BRB No. 01-0727 BLA

DON JEAN MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED:
OLD REPUBLIC 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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John H. Shumate, Mount Hope, West Virginia, for claimant.

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

Rita A. Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (88-BLA-2340) of Administrative Law Judge Daniel L. Leland on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] After summarizing the procedural history in this case[2], the

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed for benefits on October 27 1987. Director's Exhibit 1. On May 4, 1989, Administrative Law Judge Sayrs awarded benefits. The Board affirmed the administrative law judge's findings. *Morgan v. Peabody Coal Co.*, BRB No. 89-1776 BLA (Dec. 11, 1991) (unpub.). In light of the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the Board granted employer's second request for reconsideration and remanded the case to the administrative law judge for reconsideration of the evidence relating to the cause of claimant's disability under 20 C.F.R. §718.204(b) (2000). *Morgan v. Peabody Coal Co.*, BRB No. 89-1776 BLA (Aug. 22, 1996) (unpub.).

On remand, relying upon Dr. Rasmussen's opinion, Administrative Law Judge Leland found that claimant's total disability was due to pneumoconiosis, and therefore, awarded benefits. Employer appealed, contending that recent circuit court law invalidated the previous finding of pneumoconiosis, and alleging error regarding the weighing of the evidence at Section 718.204(b). The Board declined to reconsider the administrative law judge's reliance on the numerical superiority of the physicians finding the existence of pneumoconiosis. The Board also determined that substantial evidence supported the administrative law judge's finding that claimant's total disability was caused by pneumoconiosis. Lastly, the Board rejected employer's argument and reliance upon United States Court of Appeals for the Seventh Circuit law that claimant's disabling back and psychiatric problems make him ineligible for black lung benefits. *Morgan v. Peabody Coal Co.*, BRB No. 98-0129 BLA (Oct. 7, 1998) (unpub.). Employer appealed to the United States Court of Appeals for the Fourth Circuit. On October 30, 2000, the Fourth Circuit vacated the

administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) - (3) (2000). The administrative law judge next considered the medical opinion evidence and found that claimant established pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Considering all of the evidence at 20 C.F.R. §718.202(a), the administrative law judge concluded that claimant established the existence of pneumoconiosis. The administrative law judge further stated that he adhered to his earlier finding that claimant has established that his pneumoconiosis is a contributing cause of his total disability and that the onset date of total disability was October 1, 1987. Accordingly, benefits were awarded.

On appeal, employer first contends that the administrative law judge violated its due process rights and the Administrative Procedure Act (APA), 5 U.S.C. §554 *et. seq.*, as incorporated into the Act by 5 U.S.C. §554 (c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by failing to provide notice to employer of his intent to proceed with the case on remand. Employer further contends that the administrative law judge erred by failing to provide a rationale for crediting certain medical opinions in the record. Lastly, employer challenges the administrative law judge's previous findings with respect to the issue of total disability due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order. The Director, Office of Worker's Compensation Programs (the Director), responds, urging the Board to remand the case to the administrative law judge for further consideration of the medical opinion evidence. The Director also states his disagreement with employer's

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decision and remanded the case for reconsideration of the existence of pneumoconiosis pursuant to its holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Peabody Coal Co. and Old Republic Ins. Co. v. Director, OWCP, and Don Jean Morgan,* No. 99-1573 (4th Cir. Oct. 30, 2000). The Board remanded the case to the administrative law judge on January 19, 2001. *Morgan v. Peabody Coal Co.*, BRB No. 98-129 BLA (Jan. 19, 2001) (unpub.).

allegation that the administrative law judge's failure to provide a briefing schedule violated employer's due process rights and the APA and that claimant is not entitled to benefits because he had a disabling non-respiratory condition which predates his disabling pneumoconiosis. [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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

Initially, employer contends that the administrative law judge's failure to notify employer of his intention to proceed in this case violates employer's due process rights. On March 1, 2001, employer submitted a letter to the administrative law judge stating:

> It is, therefore, requested that you provide at least 30 days notice to the parties of your intention to proceed with an adjudication on remand and an opportunity within that period to request whatever proceedings any party considers necessary to a fair and complete opportunity to be heard.

Employer's March 1, 2001 letter. The administrative law judge did not respond to employer's letter but issued the Decision and Order on Remand - Awarding Benefits on March 28, 2001.

[3]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) - (3), and his determination that the opinions by Drs. Zaldivar and M. Hasan are insufficient to establish pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1- 710 (1983).

On April 25, 2001, employer submitted a Motion for Reconsideration and Request for Briefing Order. In that motion, employer alleged "[t]he decision does not address important issues raised in this case and was issued without permitting Peabody to fully brief its position, despite a timely request to do so." Employer's April 25, 2001 Motion for Reconsideration. Employer then requested that a briefing order be entered so that it could provide the reasons and bases for its motion. On May 14, 2001, the administrative law judge denied employer's motion, stating that employer's March 1, 2001 letter was not a sufficient request for briefing schedule and that the only issue on remand, the existence of pneumoconiosis, was fully discussed in the March 28, 2001 Decision and Order on Remand - Awarding Benefits.

Contrary to employer's contention, the APA does not require that the administrative law judge provide the parties with notice of his intention to proceed. Further, while employer asserts that it was denied fundamental fairness, it has not identified how it was prejudiced by the administrative law judge's actions. *Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972); *see e.g., Sykes v. Itmann Coal Co.*, 2 BLR 1-1089 (1980); *Rocchetti v. Jones and Laughlin Steel Corp.*, 1 BLR 1-812 (1978); *Sanders v. Consolidation Coal Co.*, 1 BLR 1-193 (1977).

We also disagree with employer's assertion, that the administrative law judge's actions required employer to be "clairvoyant" in order to preserve its right to participate in proceedings on remand. Employer's Reply Brief at 2. Section 725.455(d) provides that, "[b]riefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge." 20 C.F.R. §725.455(d). The administrative law judge reasonably concluded that the March 1, 2001 letter did not state employer's intent to file a brief nor did it request permission to do so. The administrative law judge was therefore not required to comply with employer's letter requesting notice of his intention to proceed in this case.

Regarding the administrative law judge's denial of employer's Motion for Reconsideration, the regulation found at 20 C.F.R. §725.479(b) states that:

> Any party may, within 30 days after the filing of a decision and order under 725.478, request a reconsideration of a decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

20 C.F.R. §725.479 (b). In denying employer's motion, the administrative law judge acted within his discretion in finding that employer's March 2001 letter was an insufficient request for a briefing order and in determining that altering his Decision and Order was unnecessary

since the sole issue on remand, the existence of pneumoconiosis, was thoroughly discussed as instructed in the Fourth Circuit's remand order.

Employer next contends that the administrative law judge erred in his consideration of the medical opinion evidence at Section 718.202(a)(4) by failing to provide a rationale for crediting opinions by Drs. Suraiya Hasan, Rasmussen, Gajendragadkar and the West Virginia Occupational Pneumoconiosis Board (WVOPB). Employer also contends that these opinions are not reasoned or documented.[4] In considering the medical opinions at Section 718.202(a)(4), the administrative law judge gave little weight to Dr. Zaldivar's diagnosis of no pneumoconiosis because the physician based his finding on a purely medical, not legal, definition of pneumoconiosis. The administrative law judge also gave little weight to Dr. M. Hasan's diagnosis of pneumoconiosis because he is treating claimant for psychiatric problems and lacks expertise in pulmonary conditions.[5] Without further discussion, the administrative law judge then stated:

> The remaining physicians of record diagnosed Claimant with either pneumoconiosis or COPD attributed to pneumoconiosis. Accordingly, I conclude that the preponderance of the physician opinion evidence established the existence of pneumoconiosis.
>
> After weighing the medical evidence, I conclude that Claimant has established the existence of pneumoconiosis. I adhere to my earlier conclusion that Claimant has established that his pneumoconiosis is a contributing cause of his total disability and that the onset date of Claimant's total disability is October 1, 1987.

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[4]Employer argues that the administrative law judge accepted the opinions at face value without considering the underlying bases of the opinions. Employer argues that the WVOPB's diagnosis could only have been based on a positive x-ray and work history. Employer's Brief at 14. Regarding Dr. Gajendragadkar's opinion, employer similarly contends that the underlying basis for the opinion is shown in a reference to a discredited x-ray and "other reports from Dr. Rasmussen." Employer's Brief at 15. Employer alleges that Dr. S. Hasan's opinion is based on a recitation of symptoms and a positive x-ray. Employer acknowledges that the physician conducted additional testing, but contends that the diagnosed conditions were not linked to coal dust exposure. *Id*.

[5]The administrative law judge's findings relative to the medical opinions by Drs. Zaldivar and Dr. M. Hasan can be affirmed as they are unchallenged on appeal. *See Skack supra*.

Decision and Order on Remand at 4.

The APA requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We agree with employer that the administrative law judge committed error by failing to explain his reason for according determinative weight to the opinions by Drs. S. Hasan, Rasmussen and Gajendragadkar, and the WVOPB. In light of the administrative law judge's conclusory statements, we vacate the administrative law judge's findings with respect to the opinions of Drs. S. Hasan, Rasmussen, Gajendragadkar and the WVOPB, and remand the case to the administrative law judge to further explain his decision to credit these opinions by making a determination as to whether the opinions are reasoned and documented.[6] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Lastly, employer contends that the administrative law judge's prior findings regarding causation at Section 718.204(b) (2000), violate the APA, and relying upon Seventh circuit law in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), argues that claimant's preexisting psychiatric and back problems remove him from the scope of the Black Lung Act. We reject this contention inasmuch as the scope of the Fourth Circuit's remand order was restricted to the issue of whether claimant established pneumoconiosis in light of *Compton, supra*. *See Peabody Coal Co. and Old Republic Ins. Co. v. Director, OWCP, and*

[6]Employer has raised several arguments regarding the administrative law judge's conclusion that Dr. Rasmussen's opinion is sufficient to establish pneumoconiosis. Employer's Brief at 15 - 17. The Director, Office of Worker's Compensation Programs, disagrees with employer and has stated that based on the physician's examinations of claimant and the physician's valid, credible reasons for diagnosing pneumoconiosis, particularly the pattern of claimant's impairment, the administrative law judge may, on remand, again credit Dr. Rasmussen's opinion on the existence of pneumoconiosis. Director's Brief at 4 - 7. As the administrative law judge did not discuss Dr. Rasmussen's opinion in any detail, other than to state that the physician diagnosed claimant with chronic bronchitis and coal workers' pneumoconiosis, *see* Decision and Order on Remand - Awarding Benefits at 3, we have no basis on which to review the administrative law judge's findings with respect to Dr. Rasmussen. Moreover, we decline to consider the arguments raised by employer regarding whether the opinions by Drs. S. Hasan and Gajendragadkar, and the WVOPB are reasoned and documented, as these are factual findings which the administrative law judge must make on remand.

Don Jean Morgan, No. 99-1573 (4th Cir. Oct. 30, 2000). Therefore, the administrative law judge properly did not consider the issue of causation at Section 718.204(b)(2000). Moreover, the administrative law judge reiterated his prior findings regarding causation, which we previously affirmed in *Morgan v. Peabody Coal Co.*, BRB No. 98-0129 BLA (Oct. 7, 1998).[7] Thus, if on remand, the administrative law judge determines that claimant has established the existence of pneumoconiosis, claimant will have established the only remaining element of entitlement, and will be entitled to benefits. *See Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]We have also previously declined to apply Seventh Circuit law to this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Morgan v. Peabody Coal Co.*, BRB No. 98-0129 BLA (Oct. 7, 1998).