BRB No. 11-0295 BLA

CY EDWARD SMITH (DECEASED)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/20/2012
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (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:

Claimant appeals the Decision and Order on Remand (2008-BLA-05022) of Administrative Law Judge Janice K. Bullard, denying benefits with respect to a claim filed on December 27, 2006, 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).[1] This case is before the Board for a second time. In its previous decision, the Board affirmed the administrative law judge's finding of twenty-five years of coal mine employment, based on the parties' stipulation, and her findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), but that he established total disability at 20 C.F.R. §718.204(b)(2). *C.S.* [*Smith*] *v. Big Elk Creek Coal Co.*, BRB No. 09-0185 BLA, slip op. at 3 n.4 (Sept. 17, 2009)(unpub.). Upon considering the allegations of error raised by employer and claimant, the Board vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and his finding that claimant did not establish disability causation at 20 C.F.R. §718.204(c). *Id*. at 6. Accordingly, the Board vacated the denial of benefits. *Id*. at 8.

On remand, the administrative law judge initially noted that, after the Board issued its decision, the Patient Protection and Affordable Care Act (PPACA) became law. The administrative law judge determined that the amendments to the Act contained in the PPACA were applicable to this claim and that claimant invoked the rebuttable presumption, set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge then found that, because Dr. Rosenberg's opinion was sufficient to rebut the presumption by establishing that claimant did not have pneumoconiosis, the burden shifted to claimant to establish the elements of entitlement. The administrative law judge determined that claimant did not establish the existence of pneumoconiosis, as the medical opinion evidence concerning legal pneumoconiosis at 20

[1] The Board issued an Order, dated November 18, 2011, acknowledging receipt of notice from the miner's widow that claimant had died. The Board stated that it would "proceed with its consideration of this case as a miner's claim." *Smith v. Big Elk Creek Coal Co.*, BRB No. 11-0295 BLA (Nov. 18, 2011)(Order).

[2] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who worked at least fifteen years in an underground coal mine or in surface mine in conditions substantially similar to those in an underground mine, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

C.F.R. §718.202(a)(4), was in equipoise. Consequently, the administrative law judge denied benefits. In a subsequent Order, the administrative law judge summarily denied claimant's Motion for Reconsideration.

On appeal, claimant argues that, because the administrative law judge found that the evidence was in equipoise, she should have concluded that employer did not rebut the amended Section 411(c)(4) presumption. Instead, claimant asserts, the administrative law judge improperly shifted the burden of proof to claimant.

Employer responds, urging affirmance of the denial of benefits. Employer further asserts that, if the administrative law judge erred, it was in invoking the rebuttable presumption, as claimant only worked for five years in underground coal mine employment and the administrative law judge's determination concerning claimant's surface work was insufficient to establish that it was substantially similar to conditions underground. Employer also contends that, if remand is required, the administrative law judge should reconsider the opinions of Drs. Vuskovich and Rasmussen.

The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that the Board should reverse the administrative law judge's denial, as her finding that the evidence regarding the cause of claimant's respiratory impairment was in equipoise was tantamount to a finding that employer did not rebut the amended Section 411(c)(4) presumption. In the alternative, the Director contends that, if the Board remands the case to the administrative law judge for additional consideration, less weight should be given to the opinions of Drs. Vuskovich and Rosenberg at 20 C.F.R. §§718.202(a)(4), 718.204(c), as the bases for their opinions are not persuasive.

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).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6, 14. 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*).

II. Invocation of the Amended Section 411(c)(4) Presumption

A. The Administrative Law Judge's Findings

In determining that claimant invoked the presumption set forth in amended Section 411(c)(4), the administrative law judge stated that claimant established coal mine employment in excess of fifteen years and that he is totally disabled due to a respiratory impairment.[4] Decision and Order on Remand at 8-10. The administrative law judge indicated that she gave "substantial weight to the evidence that established that [c]laimant worked in very dusty conditions, both in below and above-ground mining." *Id*. at 10. Therefore, she concluded that claimant invoked the presumption at amended Section 411(c)(4) and that the burden shifted to employer to rebut the presumption. *Id*.

B. Arguments on Appeal

Employer maintains that the administrative law judge erred in determining that claimant had the fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption.[5] Employer alleges that, although the parties stipulated to twenty-five years of coal mine employment, claimant worked underground for only five of those years and the administrative law judge's finding that both exposures were dusty "does not establish the required comparability," as she did not explain the bases for this conclusion. Employer's Brief at 8.

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[4] The Board previously affirmed the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). *C.S.* [*Smith*] *v. Big Elk Creek Coal Co.*, BRB No. 09-0185 BLA, slip op. at 3 n.4 (Sept. 17, 2009)(unpub.).

[5] Employer asserts that the Board need not reach this argument unless the administrative law judge's denial of benefits is vacated. In light of our holding that the administrative law judge's determination that employer established rebuttal of the amended Section 411(c)(4) presumption cannot be affirmed, *see discussion infra*, we must address employer's contention regarding whether claimant had fifteen years of qualifying coal mine employment.

Employer's contention has merit.[6] Pursuant to amended Section 411(c)(4), in addition to establishing total disability, a claimant is required to establish that the miner "was employed for fifteen years or more in one or more underground coal mines." 30 U.S.C. §921(c)(4). For employment at a surface mine to be treated as qualifying coal mine employment under amended Section 411(c)(4), a claimant must prove that the conditions "were substantially similar to those in an underground mine." *Id*. In so doing, a claimant is not required to present evidence of the conditions in an underground mine, but must establish comparable conditions by showing that the miner was exposed to sufficient coal mine dust at the surface mine. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Muncy v. Elkay Mining Co.*, BLR , BRB No. 11-0187 BLA (Nov. 29, 2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). The administrative law judge must then render factual findings by comparing the surface mining conditions established by claimant to the conditions known to prevail in underground mines. *Id*.

In this case, the administrative law judge did not identify the evidence that she relied on in determining that "[c]laimant worked in very dusty conditions, both in below and above-ground mining." Decision and Order on Remand at 10. Accordingly, the administrative law judge did not comply with the Administrative Procedure Act (APA), 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).[7] Therefore, we must vacate the administrative law judge's finding that claimant established invocation of the amended Section 411(c)(4) presumption and remand the case to the administrative law judge to make the requisite findings concerning claimant's qualifying coal mine employment.

On remand, the administrative law judge must determine whether claimant has at least fifteen years of qualifying coal mine employment and identify the evidence upon which she bases her finding. If the administrative law judge concludes that claimant does not have the fifteen years of qualifying coal mine employment needed to invoke the

[6] In its initial decision, the Board affirmed the administrative law judge's finding that claimant established twenty-five years of coal mine employment. *Smith*, BRB No. 09-0185 BLA, slip op. at 3 n.4. However, this decision was issued prior to the passage of the Patient Protection and Affordable Care Act and no distinction was made between claimant's underground and surface employment.

[7] The Administrative Procedure Act provides that every adjudicatory decision must 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 . . . ." 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).

amended Section 411(c)(4) presumption, then she must determine whether claimant has established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

III. The Existence of Legal Pneumoconiosis

A. The Administrative Law Judge's Findings

When weighing the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Vuskovich, Rosenberg, Baker, Sandlin and Rasmussen. The administrative law judge found that Dr. Vuskovich's opinion, that claimant's impairment was unrelated to coal dust exposure, was "compromised" because he did not fully consider claimant's coal mine employment. Decision and Order on Remand at 10; Employer's Exhibit 5. The administrative law judge stated that Dr. Vuskovich assumed that claimant's surface work did not expose him to dusty conditions, despite evidence that established otherwise, and that Dr. Vuskovich relied on a coal mine employment history of twenty-five years, while other physicians relied on claimant's "self-reported history of thirty-five years." Decision and Order on Remand at 10. The administrative law judge determined that Dr. Vuskovich's opinion concerning the cumulative effects of exposure indicates that "a higher quantity of coal dust exposure would merit a different opinion on the presence of legal pneumoconiosis." *Id*. The administrative law judge also found that Dr. Vuskovich's determination, that the results of objective testing ruled out a diagnosis of legal pneumoconiosis, is conclusory, as the record did not contain studies to support this assertion. *Id*. The administrative law judge further indicated that Dr. Vuskovich did not adequately explain why coal dust exposure could not have an additive effect on claimant's impairment. *Id*. Therefore, the administrative law judge found that Dr. Vuskovich's opinion was insufficient to rebut the presumption because it was conclusory and not well-documented. *Id*. at 11.

However, the administrative law judge found that Dr. Rosenberg's opinion, that coal dust exposure played no role in causing claimant's respiratory impairment, was well-documented and well-reasoned and, therefore, sufficient to rebut the presumption. Decision and Order on Remand at 11; Employer's Exhibits 1, 12. The administrative law judge gave additional weight to Dr. Rosenberg's opinion, based on his qualifications as a Board-certified pulmonologist, and found that he rationally explained how the objective tests supported a diagnosis of an impairment caused solely by cigarette smoking. Decision and Order on Remand at 11. The administrative law judge acknowledged that Dr. Rosenberg opined that a diagnosis of legal pneumoconiosis is appropriate when pulmonary function tests show an obstructive impairment with a normal FEV1/FVC

ratio, which was not observed on the tests of record. *Id*. The administrative law judge "decline[d] to discredit [Dr. Rosenberg's] report as against the regulations because of this observation," as "[t]he doctor differentiated his opinion from the regulatory language and literature that addresses legal pneumoconiosis." *Id*. Based upon her crediting of Dr. Rosenberg's opinion as sufficient to establish rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that for claimant to be awarded benefits, he needed to establish all of the elements of entitlement. *Id*.

The administrative law judge then weighed the evidence supportive of a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and stated that she declined to give substantial weight to Dr. Baker's opinion because, as she indicated in her initial Decision and Order, his opinion is equivocal. Decision and Order on Remand at 11. The administrative law judge found that Dr. Sandlin's opinion was not entitled to additional weight, despite his status as claimant's treating physician, because he did not address claimant's smoking history. *Id*. In contrast, the administrative law judge determined that Dr. Rasmussen credibly explained how claimant's test results supported a diagnosis of legal pneumoconiosis and cited to medical literature indicating that pneumoconiosis can cause emphysema. *Id*. The administrative law judge also credited Dr. Rasmussen's opinion because of his experience, expertise, and background, which she found demonstrated that he is highly-qualified to offer an opinion on coal workers' pneumoconiosis. *Id*. The administrative law judge opted not to discredit Dr. Rasmussen's opinion, based on an inaccurate smoking history, because he still opined that claimant had a substantial and significant smoking history that contributed to his impairment. *Id*.

The administrative law judge concluded "that the reliable and best reasoned evidence regarding the presence of legal pneumoconiosis is in equipoise, and accordingly, provides no definitive probative value on this issue." Decision and Order on Remand at 11-12. Accordingly, the administrative law judge found that claimant did not establish the presence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 12. Based on this finding, the administrative law judge determined that the issue of total disability causation at 20 C.F.R. §718.204(c) was moot, and that claimant was not entitled to benefits. *Id*. at 12.

B. Arguments on Appeal

Claimant contends that, after the amended Section 411(c)(4) presumption is invoked, the burden of proof shifts to employer to rebut the presumption. Based upon the administrative law judge's finding that the evidence regarding the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) was in equipoise, claimant argues that the administrative law judge should have determined that employer did not meet its burden on rebuttal and awarded benefits.

The Director concurs with claimant's contention that if the evidence is in equipoise, it is insufficient to satisfy employer's burden of rebutting the amended Section 411(c)(4) presumption. Accordingly, the Director asserts that the Board should reverse the administrative law judge's denial of benefits. In the alternative, the Director argues that the Board should vacate the denial of benefits and remand the case for reconsideration of the medical opinion evidence, with instructions that the administrative law judge take into account "the flaws" in the opinions of Drs. Rosenberg and Vuskovich and Rosenberg. Director's Brief at 3. The Director contends that Dr. Rosenberg's opinion, that claimant's impairment is due solely to cigarette smoking, is faulty because he does not explain why the studies he cites in support of his opinion are more reliable than those relied upon by the Department of Labor (DOL) in the preamble to the regulations. The Director also contends that the bases for Dr. Vuskovich's opinion are similarly unpersuasive.

Employer argues that the administrative law judge did not properly weigh the opinions of Drs. Vuskovich and Rasmussen. Employer asserts that the administrative law judge erred in discrediting Dr. Vuskovich's opinion for relying on twenty-five years of coal dust exposure, as this corresponds to the administrative law judge's finding, which the Board affirmed. Employer states that Dr. Rasmussen's opinion should be discredited on this basis, as he overestimated claimant's coal dust exposure and underestimated claimant's cigarette smoking history. Employer also alleges that the administrative law judge did not follow the Board's remand instructions when she discredited Dr. Vuskovich's opinion for his failure to explain why the effects of cigarette smoking and coal dust are not additive, as the Board previously vacated the administrative law judge's reliance on this factor. Employer further contends that the administrative law judge should reject Dr. Rasmussen's opinion, as it is not adequately reasoned or documented.

The allegations of error raised by claimant and the Director regarding the administrative law judge's determination that employer established rebuttal of the amended Section 411(c)(4) presumption have merit. The administrative law judge's finding, that Dr. Rosenberg's opinion was sufficient to establish that claimant did not have legal pneumoconiosis on rebuttal, cannot be reconciled with her subsequent determination that the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) was in equipoise. Accordingly, we vacate the administrative law judge's finding that employer established rebuttal of the amended Section 411(c)(4) presumption and instruct the administrative law judge to reconsider this issue on remand, if she determines that claimant has established invocation of the presumption.

When weighing the conflicting medical opinions on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Tenn. Consol. Coal Co. v.*

Crisp, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). With respect to the administrative law judge's weighing of Dr. Vuskovich's opinion on remand, we note that there is merit to employer's allegation that the administrative law judge has not adequately explained how Dr. Vuskovich's reliance on a coal mine employment history of twenty-five years detracted from the credibility of his opinion, when this is the number of years that the administrative law judge credited to claimant. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Similarly, when reconsidering Dr. Rosenberg's opinion, the administrative law judge must explain why she found that the studies he cites in support of his opinion are more reliable than those cited by the DOL in the preamble to the regulations. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). In addition, regarding Dr. Rasmussen's opinion, employer is correct in asserting that, if the administrative law judge relies upon the accuracy of Dr. Vuskovich's understanding of claimant's work or social histories in weighing his opinion, she must also consider this factor in evaluating Dr. Rasmussen's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wright v. Director, OWCP*, 7 BLR 1-475 (1984). In rendering her findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge again finds that the evidence at 20 C.F.R. §718.202(a)(4) is in equipoise, then it is insufficient to establish that claimant does not have legal pneumoconiosis on rebuttal at amended Section 411(c)(4). The administrative law judge must then determine whether employer has rebutted the amended Section 411(c)(4) presumption by establishing that claimant's disabling respiratory impairment is not due to legal pneumoconiosis. If the administrative law judge finds that employer has rebutted the amended Section 411(c)(4) presumption, then she must determine whether claimant has established the elements of entitlement by a preponderance of the evidence. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge