BRB No. 11-0722 BLA

DARRELL L. BARNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/24/2012
	)	
DECKER COAL COMPANY	)	
	)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet), Golden, Colorado, for claimant.

John S. Lopatto, Washington, D.C., for employer.

Maia S. Fisher (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 (08-BLA-5683) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed 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). This case involves a subsequent claim filed on May 22, 2007.[1]

After crediting claimant with at least twenty-six years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). The administrative law judge, therefore, considered claimant's 2007 claim on the merits.

In considering the merits of the claim, the administrative law judge found that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in not addressing whether the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also contends that principles of res judicata preclude consideration of claimant's subsequent claim. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that principles of res judicata bar consideration of claimant's subsequent claim. The Director further states that if the Board vacates the award of benefits, the administrative law judge should be instructed to consider the claim pursuant to amended Section 411(c)(4). 30 U.S.C. §921(c)(4).[3]

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[1] Claimant's previous claim, filed on February 14, 2003, was finally denied because he failed to establish that he suffered from pneumoconiosis. Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in Montana. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] Because employer does not challenge the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his subsequent claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Section 718.202(a)(4)

Employer initially contends that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4). The record contains the new medical opinions of Drs. Gottschall and Repsher. Dr. Gottschall diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibit 2. Although Dr. Repsher also diagnosed COPD, he opined that the disease was due solely to claimant's cigarette smoking. Employer's Exhibit 4.

Employer argues that the administrative law judge failed to properly resolve the conflicting medical opinion evidence regarding the existence of legal pneumoconiosis. We agree. In finding that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge merely acknowledged that Dr. Gottschall's opinion supports such a finding. Decision and Order at 5-6. The administrative law judge neither addressed whether Dr. Gottschall's diagnosis was adequately reasoned, nor weighed Dr. Gottschall's opinion against Dr. Repsher's contrary opinion. The

[4] "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).

administrative law judge's conclusory analysis, that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis, does not comply with 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that every adjudicatory decision include 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); *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we must vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration. In light of our decision to vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding of a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Section 718.204(c)

Employer also argues that the administrative law judge erred in failing to address whether the medical opinion evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We agree. The administrative law judge's Decision and Order contains no finding as to the cause of claimant's total disability, a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). We, therefore, vacate the administrative law judge's award of benefits under 20 C.F.R. Part 718.

The Section 411(c)(4) Presumption

Finally, we agree with the Director that the administrative law judge, on remand, should consider the claim pursuant to amended Section 411(c)(4). 30 U.S.C. §921(c)(4). Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

On remand, the administrative law judge must determine whether claimant has established invocation of the Section 411(c)(4) presumption. The administrative law judge should initially determine whether claimant has established at least fifteen years of qualifying coal mine employment.[5] *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). If so, claimant will have invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d).[6] The burden will then shift to employer to rebut the presumption, either by disproving the existence of pneumoconiosis or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-213 (10th Cir. 1989) (holding that on rebuttal, employer must "affirmatively establish[] the lack of either pneumoconiosis or a link with [claimant's] mine employment"). In determining whether employer has rebutted the presumption, the administrative law judge, on remand, must discuss and weigh all of the relevant evidence, and set forth the specific bases for his findings. *Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17.

If the administrative law judge does not find that claimant has invoked the Section 411(c)(4) presumption, he must reconsider whether the new medical evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In determining whether the new medical opinion evidence establishes the existence of pneumoconiosis, the administrative law judge must discuss and weigh all of the relevant evidence, and set

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[5] As noted above, employer has not challenged the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See* n.3, *supra*.

[6] We reject employer's contention that principles of res judicata preclude consideration of claimant's subsequent claim. The doctrine of res judicata generally has no application in the context of subsequent claims, "as the purpose of Section 725.309 is to provide relief from the principles of res judicata to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Section 725.309 provides specifically that if claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* §725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4). In addition, courts have held that res judicata does not apply in a subsequent claim where the issue is claimant's physical condition at entirely different times. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996) (en banc); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995).

forth the specific bases for his findings. *Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17. If reached, the administrative law judge must also determine whether the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

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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BETTY JEAN HALL
Administrative Appeals Judge