5, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Hardison v. Peabody*

---

[2] The Board noted that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). *E.A.H.* [*Hardison*] *v. Peabody Coal Co.*, BRB No. 08-0513 BLA, slip op. at 7 (Apr. 16, 2009) (unpub.).

[3] The administrative law judge noted that a separate finding regarding disease causality under 20 C.F.R. §718.203 was unnecessary, given that he found that claimant has legal pneumoconiosis. 2009 Decision and Order on Remand at 4.

[4] Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

*Coal Co.*, BRB No. 10-0249 BLA (May 5, 2010)(unpub. Order). Claimant, employer, and the Director respond.

Claimant urges affirmance of the administrative law judge's award of benefits, but indicates that, if the award is vacated, the case must be remanded because the recent amendments are applicable to his claim, since the instant claim was filed on June 9, 2006, he has more than 15 years of coal mine employment, and he has a totally disabling pulmonary impairment. The Director states that, if the Board does not affirm the administrative law judge's award of benefits, the claim should be remanded to the administrative law judge for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), as the present claim was filed on June 9, 2006 and the parties stipulated that claimant worked at least 23 years in coal mine employment. In addition, the Director states that, if the case is remanded for consideration under Section 411(c)(4), the administrative law judge should allow the parties to proffer additional evidence in view of the change in the allocation of burdens of proof. Employer indicates that, if the recent amendment at Section 411(c)(4) applies to this claim, based on the filing date of the claim and claimant's coal mine employment history, due process requires that it be allowed to develop evidence and defenses.

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.[5] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Baker, Simpao, and Repsher. Drs. Baker and Simpao opined that claimant has legal

[5] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4, 6, 8. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis.[6] Director's Exhibits 15, 18; Claimant's Exhibits 1, 3. By contrast, Dr. Repsher opined that claimant does not have a pulmonary or respiratory disease or condition either caused by, or aggravated by, coal mine dust exposure. Director's Exhibit 19. The administrative law judge gave less weight to Dr. Baker's opinion because he found that it was equivocal.[7] 2009 Decision and Order on Remand at 2. After noting the observations of Drs. Simpao[8] and Repsher,[9] the administrative law judge found that Dr. Simpao rendered a well-reasoned opinion. *Id*. at 4. The administrative law judge then found that the existence of legal pneumoconiosis was established at Section 718.202(a)(4), based on Dr. Simpao's opinion. *Id*.

---

[6] In a report dated November 6, 2006 and a deposition dated September 5, 2007, Dr. Baker opined that claimant has chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1.

In reports dated July 16, 2006 and August 10, 2006, as well as a deposition dated October 1, 2007, Dr. Simpao opined that claimant has legal pneumoconiosis. Director's Exhibits 15, 19; Claimant's Exhibit 3.

[7] In an addendum to his November 6, 2006 report, Dr. Baker opined that claimant's COPD was "based on the presence of clinical pneumoconiosis and *possible* legal pneumoconiosis." Claimant's Exhibit 1 (emphasis added).

[8] The administrative law judge stated: "I note that Dr. Simpao also testified that [c]laimant has legal pneumoconiosis, based on the objective testing, the disability and his physical appearance including color changes; skin slightly dark and cyanotic or plethoric. He noted that this is caused by the discrepancy in the exchange of gas. He reports hearing crepitations, noise in the lung that is by scars in the lung and also there is wheezing along with the crepitations. CX 1." 2009 Decision and Order on Remand at 3. The administrative law judge additionally stated: "In his report, Dr. Simpao indicated that the [c]laimant has both clinical and legal pneumoconiosis. In his deposition, Dr. Simpao stated that the [c]laimant has both a mild restrictive and a moderate obstructive breathing deficit. CX 3 at 15. He said that the restrictive disorder would not have been generated by the smoking and heart condition. He also said that smoking and coal dust generate the same respiratory symptoms and restrictions." *Id*.

[9] The administrative law judge stated: "Dr. Repsher's opinion is that [c]laimant's impairments were due to cigarette smoking, heart disease and numerous other health conditions[,] none of which were due to his coal dust exposure. In testing Dr. Repsher found a moderately reduced diffusing capacity. DX 19. His report does not discuss the restrictive impairment discussed by Dr. Simpao." 2009 Decision and Order on Remand at 3.

Employer asserts that substantial evidence does not support the administrative law judge's finding that claimant established the existence of legal pneumoconiosis based on Dr. Simpao's opinion. Specifically, employer argues that the administrative law judge violated the Administrative Procedure Act (APA) by failing to provide a reason for finding that Dr. Simpao's opinion outweighed Dr. Repsher's contrary opinion. Employer maintains that the administrative law judge did not provide valid reasons for finding that Dr. Simpao's opinion is well-reasoned.

The APA, 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 an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not explain why he gave greater weight to Dr. Simpao's opinion than to Dr. Repsher's contrary opinion. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Rather, as discussed *supra*, the administrative law judge noted the observations of Drs. Simpao and Repsher, noted his reasons for finding that Dr. Simpao's opinion was well-reasoned, and then found that the existence of legal pneumoconiosis was established at Section 718.202(a)(4), based on Dr. Simpao's opinion. The administrative law judge specifically stated:

> There is no doubt that [claimant] was a smoker who was exposed to 23 years of coal mine employment. There is also no doubt that he was examined three times in this record and exhibited findings consistent with pneumoconiosis. Dr. Simpao identified symptoms, such as wheezing along with crepitations, fingernail and skin coloring, and addressed the restrictive component. He said that the restrictive disorder would not have been generated by the smoking or heart condition. I accept that opinion.

2009 Decision and Order on Remand at 4. The administrative law judge additionally stated:

> I also note that Dr. Simpao's opinion as to the effects from smoking and mining is consistent with the Department of Labor regulatory scheme. At the time that the "new" regulations were promulgated, the Department of Labor noted that smokers who mine have an additive risk for developing significant obstruction. 65 Federal Register, No. 245, 79940 (December 20, 2000).

*Id.*[10] Further, the administrative law judge noted that a lengthy history of treatment notes and records of claimant's symptoms of chronic obstructive pulmonary disease (COPD) supported Dr. Simpao's opinion.[11] *Id.* However, the administrative law judge did not address whether Dr. Repsher's opinion was reasoned.[12] *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987). Because the administrative law judge did not explain why he gave dispositive weight to Dr. Simpao's opinion, we hold that the administrative law judge did not comply with the requirements of the APA in setting forth his findings regarding the opinions of Drs. Simpao and Repsher. *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of all the relevant medical opinion evidence in accordance with the APA.[13] *Id.*

---

[10] Employer asserts that the administrative law judge erred in relying on the preamble to the 2001 regulations as a basis to credit Dr. Simpao's opinion, given that it is not evidence of record and does not provide a presumption of pneumoconiosis. Contrary to employer's assertion, the administrative law judge did not treat the preamble to the amended regulations as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Rather, the administrative law judge consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis. The Department of Labor's comments to the amended regulations and the preamble are relevant to the appropriate interpretation of the amended regulations in that they set forth the legal and factual principles that the Department of Labor relied on in promulgating them. We, therefore, reject employer's assertion that the administrative law judge's review of Dr. Simpao's opinion in light of the principles set forth in the preamble constituted the use of evidence outside of the record and a presumption of pneumoconiosis.

[11] Employer's asserts that the record does not contain treatment notes and records regarding COPD. Contrary to employer's assertion, the record consists of Dr. Havelda's October 19, 1997, March 18, 1998, and April 17, 1998 hospital records diagnosing COPD.

[12] An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

[13] On remand, if the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4),

On remand, when considering the medical opinion evidence, 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 opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all the relevant evidence in accordance with the APA, if reached. On remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[14] *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether legal pneumoconiosis and/or clinical pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

---

then he need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as his findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159, n.18 (2006).

[14] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

At the outset, however, the administrative law judge must consider whether claimant has established invocation of the Section 411(c)(4) presumption. As discussed *supra*, 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 are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least 15 years of qualifying coal mine employment and a totally disabling respiratory impairment, there is a rebuttable presumption that claimant was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, Director's Exhibit 3, and the administrative law judge credited him with at least 23 years of coal mine employment, 2008 Decision and Order at 2.

On remand, the administrative law judge must determine whether at least 15 of the 23 years of coal mine employment that the administrative law judge found established in this case occurred in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The administrative law judge must then determine whether claimant has established invocation of the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

If the administrative law judge finds that claimant is entitled to the presumption at Section 411(c)(4), then the administrative law judge must determine whether the medical evidence rebuts the presumption. 30 U.S.C. §921(c)(4).

Further, on remand, the administrative law judge must allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).[15]

[15] Employer requests that the case be remanded for reassignment to a different administrative law judge. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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

_____
JUDITH S. BOGGS
Administrative Appeals Judge