BRB No. 13-0012 BLA

PAUL BURKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/30/2013
	)	
GOLDEN OAK MINING 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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Kathleen H. Kim (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 Law Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-5241) 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 (Supp. 2011) (the Act). This case involves a miner's claim filed on September 15, 2009. The district

director awarded benefits and employer requested a hearing, which was held on September 22, 2011. Director's Exhibits 25, 26.

The administrative law judge credited claimant with at least fifteen years of underground coal mine employment,[1] and found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), based on the parties' stipulation. The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contentions that the administrative law judge applied an improper rebuttal standard, and that Dr. Alam's opinion is insufficient to constitute a diagnosis of legal pneumoconiosis. In separate reply briefs, employer reiterates its previous contentions.[3]

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

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[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

[2] 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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[3] Employer does not challenge the administrative law judge's findings that claimant worked for at least fifteen years in underground coal mine employment, that claimant established that he is totally disabled under 20 C.F.R. §718.204(b)(2), and that he invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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 Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer did not establish rebuttal under either method. Decision and Order at 10-12.

Initially, we reject employer's contention that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 8-9. Contrary to employer's argument, the administrative law judge correctly stated that, on rebuttal, employer bore the burden to establish that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 4-5. The United States Court of Appeals for the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the claimant does not suffer from pneumoconiosis, or that the disease is not related to coal mine work," and that an employer bears the burden to "affirmatively prove[] the absence of pneumoconiosis. . . ." *Morrison*, 644 F.3d at 480 and n.5, 25 BLR at 2-9, 2-12 and n.5. Therefore, we reject employer's contention that the administrative law judge applied an improper standard on rebuttal. *See* Decision and Order at 4-6, 10; Employer's Brief at 8.

In determining whether employer disproved the existence of legal pneumoconiosis,[4] the administrative law judge considered the opinions of Drs. Jarboe, Dahhan, and Alam. While all of the physicians agreed that claimant is totally disabled due to a severe obstructive impairment, they disagreed as to the etiology of the impairment. Drs. Jarboe and Dahhan concluded that claimant's obstructive impairment is caused by smoking, and is unrelated to his coal mine employment. Director's Exhibits 16, 17. In support of his opinion, Dr. Jarboe noted that the FEV1 value on claimant's

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pulmonary function studies is disproportionately reduced compared to his FVC value, that his pulmonary function studies revealed a reversibility of airflow obstruction with the administration of bronchodilators, and that claimant's hyperinflation of the lung and air trapping are inconsistent with coal mine dust exposure. Director's Exhibit 17. Dr. Dahhan supported his opinion with reference to his experience treating coal miners and the medical literature, noting that the significant FEV1 reduction on claimant's pulmonary function studies is inconsistent with exposure to coal mine dust, as is claimant's bronchodilator response and use of bronchodilators for treatment. Director's Exhibit 16. In contrast, Dr. Alam opined that claimant suffers from legal pneumoconiosis, in the form of chronic bronchitis and emphysema related to smoking and coal mine dust exposure.[5] Director's Exhibit 11.

In considering the opinions of Drs. Jarboe and Alam, the administrative law judge noted that "Dr. Jarboe reviewed more evidence," but that Dr. Alam, as claimant's treating physician, was "presumably extensively familiar with [c]laimant's lung condition." Decision and Order at 10. Therefore, the administrative law judge found "no reason in particular to give Dr. Jarboe's opinion greater weight than that of Dr. Alam." *Id.* The administrative law judge accorded Dr. Dahhan's opinion less weight, because she found that the physician did not explain his basis for determining that claimant's fifteen years of coal mine employment did not contribute to his pulmonary impairment. *Id.* The administrative law judge concluded that the evidence regarding the existence of legal pneumoconiosis was in equipoise, "[a]t best," and therefore found that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *Id.*

Employer contends that the administrative law judge erred in her consideration of the opinions of Drs. Jarboe and Alam. We agree. In her decision, the administrative law judge did not address Dr. Jarboe's reasons for concluding that claimant's coal mine dust exposure did not contribute to his pulmonary impairment. Instead, the administrative law judge simply noted that Dr. Jarboe reviewed more evidence than Dr. Alam, that Dr. Alam was claimant's treating physician and was "presumably extensively familiar with [c]laimant's lung condition," and that she found no reason to give greater weight to Dr. Jarboe's opinion than to Dr. Alam's opinion. Decision and Order at 10. Furthermore, as employer argues, Dr. Alam began to treat claimant only after the visit that formed the basis for Dr. Alam's medical report, a fact that the administrative law judge must take into account on remand in considering the quality of Dr. Alam's relationship with

