BRB No. 09-0398 BLA

JAMES V. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/26/2010
	)	
PIKEVILLE COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2006-BLA-06133) of Administrative Law Judge Daniel F. Solomon, with respect to 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).[1] Pursuant to the Board's prior Decision and Order, the administrative law

[1] Claimant filed his initial claim for benefits on August 30, 2002. Director's Exhibit 1. This claim was denied by the district director on November 25, 2003, because

judge reconsidered the relevant evidence and concluded that claimant established the presence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and that his total disability was due to legal pneumoconiosis under 20 C.F.R. §718.204(c).[2] Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). In addition, employer asserts that the administrative law judge incorrectly determined, pursuant to 20 C.F.R. §725.503, that benefits were payable beginning November 1, 2005. Claimant responds, urging affirmance of the award of benefits and the administrative law judge's determination regarding the date of onset of total disability. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.[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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

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claimant failed to establish that he was totally disabled due to pneumoconiosis. *Id*. No further action was taken by claimant until he filed the present subsequent claim.

[2] In the Board's previous decision, we affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See J.V.M.* [*Martin*] *v. Pikeville Coal Co*., BRB No. 07-0944 BLA (Aug. 22, 2008)(unpub.). In addition, we affirmed the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*. However, we vacated the denial of benefits on the ground that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). *Id*.

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989)(*en banc*).

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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In evaluating whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge reconsidered the medical opinions of Drs. Rosenberg, Dahhan and Rasmussen. The administrative law judge stated that these physicians agreed that claimant has totally disabling chronic obstructive pulmonary disease (COPD) and that they noted that claimant has a lengthy history of coal mine employment and smoking. Decision and Order at 3, 5; Director's Exhibits 12, 14; Claimant's Exhibit 5; Employer's Exhibits 1, 2. The administrative law judge determined that the issue to be resolved was whether coal dust exposure was a contributing cause of claimant's COPD. Decision and Order at 5.

Regarding Dr. Rosenberg's opinion, that claimant's COPD was unrelated to coal dust exposure, the administrative law judge determined that the Attfield and Hodous study cited by the Department of Labor (DOL) in drafting the revised regulations, refutes the findings from Morgan, Soutar and Hurley, and another Attfield and Hodous study, on which Dr. Rosenberg relied. Decision and Order at 6. According to the administrative law judge, the study cited by DOL found a clear relationship between coal dust exposure and an annual decline in pulmonary function, even when the miners did not have radiographic evidence of coal workers' pneumoconiosis. *Id*. The administrative law judge further noted that this study "confirm[ed] the connection between coal mine dust exposure and obstructive lung disease," described by Dr. Rasmussen. *Id., citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000).

The administrative law judge found that Dr. Dahhan's opinion, that coal dust exposure did not cause or contribute to claimant's COPD, was entitled to less weight than the contrary opinion of Dr. Rasmussen. The administrative law judge based his finding upon his determination that Dr. Dahhan's reference to "a loss of over 1600 cc in [claimant's] FEV1 is as compatible with Dr. Rasmussen's rationale as it is [with] a diagnosis that disability is entirely due to cigarette smoking." Decision and Order at 6; *see* Director's Exhibit 14.

With respect to Dr. Rasmussen's opinion, the administrative law judge stated that the Board, in its previous decision, "specifically determined that his opinion constituted legal pneumoconiosis." Decision and Order at 5. In addition, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was independent of his positive interpretation of an x-ray and was rendered to a reasonable degree of medical certainty. *Id*. Although the administrative law judge noted that Dr. Rasmussen, unlike

the other physicians, is not Board-certified in pulmonology, he determined that Dr. Rasmussen is "an acknowledged expert in the field of pulmonary impairments of coal miners" and has researched and written about pneumoconiosis while the other physicians have not.[4] *Id*., *citing* 1972 U.S. Code Cong. Adm. News 2305, 2314. The administrative law judge also found that Dr. Rasmussen's opinion was better reasoned because "it is substantiated by the regulatory materials," and was well documented because Dr. Rasmussen adequately explained the results of claimant's testing. Decision and Order at 5-6. The administrative law judge further stated that "the physical facts better lend themselves to a conclusion that there had been aggravation of other respiratory conditions (i.e.[,] the effects of smoking) by exposure to breathing in materials found in mining." *Id*. at 6. The administrative law judge concluded that Dr. Rasmussen's opinion "is better reasoned, and is the most authoritative," and found it sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*.

On appeal, employer argues that the administrative law judge did not properly weigh the medical opinion evidence relevant to 20 C.F.R. §718.202(a)(4). With respect to the opinions of Drs. Rosenberg and Dahhan, employer contends that the administrative law judge did not provide valid rationales for discrediting their diagnoses of COPD due entirely to smoking. In addition, employer maintains that the administrative law judge erred in shifting the burden to employer to affirmatively disprove claimant's evidence when the administrative law judge noted that Dr. Dahhan's finding regarding the reduction in claimant's FEV1 was as compatible with Dr. Rasmussen's rationale as it was with a diagnosis that claimant's disability is due entirely to smoking. Claimant responds that the administrative law judge properly discredited the opinions of Drs. Rosenberg and Dahhan.

Employer's allegations of error have merit. In discrediting Dr. Rosenberg's opinion, the administrative law judge referred to a study by Attfield and Hodous, and a portion of the regulations, and concluded that this material refuted Dr. Rosenberg's opinion because it establishes that coal mine dust exposure can cause COPD. *See* Decision and Order at 6. However, Dr. Rosenberg never opined that coal dust exposure cannot cause COPD. Rather, he stated that it is possible to distinguish between COPD caused by smoking and COPD caused by coal dust exposure and that he was able to discern that coal dust did not play a factor in causing claimant's COPD, based on the

[4] The record indicates that Dr. Rasmussen is Board-certified in internal medicine, Dr. Dahhan is Board-certified in internal and pulmonary medicine, and Dr. Rosenberg is Board-certified in internal medicine, pulmonary disease, and occupational medicine. Director's Exhibits 12, 14; Employer's Exhibit 4. Dr. Agarwal's credentials are not in the record.

particular nature of claimant's pulmonary impairment. *See* Employer's Exhibits 1, 2 at 9-11.

Regarding Dr. Dahhan's opinion, the administrative law judge did not explain his determination that Dr. Dahhan's reference to the loss in claimant's FEV1 was equally supportive of Dr. Rasmussen's contrary opinion, that coal dust exposure was a contributing cause of claimant's COPD. *See* Decision and Order at 6. Absent an explanation, the administrative law judge's decision to credit Dr. Rasmussen's view, rather than Dr. Dahhan's, suggests that he placed the burden on employer to rebut Dr. Rasmussen's opinion. As employer maintains, this is improper, as claimant bears the burden of proving each element of entitlement by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

With respect to the administrative law judge's crediting of Dr. Rasmussen's diagnosis of legal pneumoconiosis, employer argues that Dr. Rasmussen's opinion was not well reasoned and did not deserve full probative weight because he did not point to any specific evidence that coal dust exposure contributed to claimant's impairment in this case. Employer also asserts that Dr. Rasmussen's opinion, that cigarette smoking and coal mine dust exposure cause indistinguishable effects, is hostile to the Act because the Department of Labor stated, in its comments to the regulations, that only a minority of miners has significant impairment of pulmonary function. Further, employer contends that the administrative law judge erred in failing to identify the "regulatory materials" that substantiated Dr. Rasmussen's opinion. Decision and Order at 6. Claimant responds and argues that Dr. Rasmussen's report was sufficiently documented and reasoned, based on the objective tests he performed and because he is recognized as an expert in the field of pneumoconiosis. In addition, claimant asserts that Dr. Rasmussen related the medical literature he cited to claimant's condition and that his conclusion, that claimant's condition is due to coal dust exposure and cigarette smoking, is supported by relevant case law.

Employer's contentions have merit. In according greatest weight to Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4), the administrative law judge did not identify what in Dr. Rasmussen's report supported his determination that claimant's COPD was due to both smoking and coal dust exposure. In addition, the administrative law judge did not explain his determination that Dr. Rasmussen's opinion was substantiated by the regulatory materials. *Id*. Although Dr. Rasmussen's opinion is consistent with the amended definition of legal pneumoconiosis, there is no presumption that a causal link exists in any particular individual's case and a physician's diagnosis of COPD related, in part, to coal dust exposure must be adequately documented and

reasoned. *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977.

In light of the foregoing, we hold that the administrative law judge did not accurately characterize the medical opinions of record, did not properly allocate the burden of proof, and did not comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the 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 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Ondecko*, 512 U.S. at 280-81, 18 BLR 2A-12; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985). Thus, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), and the award of benefits, and remand the case for reconsideration of the medical opinions relevant to the issue of legal pneumoconiosis.

With respect to the issue of total disability causation at 20 C.F.R. §718.204(c), the administrative law judge stated:

> Dr. Rasmussen and Dr. Agarwal concluded that both smoking and coal dust inhalation contributed. I accept this opinion. A doctor's opinion, stating that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition, is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability.

Decision and Order at 7-8 (citations omitted). Because we have vacated the administrative law judge's finding that Dr. Rasmussen's diagnosis of COPD, related to smoking and coal dust exposure, was sufficient to establish the existence of legal pneumoconiosis, we must also vacate his crediting of Dr. Rasmussen's opinion under 20 C.F.R. §718.204(c). In addition, while the administrative law judge considered Dr. Agarwal's opinion at 20 C.F.R. §718.204(c), he did not first determine whether it was reasoned and documented at 20 C.F.R. §718.202(a)(4). Absent this determination, the administrative law judge could not render a rational finding as to whether Dr. Agarwal's opinion supported a finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Thus, we vacate the administrative law judge's decision to credit Dr. Agarwal's opinion and his finding that claimant satisfied his burden of proof under 20 C.F.R. §718.204(c).

On remand, the administrative law judge must first reconsider, based on a weighing of all of the relevant medical opinions, whether claimant has established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). If the administrative law judge determines that claimant has established the existence of legal

pneumoconiosis, he must then reconsider whether claimant's total disabling pulmonary impairment was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In making his credibility determinations on remand, the administrative law judge must address all of the evidence of record, clearly explain the basis for his findings in accordance with the APA, and place the burden on claimant to establish the relevant elements of entitlement. *See Ondecko*, 512 U.S. at 280-81, 18 BLR 2A-12; *Wojtowicz*, 12 BLR at 1-165.

We also vacate the administrative law judge's determination regarding the onset of total disability due to pneumoconiosis at 20 C.F.R. §725.503, as his finding may change based upon his weighing of the medical evidence on remand. If the administrative law judge finds that claimant is entitled to benefits, he must reconsider the evidence of record and determine the date from which benefits are payable. In general, benefits are payable beginning from the date upon which the miner became totally disabled due to pneumoconiosis. If the administrative law judge cannot ascertain this date, then the miner is entitled to benefits as of his filing date, unless credited medical evidence establishes that claimant was not totally disabled at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand Award of 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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge