BRB No. 13-0185 BLA

JAMES E. RISTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCRUBET, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/23/2014
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05102) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on May 26, 2010.

Applying amended Section 411(c)(4),[1] 30 U.S.C. §921(c)(4), the administrative law judge found that claimant established that he had thirty years of coal mine employment in above ground mining,[2] but did not establish that any of his coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge, however, found that the evidence established the existence of both clinical and legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a) (2013). Moreover, after finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2013), the administrative law judge found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2013). Accordingly, the administrative law judge awarded benefits.

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[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. 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).

[3] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) (2013). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (2013).

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2013). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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 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 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 (2013). 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).

Legal Pneumoconiosis

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Baker, Ammisetty, Rasmussen, Zaldivar, and Rosenberg. Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to coal

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), and that claimant's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2013). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis, thereby precluding claimant from establishing entitlement based upon the Section 718.304 presumption. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.304 (2013); Decision and Order at 8.

dust exposure and cigarette smoking.[5] Director's Exhibit 12. Dr. Ammisetty diagnosed legal pneumoconiosis, in the form of chronic obstructive lung disease due to coal dust exposure. Claimant's Exhibit 3. Dr. Ammisetty also diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to both coal dust exposure and cigarette smoking. *Id.* Drs. Rasmussen diagnosed legal pneumoconiosis, in the form of a restrictive impairment caused, in part, by coal mine dust exposure. Claimant's Exhibit 4. Conversely, Drs. Zaldivar and Rosenberg opined that claimant does not suffer from legal pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 2-6. Dr. Zaldivar diagnosed pulmonary fibrosis, but opined that it was unrelated to coal mine dust exposure, and was most likely idiopathic in nature. Employer's Exhibits 2, 5. While Dr. Rosenberg opined that claimant suffers from interstitial parenchymal lung disease, he opined that it was not due to claimant's coal mine dust exposure. Employer's Exhibit 4.

The administrative law judge accorded less weight to Dr. Ammisetty's opinion because he found that it was based upon inaccurate coal mine employment and smoking histories. Decision and Order at 11. The administrative law judge gave less weight to Dr. Rasmussen's opinion because he found that it was not sufficiently reasoned. *Id*. The administrative law judge discredited Dr. Zaldivar's diagnosis of pulmonary fibrosis, unrelated to coal mine dust exposure, because she found that it was inconsistent with the x-ray evidence. *Id.* at 12. Finally, the administrative law judge discredited the opinions of Drs. Zaldivar and Rosenberg because he found that they failed to adequately explain why claimant's thirty years of coal mine dust exposure played no part in his lung disease. *Id*. Having accorded less weight to the opinions of Drs. Ammisetty, Rasmussen, Zaldivar, and Rosenberg, the administrative law judge found that, "the preponderance of the medical opinion evidence supports [her] conclusion that the [c]laimant has . . . legal pneumoconiosis." *Id*.

Employer argues that the administrative law judge erred in not identifying the medical opinion evidence which she found supportive of a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013). We agree. Having discredited the medical opinions of Drs. Ammisetty, Rasmussen, Zaldivar, and Rosenberg, the administrative law judge failed to explain whether the remaining medical opinion, that of Dr. Baker, was sufficient to satisfy claimant's burden to establish the

[5] Employer argues that the administrative law judge erred in not making a specific determination regarding the extent of claimant's smoking history. We disagree. The administrative law judge found that claimant smoked one and one-half to two packs of cigarettes a day for thirty-two to forty years. Decision and Order at 2. The administrative law judge found that this smoking history was supported by claimant's reported histories, as well as claimant's hearing testimony. *Id.*; Hearing Transcript at 33, 53-54.

existence of legal pneumoconiosis. Therefore, the Board is unable to determine whether substantial evidence supports the administrative law judge's finding. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We, therefore, vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, when considering whether Dr. Baker's opinion establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013), the administrative law judge should address Dr. Baker's credentials, the explanation for his conclusion, the documentation underlying his medical judgment, and the sophistication of, and bases for, his diagnosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Total Disability

Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv) (2013).[6] Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered five arterial blood gas studies conducted on May 21, 2010, June 30, 2010, August 4, 2010, March 2, 2011, and June 15, 2011. Decision and Order at 14; Director's Exhibits 12, 14; Claimant's Exhibits 3, 4; Employer's Exhibit 2. The administrative law judge noted that the only arterial blood gas study to produce qualifying values[7] was the exercise blood gas study conducted by Dr. Zaldivar on March 2, 2011. Decision and Order at 14; Employer's Exhibit 2. The administrative law judge, therefore, found that a finding of total disability was supported, in part, by the blood gas evidence of record. *Id.*

Turning to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) (2013), the administrative law judge considered the medical opinions of Drs. Baker, Ammisetty, Rasmussen, Zaldivar, and Rosenberg. While Drs. Baker, Ammisetty, Rasmussen, and Zaldivar opined that claimant has a totally disabling respiratory or pulmonary impairment, Director's Exhibit 12; Claimant's Exhibits 3-5; Employer's Exhibits 2, 3, 5, Dr. Rosenberg opined that claimant does not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 14; Employer's Exhibits 4, 6.

[6] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii) (2013), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii) (2013).

In resolving the conflicting medical opinion evidence, the administrative law judge accorded no weight to Dr. Rosenberg's opinion because the doctor had not reviewed Dr. Zaldivar's report, including the qualifying exercise blood gas study obtained by Dr. Zaldivar on March 2, 2011. Decision and Order at 15. The administrative law judge accorded significant weight to the opinions of Drs. Ammisetty, Baker, Rasmussen, and Zaldivar, that claimant suffers from a totally disabling pulmonary impairment, finding that their opinions were well-reasoned and documented. *Id.* "Based on the qualifying blood gas study and the medical opinions," the administrative law judge found that "total disability ha[d] been established." *Id.*

Employer argues that the administrative law judge erred in failing to explain why she found the arterial blood gas study evidence supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) (2013). We agree. The administrative law judge did not explain why she found that the qualifying exercise blood gas study conducted on March 2, 2011 was more probative than the non-qualifying blood gas studies that were conducted both before and after that study. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii) (2013), and instruct the administrative law judge, on remand, to weigh the qualifying and non-qualifying arterial blood gas studies,[8] make a specific finding, and explain her determination regarding whether the arterial blood gas study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(ii) (2013).

In light of our decision to remand the case to the administrative law judge for reconsideration of the arterial blood gas study evidence, we vacate her finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) (2013), as that finding was based in part upon the administrative law judge's unexplained finding that the arterial blood gas study evidence supports a finding of total disability. On remand, when considering whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) (2013), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their

[8] A review of the record indicates that Dr. Rasmussen also conducted an exercise arterial blood gas study on August 4, 2010, which produced qualifying results. Claimant's Exhibit 4.

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 arterial blood gas or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv) (2013), she must weigh all the new evidence together, both like and unlike, to determine whether claimant has established that he is totally disabled pursuant to 20 C.F.R. §718.204(b) (2013). *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).

Total Disability Due to Pneumoconiosis

In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013), and her finding that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b) (2013), we also vacate the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2013). On remand, if reached, the administrative law judge should reconsider whether the evidence establishes that claimant's totally disabling pulmonary impairment was due to clinical pneumoconiosis, legal pneumoconiosis, or both diseases.[9]

The Section 411(c)(4) Presumption

In his response brief, claimant contends that he is entitled to invocation of the Section 411(c)(4) presumption.[10] The administrative law judge found that the Section

[9] We agree with employer that the administrative law judge, in addressing whether the evidence establishes that claimant's total disability is due to clinical pneumoconiosis, should address the significance of the fact that Drs. Baker and Rasmussen each diagnosed complicated pneumoconiosis, a diagnosis which the administrative law judge found was not supported by the record. Employer's Brief at 19.

[10] The arguments in claimant's response brief are in support of another method by which the administrative law judge may reach the same result and conclude that claimant is entitled to benefits. Therefore, those arguments are properly before the Board in this appeal. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

411(c)(4) presumption of total disability due to pneumoconiosis was inapplicable because claimant failed to establish that he worked for fifteen years in a surface mine with dust conditions substantially similar to those found in underground mines. The administrative law judge specifically found that claimant failed to prove that, during his thirty years as an above ground miner, he was exposed to dust conditions substantially similar to those existing underground. Decision and Order at 8.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). Those regulations provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."[11] 20 C.F.R. §718.305(b)(2); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

As summarized by the administrative law judge, claimant testified about the conditions of his above ground coal mine employment:

> [Claimant] stated that he worked mainly as a machine operator at the mines, lastly doing strip mine reclamation and driving an excavator, a dozer, or a "wobble truck." He testified that he was exposed to dust daily and that some of the older machines allowed dust inside, even if he sat inside enclosed in a cab.

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[11] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

Decision and Order at 3 (Hearing Transcript citations omitted).

In light of the newly promulgated regulations, we vacate the administrative law judge's finding that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to reconsider whether claimant's testimony regarding his working conditions is sufficient under the regulations to satisfy the "substantially similar" requirement of Section 411(c)(4). 20 C.F.R. §718.305(b)(2).

Should the administrative law judge, on remand, credit claimant with fifteen years of qualifying coal mine employment, and further find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) (2013), claimant would be entitled to invocation of the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. If the administrative law judge finds that claimant is entitled to invocation of the Section 718.305 presumption, the Department's regulations provide that the burden of proof shifts to employer to establish rebuttal by establishing both that claimant does not have legal and clinical pneumoconiosis, or by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2).

However, if the administrative law judge, on remand, determines that claimant has not established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, she must determine whether claimant can otherwise establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge must reconsider whether the evidence establishes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), and whether the evidence establishes that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2013).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and this 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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JUDITH S. BOGGS
Administrative Appeals Judge