[5] Dr. Alam opined that eighty percent of claimant's pulmonary impairment is attributable to smoking and fifteen percent is attributable to claimant's coal mine dust exposure, and concluded that both smoking and coal mine dust exposure "substantially aggravated his underlying pulmonary condition . . . ." Director's Exhibit 11.

claimant and the weight to accord his opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In light of the above, we are unable to affirm the administrative law judge's finding that the opinions of Drs. Jarboe and Alam are in equipoise, as her finding does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We also agree with employer that the administrative law judge erred in her consideration of Dr. Dahhan's opinion. The administrative law judge discounted Dr. Dahhan's opinion, because she found that Dr. Dahhan did "not explain how 15 years of underground coal mine dust exposure had no effect on the development of [legal pneumoconiosis]." Decision and Order at 10. However, the record reflects that Dr. Dahhan, based on his evaluation of claimant and his experience, gave several reasons for his conclusion that claimant does not have legal pneumoconiosis, and instead suffers from a smoking-related impairment. Director's Exhibit 16 at 5, 34-35. Because the administrative law judge did not address the entirety of Dr. Dahhan's opinion in light of its underlying reasoning, we must vacate the administrative law judge's determination to accord less weight to Dr. Dahhan's opinion on the issue of whether employer disproved the existence of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

In light of the above, we vacate the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. On remand, when considering whether the medical opinion evidence disproves the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[6] *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

[6] We reiterate that it is employer's burden to "affirmatively prove[] the absence of pneumoconiosis. . . ." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-12 (6th Cir. 2011). Therefore, employer's contention that Dr. Alam's opinion is legally insufficient to support a finding of legal pneumoconiosis is irrelevant, as it is employer's burden to disprove the existence of the disease. Employer's Brief at 11-12.

The administrative law judge also found that employer failed to establish 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); Decision and Order at 10-12. The administrative law judge accorded less weight to Dr. Jarboe's opinion on disability causation because he "failed to explain how 15 years of coal dust exposure played no part in the [c]laimant's disability." *Id.* at 11. The administrative law judge further found Dr. Alam's opinion well-reasoned and documented, and found "no reason" to grant it less weight. *Id.* Finally, the administrative law judge accorded less weight to Dr. Dahhan's opinion, finding the physician erred in relying on claimant's pulmonary function studies to determine the etiology of claimant's pulmonary impairment, improperly assumed this impairment is unrelated to his coal mine employment based on claimant's bronchodilator treatments, and inappropriately ruled out a connection between claimant's coal mine employment and his impairment by noting claimant's smoking history. *Id.* at 11-12.

Employer initially contends that the administrative law judge's findings regarding the opinions of Drs. Jarboe and Alam at disability causation cannot be affirmed, for the same reasons discussed above at legal pneumoconiosis. We agree. While the administrative law judge found that Dr. Jarboe "failed to explain how 15 years of coal dust exposure played no part in the [c]laimant's disability," the record reflects that Dr. Jarboe set forth several reasons why claimant's impairment did not arise out of, or in connection with, his coal mine employment. Director's Exhibit 17 at 6-9. Furthermore, the administrative law judge did not explain her reasons for finding Dr. Alam's opinion to be well-reasoned or documented and therefore of equal weight to the opinions of employer's physicians. Decision and Order at 11. As the administrative law judge has not accurately characterized Dr. Jarboe's opinion in her analysis, or explained the specific bases for her weighing of the opinions of Drs. Jarboe and Alam, remand is required. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-162; *see Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Employer also challenges the administrative law judge's finding that Dr. Dahhan's opinion is insufficient to rule out a connection between claimant's coal mine employment and his pulmonary impairment. Employer's Brief at 9-10; Employer's Second Reply Brief at 2-3. For the reasons set forth below, employer's contention has merit.

However, we note that, if the administrative law judge, on remand, again finds Dr. Alam's opinion relevant to considering the weight to accord the rebuttal opinion of Dr. Jarboe, she must consider the factors listed in 20 C.F.R. §718.104(d)(1)-(5) and address whether Dr. Alam's opinion is documented and reasoned, prior to according Dr. Alam's opinion enhanced weight due to his treating physician status.

The administrative law judge initially found that Dr. Dahhan improperly relied on pulmonary function study evidence in addressing the etiology of claimant's totally disabling pulmonary impairment. In support of this finding, the administrative law judge quoted from a published Board decision for the proposition that pulmonary function and arterial blood gas study evidence is "not diagnostic of the etiology of the respiratory impairment, but [is] diagnostic only of the severity of the impairment." Decision and Order at 11, *quoting Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). The administrative law judge's reliance on *Tucker* is misplaced. In *Tucker*, decided under 20 C.F.R. Part 718, the Board held that a claimant who establishes the existence of pneumoconiosis, and establishes total disability based on qualifying pulmonary function or arterial blood gas study evidence, without the benefit of the Section 411(c)(4) presumption, "has not also established that the total disability is due to pneumoconiosis"; he must prove that his total disability is due to pneumoconiosis. *Tucker*, 10 BLR at 1-41-42. In that specific context, the Board held that neither pulmonary function study evidence nor blood gas study evidence, by itself, can establish disability causation.[7] The Board, however, did not hold, or suggest, that a qualified physician may not rely on such evidence, as well as other relevant evidence and his or her experience, in formulating an opinion as to the etiology of a miner's pulmonary impairment. *See Tucker*, 10 BLR at 1-41-42. In this case, the administrative law judge therefore erred in discounting Dr. Dahhan's opinion on the basis that he impermissibly relied on pulmonary function study evidence in determining the etiology of claimant's pulmonary impairment.

The administrative law judge also accorded less weight to Dr. Dahhan's opinion because he relied on claimant's receiving bronchodilator treatments to conclude that claimant's impairment is not related to coal mine dust exposure, when Dr. Alam, who prescribed those treatments, believes that claimant has legal pneumoconiosis. Decision and Order at 11. The administrative law judge, however, has not resolved the conflict between these opinions, or addressed why Dr. Dahhan's opinion is insufficient to establish that claimant's impairment did not arise out of, or in connection with, his coal mine employment. *Wojtowicz*, 12 BLR at 1-162.

The administrative law judge also accorded Dr. Dahhan's opinion less weight because she found that Dr. Dahhan's diagnosis of a smoking-related pulmonary

[7] Consistent with the Board's holding in *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), 20 C.F.R. §718.204(c) provides that, except in limited circumstances, "proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment . . . shall not, *by itself*, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis," but that "the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical opinion." 20 C.F.R. 718.204(c)(2) (emphasis added).

impairment "does not explain why coal dust exposure would have not contribute[d] to the [c]laimant's condition." Decision and Order at 12. The record reflects that, while Dr. Dahhan opined that claimant's impairment was related to smoking, he gave several reasons for why he concluded that claimant's impairment is inconsistent with one that is related to coal mine dust exposure. Director's Exhibit 16 at 5, 34-36. Accordingly, the administrative law judge appears to have misconstrued the basis for Dr. Dahhan's conclusion that claimant's impairment is unrelated to his coal mine employment. For the above reasons, we conclude that the administrative law judge has not adequately addressed or considered the reasons underlying Dr. Dahhan's opinion at disability causation. Therefore, on remand, the administrative law judge must address, pursuant to the APA, the reasons underlying Dr. Dahhan's conclusions, the documentation supporting his medical judgments, and the sophistication of, and bases for, his diagnoses. *See* 5 U.S.C. §557(c)(3)(A).

Finally, we reject employer's contention that the administrative law judge erred in excluding the medical report of Dr. Vuskovich, pursuant to 20 C.F.R. §725.414. Section 725.414(a)(3)(i) allowed employer to "submit, in support of its affirmative case . . . no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). A showing of "good cause" was required to exceed this limit. 20 C.F.R. §725.456(b)(1). Employer submitted, and the administrative law judge admitted, the reports of Drs. Dahhan and Jarboe as employer's two affirmative medical reports. At the hearing, employer proffered a third medical report by Dr. Vuskovich, designated as rebuttal to the pulmonary function and arterial blood gas studies administered by Dr. Alam, as well as "other medical evidence." Hearing Tr. at 8-11. The administrative law judge found that "Dr. Vuskovich's assessment of the Department-sponsored pulmonary function and arterial blood gas studies [is] inextricably intertwined with [his] otherwise inadmissible assessment of the [c]laimant's respiratory or pulmonary condition generally." Evidentiary Order at 2. As employer has not demonstrated that the administrative law judge abused her discretion in excluding Dr. Vuskovich's medical report, we reject employer's allegation of error. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989).

In sum, we remand this case to the administrative law judge to determine whether employer has rebutted the Section 411(c)(4) presumption of total disability due to pneumoconiosis. On remand, it is employer's burden to disprove the existence of pneumoconiosis, or to establish 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 Morrison* , 644 F.3d at 479, 25 BLR at 2-8.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded 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