BRB No. 10-0342 BLA

GARY R. FIELDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SIDNEY COAL COMPANY	)	
	)	DATE ISSUED: 02/18/2011
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky for employer.

Maia S. Fisher (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-5832) of Administrative Law Judge Alan L. Bergstrom denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits 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*)) (the Act). This case involves a miner's claim filed on August 7, 2007. After noting

employer's stipulation that claimant had at least twenty-three years of coal mine employment,[1] the administrative law judge noted that employer withdrew, as contested issues, the existence of pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b); Hearing Transcript at 6. Considering the medical evidence, the administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis and, therefore, did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the biopsy and medical opinion evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), (c). Claimant further asserts that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds in support of the administrative law judge's denial of benefits. Additionally, employer states that recent amendments to the Act, which were enacted by Section 1556 of Public Law No. 111-148, do not affect this case if the Board affirms the administrative law judge's finding that claimant did not establish total disability. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief regarding the merits of this case, but has submitted a brief addressing the potential impact of the amendments to the Act, if the Board does not affirm the denial of benefits.

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

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board 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*).

[2] The administrative law judge's findings that complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304(a), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), are unchallenged on appeal. Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Impact of the Recent Amendments

The recent amendments to the Act apply to claims filed after January 1, 2005 that were pending on March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Employer and the Director assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for consideration under Section 411(c)(4), unless the Board vacates the administrative law judge's finding that the medical evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Based on the parties' statements and our review, we conclude that this case is potentially affected by Section 1556. As will be discussed below, we cannot affirm the administrative law judge's finding that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Because we must remand this case for the administrative law judge to reconsider whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment, we will also instruct the administrative law judge, on remand, to consider this case in light of the amendments to the Act.

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*).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20

C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

Claimant contends that the administrative law judge erred in finding that the biopsy evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The administrative law judge considered the reports of Drs. Dennis, Bush, and Oesterling, in which they examined lung tissue obtained during a June 1, 2006, biopsy conducted by Dr. Havens.[3] Director's Exhibit 10 at 53-58. Upon receipt of the lung tissue, Dr. Dennis conducted both a gross and microscopic examination. On gross examination, Dr. Dennis identified "elevated macules" that varied "in size and shape from 0.2 to 1.5 cms. in diameter." Director's Exhibit 10 at 50; Employer's Exhibit 2. On microscopic examination, Dr. Dennis identified several nodules that were "greater than 1.5 cms. in diameter." *Id.* Based on these findings, Dr. Dennis diagnosed progressive massive fibrosis.[4] *Id.*

Dr. Bush reviewed claimant's biopsy slides and Dr. Dennis's pathology report. Dr. Bush disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis. Employer's Exhibit 1. Based upon his own examination of the biopsy slides, and his interpretation of the gross description provided by Dr. Dennis, Dr. Bush opined that the criteria for a diagnosis of progressive massive fibrosis had not been satisfied. *Id.* Dr. Oesterling also disagreed with Dr. Dennis's diagnosis of progressive massive fibrosis. Employer's Exhibit 4. Based upon his review of the biopsy slides, and Dr. Dennis's pathology report, Dr. Oesterling opined that there was "absolutely no indication . . . of progressive massive fibrosis." *Id.*

In his consideration of the conflicting biopsy evidence, the administrative law judge found that Dr. Dennis's opinion was not well-reasoned, because the doctor failed to reconcile his conflicting measurements of the lung nodules he described on gross and

[3] The record reflects that Dr. Havens excised the tissue from claimant's right lung on June 1, 2006, but the record does not contain a diagnosis from Dr. Havens. Director's Exhibit 10 at 53-58.

[4] A diagnosis of progressive massive fibrosis has been held to be equivalent to a diagnosis of "massive lesions" under 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006).

microscopic examination. Specifically, the administrative law judge noted that Dr. Dennis's gross measurement of a nodule measuring .7 cm on one slide conflicted with his microscopic measurement of the same nodule as measuring greater than 1.5 cms. Decision and Order at 28. The administrative law judge further noted that Drs. Bush and Oesterling each questioned the accuracy of Dr. Dennis's diagnosis of progressive massive fibrosis. *Id.* at 28-29. Viewing Dr. Dennis's report in context, the administrative law judge found that Dr. Dennis's measurement discrepancies undercut the reliability of his diagnosis of complicated pneumoconiosis. The administrative law judge further found that Dr. Dennis did not address whether any of the nodules that he observed would produce an opacity measuring greater than one centimeter if seen on a chest x-ray.[5] The administrative law judge, therefore, found that the biopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

In challenging the administrative law judge's finding pursuant to 20 C.F.R. §718.304(b), claimant's sole contention is that the opinion of Dr. Havens was entitled to greater weight than the opinions of Drs. Bush and Oesterling, based upon Dr. Havens's status as a treating physician. Claimant's Brief at 10. Claimant's contention lacks merit. The opinion of Dr. Havens is not relevant to whether the conflicting biopsy evidence established the existence of massive lesions. Although Dr. Havens conducted claimant's lung biopsy, he did not provide a pathological diagnosis. Therefore, we reject claimant's allegation of error, and affirm the administrative law judge's finding that complicated pneumoconiosis was not established by the biopsy evidence pursuant to 20 C.F.R. §718.304(b).

Pursuant to 20 C.F.R. §718.304(c), claimant contends that the administrative law judge erred in failing to accord greater weight to the medical opinion of claimant's treating physician, Dr. Ebeo, diagnosing claimant with complicated pneumoconiosis. Claimant's Brief at 10. We disagree. Dr. Ebeo, a pulmonologist, testified that he relied upon Dr. Dennis's biopsy report to diagnose progressive massive fibrosis. Claimant's Exhibit 1 at 20, 29. Because Dr. Ebeo's diagnosis of progressive massive fibrosis was based on Dr. Dennis's discredited report, the administrative law judge permissibly accorded Dr. Ebeo's opinion little weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 32. We therefore reject claimant's contention, and affirm the administrative law judge's finding that complicated pneumoconiosis was not established pursuant to 20 C.F.R. §718.304(c). Consequently, we affirm the administrative law judge's finding that claimant did not establish

[5] Claimant does not challenge the administrative law judge's specific credibility determinations with respect to Dr. Dennis's diagnosis of complicated pneumoconiosis. Those credibility determinations are therefore affirmed. *Skrack*, 6 BLR at 1-711.

invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Total Disability

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering whether the medical opinion evidence established total disability, the administrative law judge considered the opinions of Drs. Ebeo, Rasmussen, and Repsher. Based on the results of a September 6, 2006 pulmonary function study,[6] Dr. Ebeo opined that claimant suffers from a class II pulmonary impairment, which Dr. Ebeo opined indicates an impairment ranging from ten to twenty-five percent. Claimant's Exhibit 1 at 17, 22. Dr. Ebeo also completed a "Capabilities and Limitations Worksheet," wherein he indicated that claimant could perform sedentary work. Claimant's Exhibit 1 (internal Exhibit 10). Dr. Ebeo indicated that claimant suffers from a "moderate limitation of functional capacity," meaning that he could exert up to ten pounds of force occasionally. *Id.*

By contrast, Dr. Rasmussen opined that claimant retains the pulmonary capacity to perform his regular coal mine job. Director's Exhibit 8. Dr. Repsher indicated that claimant has no pulmonary impairment, and opined that claimant is capable, from a respiratory standpoint, of performing his usual coal mine employment. Employer's Exhibits 6.

In considering whether the medical opinion evidence established total disability, the administrative law judge accorded "little weight" to Dr. Ebeo's opinion because he fount that it was based, in large part, on Dr. Dennis's discredited pathology report. Decision and Order at 32. The administrative law judge noted that Drs. Rasmussen and Repsher each opined that claimant retains the respiratory capacity to perform his usual coal mine employment.[7] *Id.* at 32-33. The administrative law judge, therefore, found

[6] Dr. Ebeo interpreted the non-qualifying September 6, 2006 pulmonary function study as revealing mild, obstructive airway disease. Claimant's Exhibit 1 at 17

[7] The administrative law judge found that claimant's most recent coal mine employment was as a "working mine foreman," a position that required him to lift crib blocks weighing thirty to forty pounds, bags of cement or plaster weighing forty pounds, and roof bolts weighing fifty to sixty pounds. Decision and Order at 4. The administrative law judge further noted that claimant also lifted heavier objects weighing about 100 pounds when he was setting head drives. *Id.*

that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant argues that the administrative law judge erred in his consideration of Dr. Ebeo's opinion, because he did not address the doctor's opinion regarding claimant's respiratory capacity to perform his usual coal mine work. Claimant's Brief at 13-14. We agree. The administrative law judge's sole basis for according less weight to Dr. Ebeo's disability assessment is that Dr. Ebeo based his opinion on Dr. Dennis's discredited biopsy report. However, there is no evidence that Dr. Ebeo's assessment of claimant's pulmonary impairment and work capability was based upon Dr. Dennis's pathology report. Dr. Ebeo explained that his disability assessment was based upon his interpretation of claimant's September 6, 2006 pulmonary function study. Claimant's Exhibit 1. Consequently, the administrative law judge's basis for discrediting Dr. Ebeo's opinion cannot stand. Because the administrative law judge did not provide any other basis for questioning Dr. Ebeo's assessment of the extent of claimant's respiratory impairment, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

On remand, when considering whether the medical opinion evidence establishes total disability 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. *See 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 of the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). *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*).

Application of the Recent Amendments

On remand, should the administrative law judge determine that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), he must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 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).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, 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