BRB No. 10-0343 BLA

WILLIAM HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SKY COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYERS' INSURANCE OF WAUSAU	)	DATE ISSUED: 02/18/2011
	)	
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 – Awarding Living Miner's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), 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 - Awarding Living Miner's Benefits (2008-BLA-05261) of Administrative Law Judge Kenneth A. Krantz on a claim filed on February 20, 2007, 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). Crediting claimant with seventeen years of coal mine employment, the administrative law judge found that claimant established the existence of both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203, and that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(c).[1] The Director, Office of Workers' Compensation Programs (the Director), responds, declining to file a brief on the merits of this case. However, the Director notes that, if the Board affirms the administrative law judge's award of benefits, it need not consider the applicability of Section 411(c)(4), 30 U.S.C. §921(c)(4), to this case. If, however, the Board vacates the administrative law judge's award, the Director states that this case must be remanded for consideration under Section 411(c)(4).[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,[3] they are binding upon this Board and

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[1] The administrative law judge's findings, with respect to years of coal mine employment, that clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), and that total disability was established at 20 C.F.R. §718.204(b)(2)(i) and (iv), are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

[2] 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 fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] Because claimant was last employed in the coal mining industry in Kentucky, Director's Exhibits 1, 4, 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*).

may not be disturbed. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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, 1-112 (1989).

At the outset, we note that, the administrative law judge's finding that the existence of clinical pneumoconiosis was established at Section 718.202(a)(1), which employer has not challenged, is sufficient to establish the essential element of pneumoconiosis under the Act. *See Anderson*, 12 BLR at 1-112. Claimant is not, therefore, required to additionally establish the existence of either clinical or legal pneumoconiosis at another subsection of Section 718.202(a). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Nonetheless, we will consider employer's arguments concerning the administrative law judge's evaluation of the medical opinion evidence, relevant to legal pneumoconiosis at Section 718.202(a)(4), as it affects his finding that disability causation was established at Section 718.204(c).

Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis[4] at Section 718.202(a)(4). Specifically, employer contends that the administrative law judge erred in crediting the opinion of Dr. Baker on the issue, without considering the fact that Dr. Baker relied on an inaccurate smoking history and failed to sufficiently explain why he found that coal mine employment contributed to claimant's respiratory impairment.[5] Additionally, employer contends that the administrative law judge erred in failing to adequately consider the opinions of Drs. Dahhan and Castle, who explained how

[4] Legal pneumoconiosis is defined as any chronic lung disease or impairment and its sequelae arising out of coal mine employment. *See* 20 C.F.R. §718.201.

[5] Dr. Baker diagnosed claimant with chronic obstructive pulmonary disease, hypoxemia and bronchitis, noting that all three conditions were caused by coal dust exposure and cigarette smoking. Decision and Order at 11; Director's Exhibit 1.

claimant's medical testing supported a finding that claimant's respiratory impairment was caused by smoking, and not coal mine employment.[6]

The administrative law judge found that Dr. Baker's opinion, attributing claimant's chronic obstructive pulmonary disease (COPD) to coal mine employment and smoking, established legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge acknowledged that Dr. Baker, in his 2007 report, found that claimant had only a five to ten pack-year history of smoking, far less than the approximately nineteen pack-years found by the administrative law judge. The administrative law judge noted that Dr. Baker opined that, in light of claimant's less than 10-pack year history of smoking, the most obvious cause of his COPD was his seventeen and a half years of coal mine employment. The administrative law judge noted, however, that Dr. Baker further opined that, if claimant had a smoking history closer to twenty-pack years, his smoking history alone would have been sufficient to cause his COPD. *See* Decision and Order at 12; Director's Exhibit 12 at 10; Employer's Exhibit 4 at 9. Nonetheless, the administrative law judge determined that Dr. Baker's 2007 opinion attributing claimant's COPD to both coal mine employment and smoking was reasoned because the doctor had attributed claimant's COPD to both smoking and coal mine employment in a 2003 report, where he relied on the accurate nineteen pack-year smoking history. Decision and Order at 18. The administrative law judge, however, accorded less weight to the opinions of Drs. Augustine and Phillips, attributing claimant's COPD to both smoking and coal mine employment, because they relied on an inaccurate smoking history. In light of the inaccurate smoking history relied on by Dr. Baker, and the fact that both Drs. Augustine and Phillips relied on an inaccurate smoking history, we conclude that the administrative law judge's decision to credit Dr. Baker's 2007 opinion in light of the information contained in his earlier 2003 report, without further discussion of his 2007 opinion, was not reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, we note that the administrative law judge did not sufficiently discuss the medical data relied on by Dr. Baker to find that claimant's COPD was due to both coal mine employment and smoking. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge found that Dr. Baker's opinion, that there is no way to differentiate the degree to which each exposure contributed to his respiratory impairment, was sufficient to establish that claimant's COPD was due, in part, to coal mine employment. Decision and Order at 13. The administrative law judge failed, however, to determine whether claimant met his burden of establishing that claimant's COPD was "significantly related to, or

[6] Dr. Dahhan diagnosed claimant with a ventilatory impairment due to smoking, and not coal mine dust exposure. Decision and Order at 13-14; Employer's Exhibits 1, 5. Dr. Castle diagnosed chronic obstructive pulmonary disease due entirely to smoking. Employer's Exhibit 7.

substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Regarding the opinions of Drs. Dahhan and Castle, we agree with employer that the administrative law judge's mere citation to regulations, noting the additive effects of smoking and coal mine employment on COPD, do not provide a sufficient basis to reject their opinions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Rather, the administrative law judge must consider the opinions of Drs. Dahhan and Castle in their entirety, including their specific discussion of claimant's medical testing and their explanations of why the testing showed that claimant's COPD was due to smoking, and not coal mine employment. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Accordingly, we vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4) and remand the case for reconsideration of the relevant evidence thereunder.

Disability Causation – 20 C.F.R. §718.204(c)

Employer next contends that the administrative law judge erred in finding that claimant's disability was due to legal pneumoconiosis at Section 718.204(c). Specifically, employer contends that the administrative law judge erred in crediting the opinions of Drs. Baker and Phillips, that claimant's disability was due to both coal dust exposure and smoking, over the contrary opinions of Drs. Dahhan and Castle, that coal dust exposure did not contribute to claimant's disability. Employer contends that the administrative law judge did not consider the fact that the opinions of Drs. Baker and Phillips were based "on general conjecture rather than data specific to this claimant." Employer's Brief at 7. Employer also contends that the administrative law judge erred in relying on general propositions in the regulations concerning the additive effects of coal mine employment and smoking, rather than considering the specific testimony from Drs. Dahhan and Castle regarding claimant's respiratory condition.

For the reasons we vacate the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4), we also vacate the administrative law judge's finding of disability causation at Section 718.204(c), *see* discussion *supra* at pp 4-5. On remand, if reached, the administrative law judge must determine whether the medical opinion evidence establishes that pneumoconiosis is a "substantially contributing cause" of claimant's total disability.[7] *See* 20 C.F.R. §718.204(c).

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[7] In finding that disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge relied on the finding that legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4). On remand, however, the administrative law judge must also consider whether disability causation can be established based on the finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). *See Scott v. Mason Coal Co.*,

Section 411(c)(4)

On remand, since the administrative law judge found that claimant had seventeen years of coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), the administrative law judge must initially determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In determining whether claimant is entitled to the presumption at Section 411(c)(4), the administrative law judge must determine whether claimant worked at least fifteen years 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). If the administrative law judge determines that the presumption is invoked, he should then consider whether employer has satisfied its burden to rebut the presumption. 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, 11047-50, 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 consistent 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 pursuant to 20 C.F.R. §725.456(b)(1).

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289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order – Awarding Living Miner's Benefits is affirmed in part, vacated in part, 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

BETTY JEAN HALL
Administrative Appeals Judge