BRB No. 10-0269 BLA

BILL CANTRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOTCO ENERGY COMPANY, INCORPORATED	)	DATE ISSUED: 01/11/2011
	)	
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 – Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

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

Jonathan Rolfe (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 – Awarding Benefits (2008-BLA-05498) of Administrative Law Judge Alan L. Bergstrom, with respect to a claim filed on November 2, 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). After crediting claimant with seventeen years and eleven months of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this appeal.[1]

The parties have filed briefs addressing the applicability, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, to the current case.[2] The Director states that Section 1556 will not affect this case if the Board affirms the award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required as the present claim was filed after January 1, 2005 and the administrative law judge credited the miner with more than fifteen years of coal mine employment. Claimant agrees that if the case is remanded, the recent amendments would apply to this case, based on the filing date, claimant's coal mine employment history, and the fact that the administrative law judge determined that claimant suffers from a totally disabling respiratory impairment. Employer asserts that the recent amendments may affect this case and maintains, therefore, that due process

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Relevant to this claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year 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 miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

requires that the case be remanded for the development of evidence addressing the new standards created. Additionally, employer argues that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property. In the alternative, employer moves that the Board hold the case in abeyance pending promulgation of regulations implementing the amendments or until resolution of the legal challenges to the Act.

To determine whether this case must be remanded for consideration of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4) and 718.204(c).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *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*).

I. The Administrative Law Judge's Findings

In considering whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), and whether total disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge evaluated the opinions of Drs. Agarwal, Baker, Hippensteel and Jarboe.[4] At 20 C.F.R. §718.202(a)(4), the administrative law judge

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 5. 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*).

[4] While the administrative law judge referred to Dr. Jarboe as Dr. Jordon when making his findings at 20 C.F.R. §718.202(a)(4), this error is harmless as it is evident from the administrative law judge's Decision and Order that he was considering Dr. Jarboe's opinion. Decision and Order at 11-14, 17-19; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

noted that Dr. Agarwal opined that claimant has a severe obstructive impairment that is primarily due to cigarette smoking, but that claimant's coal mine employment is a substantially aggravating factor. Decision and Order at 19; Director's Exhibits 13, 28. The administrative law judge determined that Dr. Agarwal's opinion is well-documented and well-reasoned. Decision and Order at 19. Regarding Dr. Baker's opinion, the administrative law judge indicated that Dr. Baker acknowledged that coal dust exposure and cigarette smoking could both have caused claimant's severe obstructive impairment and that the effects from both can be additive. *Id*. The administrative law judge found that Dr. Baker's opinion is "well[-]documented and presented a well[-]reasoned medical opinion consistent with the Act." *Id*.

The administrative law judge discredited Dr. Hippensteel's opinion, that claimant's impairment was due solely to cigarette smoking, because he found that Dr. Hippensteel "failed to explain what role the [c]laimant's underground coal mine employment and coal dust exposure [played] in the [c]laimant's obstructive lung disease."[5] Decision and Order at 18; Employer's Exhibits 1, 7. The administrative law judge also determined that Dr. Hippensteel's opinion is "deficient," because the physician implied that coal dust exposure does not cause an obstructive impairment with significant reversibility, which the administrative law judge stated was contrary to the Act. Decision and Order at 18-19. Similarly, the administrative law judge found Dr. Jarboe's opinion, that claimant's impairment is due to cigarette smoking and asthma, to be entitled to less weight because he did not "delineate what role the [c]laimant's extensive history of coal dust exposure plays in the claimant's significant lung function deficits."[6] *Id*. at 19;

[5] Dr. Hippensteel diagnosed chronic bronchitis and obstructive lung disease due to cigarette smoking. Employer's Exhibit 1. Dr. Hippensteel indicated that an impairment due to coal mine dust exposure is usually fixed and irreversible, while claimant's pulmonary function study showed significant reversibility after the administration of a bronchodilator. Employer's Exhibit 7 at 12. Dr. Hippensteel further stated that, when a severe obstructive impairment is due to coal workers' pneumoconiosis, there is usually x-ray evidence of the disease, which was not present in this case. Employer's Exhibit 1.

[6] Dr. Jarboe determined that claimant's pulmonary function studies showed a preserved FVC, in comparison to the FEV1, and stated that a disproportionate reduction in the FEV1, as compared to the FVC, is "the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 2, *citing* studies by Soutar and Hurley, Henneberger and Attfield, and Attfield and Wagner. Dr. Jarboe also indicated that claimant's elevated residual volume argued against coal dust inhalation as a causal factor, because increases in volume of that magnitude are almost always due to pulmonary emphysema caused by cigarette smoking and/or bronchial asthma. Employer's Exhibit 2. Dr. Jarboe explained that coal dust exposure does not cause bronchial hyper-reactivity or bronchial asthma, but instead, causes a fixed

Employer's Exhibits 2, 9. The administrative law judge also noted that the studies by Dr. Morgan, cited by Dr. Jarboe, were considered when the current final regulations were promulgated and indicated that the Department of Labor (DOL) found "Morgan's conclusions . . . somewhat suspect." Decision and Order at 19, *quoting* 65 Fed. Reg. 79,942 (Dec. 20, 2000). The administrative law judge further stated that the DOL "recognized that the combined effects of coal mine dust inhalation and smoking are additive and rejected the proposition that tobacco smoking causes the only significant obstructive disorders miners develop." Decision and Order at 19, *citing* 65 Fed. Reg. 79,938-79,944.

Therefore, the administrative law judge determined that claimant established that he suffers from legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 19. Based on this finding, the administrative law judge concluded, at 20 C.F.R. §718.204(c), that claimant established that he is totally disabled due to pneumoconiosis and awarded benefits. *Id*. at 23.

II. Arguments on Appeal

Employer asserts that the administrative law judge erred in his weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer argues that the administrative law judge deferred to the opinions of Drs. Agarwal and Baker, based on a presumption that claimant's chronic obstructive pulmonary disease (COPD) was due, in part, to coal dust exposure. In addition, employer contends that the administrative law judge erred in finding that the opinions of Drs. Agarwal and Baker are well-documented and well-reasoned, despite the fact that they were unable to differentiate between the effects of cigarette smoking and coal dust exposure as causes of claimant's impairment. Further, employer alleges that the administrative law judge credited Dr. Baker's opinion because it was consistent with the Act, without explaining the basis for this determination. Similarly, employer asserts that the administrative law judge, in crediting Dr. Agarwal's opinion as consistent with the Act, did not acknowledge that Dr. Agarwal diagnosed legal pneumoconiosis due to cigarette smoking. Employer

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impairment. *Id*. Dr. Jarboe also stated that the presence of marked hyperinflation, without any coal dust deposition radiographically, supported a determination that coal dust exposure was not a cause of claimant's impairment. *Id*.

also argues that the opinions of Drs. Agarwal and Baker contain equivocal language regarding their diagnoses of legal pneumoconiosis.[7]

Employer's contentions have merit, in part. While the administrative law judge determined, pursuant to 20 C.F.R. §718.202(a)(4), that the opinions of Drs. Agarwal and Baker are well-documented, well-reasoned, and consistent with the Act, he did not explain the basis for this finding other than summarizing their conclusions that claimant's impairment was due to a combination of cigarette smoking and coal dust exposure. *See* Decision and Order at 19. This analysis does not accord, therefore, with the Administrative Procedure Act (APA), which requires an administrative law judge to set forth "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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

However, we find no merit in employer's contention that the opinions of Drs. Agarwal and Baker were speculative and equivocal because they did not differentiate between the effects of coal dust exposure and cigarette smoking on claimant's impairment. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, even though a physician cannot establish the precise percentage of lung obstruction attributable to cigarette smoking and coal mine dust exposure, such exact findings are not required for a claimant to establish that his chronic respiratory impairment arose, in part, out of coal mine employment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). In addition, contrary to employer's contention, the administrative law judge was not required to discredit Dr. Agarwal's opinion because he stated that claimant's "legal pneumoconiosis [is] due to smoking." Director's Exhibit 13. In his supplemental opinion, Dr. Agarwal clarified that claimant's obstructive impairment was primarily due to smoking, but that coal dust exposure substantially aggravated his condition. Director's Exhibit 28.

[7] Specifically, employer notes that Dr. Baker testified, in response to a question regarding whether claimant's impairment could be due entirely to cigarette smoking, "I would say I guess that's possible but it's also possible it could be caused entirely by his coal dust exposure. It's hard to say exactly because [both] of them apparently have the same degree of effect on the lungs and pulmonary function." Employer's Brief at 11, *quoting* Employer's Exhibit 8 at 9. Concerning Dr. Agarwal, employer indicates that he reported that coal dust exposure "could have" aggravated his disease. Employer's Brief, *quoting* Director's Exhibit 13.

Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Hippensteel and Jarboe because they did not rule out coal dust exposure as a cause of claimant's impairment. Employer maintains that Drs. Hippensteel and Jarboe provided reasoned opinions as to why claimant's respiratory impairment was due solely to cigarette smoking and bronchial asthma, unrelated to coal dust exposure. Employer also contends that the administrative law judge erred in discrediting Dr. Jarboe's opinion, due to his reliance on studies by Dr. Morgan, because the administrative law judge did not explain the statement that the DOL found "Dr. Morgan's conclusions . . . somewhat suspect." Employer's Brief at 19, *citing* Decision and Order at 19. In addition, employer alleges that the administrative law judge irrationally found that the reasoning that the physicians provided for their exclusion of legal pneumoconiosis was contrary to the Act, as the preamble to the amended regulations does not mention reversibility. Further, employer argues that the administrative law judge erred in relying on the preamble, because it "is not law, nor does it carry with it the same force as does [sic] the published regulations. Rather, the preamble is a guide and nonbinding explanation . . . ." Employer's Brief at 20.

These contentions have merit, in part. In discrediting the opinions of Drs. Hippensteel and Jarboe, the administrative law judge stated that both physicians failed to address the role that claimant's history of coal dust exposure played in his obstructive impairment. However, as employer asserts, Drs. Hippensteel and Jarboe specifically addressed claimant's coal mine employment history when setting forth their opinions, but concluded, based on the objective evidence that they reviewed, that claimant's impairment was due solely to cigarette smoking. *See* Employer's Exhibits 1, 2, 7, 9. Further, in support of his decision to give less weight to Dr. Hippensteel's opinion, the administrative law judge indicated that Dr. Hippensteel's reliance on the reversibility of claimant's impairment to exclude coal dust exposure as a cause, was contrary to the Act. *See* Decision and Order at 18-19, *citing* 65 Fed. Reg. 79,937-79,944 (Dec. 20, 2000). In the preamble to the amended regulations, which was referenced by the administrative law judge, the DOL endorsed the view that coal mine dust exposure can cause obstructive lung disease, but did not discuss the significance of the reversibility of an obstructive impairment.[8] 65 Fed. Reg. 79,937-79,944 (Dec. 20, 2000).

In addition, although the administrative law judge accurately quoted the portion of the preamble in which the DOL noted that Dr. Morgan's conclusion, that clinically

[8] In *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-478 (6th Cir. 2007), the Sixth Circuit addressed this issue and affirmed an administrative law judge's discrediting of a medical opinion on the ground that the physician did not adequately explain why the partial reversibility of the miner's chronic obstructive pulmonary disease necessarily precluded a finding of legal pneumoconiosis.

significant emphysema is not related to coal dust exposure in the absence of progressive massive fibrosis, is "somewhat suspect," he did not discuss the additional reasons Dr. Jarboe gave for concluding that claimant's impairment was due solely to cigarette smoking or address the additional studies on which Dr. Jarboe relied. 65 Fed. Reg. 79,942 (Dec. 20, 2000); Employer's Exhibit 2. We reject, however, employer's assertion that it was error for the administrative law judge to rely on the preamble to the regulations in weighing the medical opinion evidence. The Board has held that the extent to which a medical opinion accords with accepted scientific evidence, as recognized by DOL in the preamble to the revised regulations, is a valid criterion for an administrative law judge to consider in weighing an opinion.. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009).

Because the administrative law judge did not provide adequate rationales for his weighing of the medical opinion evidence, and relied on an inaccurate characterization of the preamble to the amended regulations, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Wojtowicz*, 12 BLR at 1-165; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, we vacate the administrative law judge's determination that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), as it was based on the administrative law judge's findings at 20 C.F.R. §718.202(a)(4). Accordingly, we must also vacate the award of benefits.

In light of our decision to vacate the award of benefits, we direct the administrative law judge to initially consider, on remand, whether claimant is entitled to invocation of the rebuttable presumption that the miner's disability was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act. The administrative law judge should 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). Further, 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). If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption.

Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. We also decline to grant employer's request to hold this case in

abeyance pending the resolution of a lawsuit filed in United States District Courts in Florida and Virginia. In addition, contrary to employer's suggestion, the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *See*, *e.g.*, *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987).

When weighing the medical opinion evidence on remand, the administrative law judge must specifically reconsider whether the opinions of Drs. Agarwal, Baker, Hippensteel and Jarboe are adequately reasoned and documented, based on a review of the entirety of their opinions. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003). Moreover, the administrative law judge must resolve all issues of fact or law, set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge