BRB No. 07-0852 BLA

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| J.O. | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 06/19/2008 |
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| ISLAND CREEK COAL COMPANY | ) | |
| | ) | |
| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (07-BLA-5032) of Administrative Law Judge Thomas M. Burke rendered 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). Claimant filed this claim on March 11, 2002. Director's Exhibit 2.

After crediting claimant with twenty-seven years of coal mine employment,[1] the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and in finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c).[2] Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987).

Employer first argues that the administrative law judge erred by not explaining why he credited the opinions of Drs. Forehand, Rasmussen, and Robinette over the opinions of Drs. Castle and Hippensteel, in finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).[3] Thus, employer asserts, the

[1] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 3, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] We affirm the administrative law judge's finding that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.

[3] "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 violated the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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), by failing to explain why he credited and discredited certain medical opinion evidence. Employer also argues that the opinions of Drs. Forehand, Rasmussen, and Robinette should not have been credited by the administrative law judge because these opinions are not well-documented or well-reasoned; because these physicians did not have access to all of the data that Drs. Castle and Hippensteel reviewed; and because neither Dr. Forehand nor Dr. Rasmussen is Board-certified in Pulmonary Disease, as are Drs. Castle and Hippensteel.

Pursuant to Section 718.202(a)(4), the administrative law judge discussed the medical opinions of Drs. Castle, Forehand, Hippensteel, Rasmussen, and Robinette. The administrative law judge accurately found that Drs. Forehand, Rasmussen, and Robinette diagnosed claimant with pneumoconiosis based upon their physical examinations of claimant, their chest x-rays, and pulmonary function and blood gas testing. Decision and Order at 11; Director's Exhibit 17; Claimant's Exhibits 1, 3. On the other hand, the administrative law judge noted that Drs. Castle and Hippensteel did not diagnose pneumoconiosis. Decision and Order at 11. Dr. Castle diagnosed idiopathic interstitial pulmonary fibrosis unrelated to coal mine employment, and Dr. Hippensteel initially diagnosed a gas exchange impairment due to non-pulmonary causes unrelated to coal mine employment. Employer's Exhibits 1, 2, 4. Dr. Hippensteel later diagnosed possible idiopathic pulmonary fibrosis, unrelated to coal mine employment. Employer's Exhibits 5, 8.

The administrative law judge then weighed the medical opinion evidence of record, and found that Dr. Hippensteel's initial opinion that claimant's disability is due to non-pulmonary causes was not persuasive, finding that the opinions of Drs. Forehand, Rasmussen, and Robinette were more persuasive. Decision and Order at 11. The administrative law judge noted that even Dr. Castle found a pulmonary impairment, which, he stated, was of unknown etiology. Id. The administrative law judge found that the weight of the opinions established legal pneumoconiosis because the opinions of Drs. Forehand, Rasmussen, and Robinette were "more persuasive." Id.

We agree with employer that the administrative law judge failed to explain why he credited the opinions of Drs. Forehand, Rasmussen, and Robinette over the opinions of Drs. Castle and Hippensteel in finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4). The administrative law judge did not explain why he found the opinions of Drs. Forehand, Rasmussen, and Robinette to be "more persuasive," or why the opinions of Drs. Castle and Hippensteel were less persuasive. Moreover, the administrative law judge did not weigh Dr. Hippensteel's subsequent opinion that claimant may have idiopathic pulmonary fibrosis unrelated to coal mine employment.

Consequently, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Sections 718.202(a)(4), 718.203(b), and remand this case to the administrative law judge for reconsideration of the opinions of Drs. Castle, Forehand, Hippensteel, Rasmussen, and Robinette. On remand, the administrative law judge must consider the physicians' respective qualifications,[4] the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses.[5] Milburn Colliery Co. v. Hicks, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989)(en banc). The administrative law judge, on remand, should explain his reasons for both crediting and discrediting the medical opinion evidence.[6] Hicks, 138 F.3d at 533-34, 21 BLR at 2-336-37.

Pursuant to 20 C.F.R. §718.204(c), employer argues that the administrative law judge erred in discrediting the opinions of Drs. Castle and Hippensteel, that claimant's total disability is unrelated to pneumoconiosis, because these doctors did not diagnose pneumoconiosis. Furthermore, employer argues that the administrative law judge erred in crediting the opinions of Drs. Forehand, Rasmussen, and Robinette, that claimant's total disability is due to pneumoconiosis, because these opinions are insufficient to establish disability causation. Because we have vacated the administrative law judge's

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[4] The record reflects that Drs. Castle and Hippensteel are Board-certified in Internal Medicine and Pulmonary Disease, Employer's Exhibits 4 at 4, 5 at 4, while Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology, and Dr. Rasmussen is Board-certified in Internal Medicine. Director's Exhibit 17; Claimant's Exhibit 1. Dr. Robinette's qualifications are not in the record.

[5] Contrary to employer's argument, the administrative law judge need not find that the opinions of Drs. Forehand and Rasmussen are undocumented and unreasoned because they are based in part on positive x-ray readings, when the weight of the x-ray evidence is negative for pneumoconiosis, since the administrative law judge is considering their opinions on the issue of legal, not clinical, pneumoconiosis. See Island Creek Coal Co. v. Compton, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000).

[6] If, on remand, the administrative law judge properly finds the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), he will necessarily have determined the etiology of the pneumoconiosis, obviating the need for a separate inquiry under Section 718.203(b). See Andersen v. Director, OWCP, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); Kiser v. L&J Equip. Co., 23 BLR 1-246, 1-259 n.18 (2006); Henley v. Cowan & Co., 21 BLR 1-147, 1-151 (1999).

finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). On remand, the administrative law judge must reconsider disability causation under 20 C.F.R. §718.204(c), if reached, in accordance with the proper legal standard in the Fourth Circuit. Robinson v. Pickands Mather & Co., 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990). If, on remand, the administrative law judge again finds that the existence of pneumoconiosis is established, he has the discretion to accord less weight to the disability causation opinions of physicians who do not diagnose pneumoconiosis. Collins v. Pond Creek Mining Co., 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); Scott v. Mason Coal Co., 289 F.3d 263, 269-70, 22 BLR 2-373, 2-383-84 (4th Cir. 2002); Toler v. Eastern Associated Coal Corp., 43 F.3d 109, 115-116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order – Award of 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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REGINA C. McGRANERY
Administrative Appeals Judge