



BRB No. 15-0089 BLA

DELORES C. HUBBARD)
(o/b/o ESTATE OF GEORGE L.)
HUBBARD))

Claimant-Respondent)

v.)

WESTMORELAND COAL COMPANY)

and)

DATE ISSUED: 01/20/2016

WELLS FARGO DISABILITY)
MANANGEMENT)

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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-5182) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) awarding benefits on a subsequent miner's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).² The administrative law judge credited the miner with 23 years and nine months of qualifying coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and that employer failed to rebut it. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption at Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.³

¹ The miner filed his first claim on March 15, 1982. Director's Exhibit 1. On January 27, 1988, Administrative Law Judge Sheldon R. Lipson issued a Decision and Order denying benefits. *Id.* Judge Lipson's denial was based on the miner's failure to establish the existence of pneumoconiosis. *Id.* Because the miner did not pursue this claim any further, the denial became final. The miner filed his second claim (a subsequent claim) on August 18, 2008. Director's Exhibit 2. It was finally denied by a claims examiner on March 6, 2009, because the miner failed to establish that he was totally disabled by pneumoconiosis. *Id.* The miner filed this claim (a subsequent claim) on September 29, 2010. Director's Exhibit 4.

² Claimant is the widow of the miner, who died on September 20, 2013. She is pursuing this subsequent claim on behalf of the miner.

³ Because the administrative law judge's length of coal mine employment finding and his findings that the new evidence did not establish total respiratory disability

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address employer's contention that the administrative law judge erred in finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Specifically, employer asserts that the administrative law judge erred in finding that the new medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Rasmussen and Zaldivar, that the miner had a disabling pulmonary impairment,⁵ and the opinion of Dr. Tuteur, that the miner did not have a disabling pulmonary impairment,⁶ Employer's Exhibits 6, 18. The

pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), (b) and (c), and that employer failed to disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (2) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record indicates that the miner was last employed in the coal mining industry in West Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁵ In a report dated May 31, 2011, Dr. Rasmussen opined that the extent of "the marked loss of lung function as reflected by [the miner's] markedly reduced single breath carbon monoxide diffusing capacity...is considered totally disabl[ing] by the American Thoracic Society and is classified as Class IV impairment by the AMA Guides to Impairment of Pulmonary Function, 6th Edition." Director's Exhibit 13. Dr. Rasmussen therefore opined that the miner had a totally disabling chronic lung disease. *Id.* Similarly, in a report dated October 4, 2011, Dr. Zaldivar opined that the miner was unable to perform his usual coal mine work from a pulmonary standpoint. Employer's Exhibit 5. Additionally, during a deposition taken on March 17, 2014, Dr. Zaldivar opined that the miner had a disabling pulmonary impairment. Employer's Exhibit 17 (Dr. Zaldivar's Depo. at 10).

⁶ In a report dated October 16, 2013, Dr. Tuteur opined that, even though the valid pulmonary function testing indicated that the miner had a minimal obstructive

administrative law judge gave greater weight to the opinions of Drs. Zaldivar and Tuteur than to Dr. Rasmussen's contrary opinion, on the ground that their opinions were well-reasoned. Further, the administrative law judge gave dispositive weight to Dr. Zaldivar's opinion because Dr. Zaldivar had a better understanding of the miner's usual coal mine work.⁷ Hence, the administrative law judge found that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).⁸

Employer argues that the administrative law judge improperly applied an inconsistent degree of scrutiny to Dr. Rasmussen's opinion, as compared to Dr. Zaldivar's opinion. Employer avers that "the administrative law judge was correct to discount Dr. Rasmussen's opinion based on a significant flaw in the May 10, 2011 single breath carbon monoxide diffusing capacity test, and should have similarly discounted Dr. Zaldivar's opinion [because it was based on an invalid measurement]." Employer's Brief at 7. Contrary to employer's assertion, the administrative law judge did not discount Dr. Rasmussen's opinion because he found that the results of the diffusing capacity test were invalid. Rather, the administrative law judge discounted Dr. Rasmussen's assessment that the miner had a Class IV pulmonary impairment under the AMA Guides to the

abnormality, "the [miner's] impairment is of insufficient severity and magnitude to produce disability." Employer's Exhibit 6. Further, during a deposition taken on January 13, 2014, Dr. Tuteur opined that the miner was not disabled from a pulmonary perspective. Employer's Exhibit 18 (Dr. Tuteur's Depo. at 16-17, 44-47, 62).

⁷ After noting that Drs. Rasmussen and Zaldivar opined that the miner's level of impairment precluded him from returning to his usual coal mine work or work that involved moderate to heavy labor, the administrative law judge noted that "[j]udicial precedent suggests that when a physician has examined the miner and has knowledge of the miner's job duties, the physician's opinion likely provides a more accurate picture of whether the miner can return to work than is provided by numerical data alone." Decision and Order at 36. The administrative law judge subsequently stated, "[f]or the reasons discussed above, on the issue of total respiratory disability, [he] accord[ed] greater weight to Dr. Zaldivar's documented and reasoned medical opinions on the question of whether the [m]iner suffered from a totally disabling pulmonary or respiratory condition." *Id.* at 37.

⁸ Based on a form containing a description of the miner's coal mine work, the administrative law judge determined that "the [m]iner's usual coal mine work as a roof bolter involved operating equipment and regularly performing moderate to heavy lifting and carrying in an underground coal mine." Decision and Order at 34.

Impairment of Pulmonary Function because the record does not contain reproducible testing of the markedly reduced single breath carbon monoxide diffusing capacity, as required by the AMA Guides.⁹ Unlike Dr. Rasmussen, Dr. Zaldivar's assessment of the miner's pulmonary impairment was not based on the AMA Guides. Consequently, we reject employer's assertion that the administrative law judge improperly applied an inconsistent degree of scrutiny to Dr. Rasmussen's opinion, as compared to Dr. Zaldivar's opinion.

Employer also argues that the administrative law judge erred in failing to explain why he credited Dr. Zaldivar's opinion over Dr. Tuteur's contrary opinion. Employer's assertion has merit. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge indicated that Dr. Zaldivar had an accurate understanding of the miner's usual coal mine work. However, the administrative law judge did not state that Dr. Tuteur had an inaccurate understanding of the miner's usual coal mine work. *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Dr. Tuteur reviewed the reports of Drs. Rasmussen and Zaldivar, and noted that the miner worked for 13 years as a roof bolter using conventional and glue bolts. Employer's Exhibit 6. Thus, the administrative law judge did not adequately explain how Dr. Zaldivar's understanding of the exertional requirements of the miner's usual coal mine work provided Dr. Zaldivar with an advantage over Dr. Tuteur in assessing the extent of the miner's pulmonary impairment. *See Wojtowicz*, 12 BLR at 1-165. We, therefore, vacate the administrative law judge's finding that the new medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the medical opinion evidence in accordance with the APA.

In view of our decision to vacate the administrative law judge's finding that the new medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), we also vacate the administrative law judge's finding that the new

⁹ The administrative law judge explained that Dr. Rasmussen's opinion was "based on a single 'DLco' carbon monoxide testing where the AMA Guides state that the testing must be reproducible such that the (sic) at least two tests are within 3 units of measurement" and that "[s]uch reproducible testing was not reported in this case." Decision and Order at 35. The administrative law judge also explained that Dr. Rasmussen diagnosed the presence of complicated pneumoconiosis, which is contrary to the administrative law judge's finding on this issue.

evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall. Furthermore, we vacate the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).¹⁰

In the interest of judicial economy, we will also address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that no part of the miner's total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d). The administrative law judge found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) by both methods.¹¹

Employer asserts that the administrative law judge erred in failing to "discuss[] the presence of honeycombing as a medical factor weighing against the presence of coal workers' pneumoconiosis, despite the testimony [of Dr. Tuteur] to the contrary." Employer's Brief at 11. Employer maintains that this failure "tainted [the administrative law judge's findings] on clinical pneumoconiosis, legal pneumoconiosis, and causation." *Id.* Employer's contention has some merit. The administrative law judge did not consider whether the medical opinion evidence established the absence of clinical pneumoconiosis. Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibit 13. By contrast, Drs. Zaldivar and Tuteur opined that the miner did not have clinical pneumoconiosis. Employer's Exhibits 5, 6, 17, 18. While an administrative law judge is not required to accept evidence that he determines is not credible, he must consider and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). In this case, the administrative law judge erred in failing to consider the medical opinion evidence regarding the issue of clinical pneumoconiosis. *See McCune*, 6 BLR at 1-988; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Thus, we vacate the administrative law judge's finding that employer failed to disprove the existence of

¹⁰ At the outset, on remand, the administrative law judge must consider whether the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

¹¹ The administrative law judge determined that it was not necessary for him to consider whether employer established the absence of legal pneumoconiosis in view of his finding that employer failed to establish the absence of clinical pneumoconiosis.

clinical pneumoconiosis, and remand the case for consideration of all the relevant medical opinion evidence of record, if claimant again establishes total respiratory disability and, thus, invocation of the presumption at Section 411(c)(4).¹²

In view of the foregoing, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption at Section 411(c)(4), and remand the case for further consideration of all the relevant evidence, if reached. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d).

¹² Finally, employer asserts that the administrative law judge erred in weighing Dr. Rasmussen's opinions, that the miner suffered from legal pneumoconiosis and that the miner's coal dust exposure significantly contributed to his totally disabling chronic lung disease, because they do not meet claimant's burden of proof. As discussed, *supra*, the administrative law judge did not consider whether employer established the absence of legal pneumoconiosis because he found that employer failed to establish the absence of clinical pneumoconiosis. However, in view of our decision to vacate the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, on remand, the administrative law judge should consider whether employer disproved the existence of legal pneumoconiosis by establishing that the miner did not have a chronic lung disease or impairment that is significantly related to, or substantially aggravated by, coal dust exposure, if reached. *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 6 n.8 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). Further, contrary to employer's assertion, the administrative law judge properly applied the rebuttal standard for disability causation in finding that "[e]mployer has failed to establish that no part of the [m]iner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201." Decision and Order at 47; *see Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11. If reached, on remand, the administrative law judge should apply the same rebuttal standard for disability causation.

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 proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge