BRB No. 09-0555 BLA

LOUIS LUTSKO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	DATE ISSUED: 06/23/2010
	)	
Employer-Respondent	)	
	)	
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 Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennslyvania, for claimant.

Lindsey M. Sbrolla (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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:

Claimant appeals the Decision and Order - Denying Benefits (06-BLA-6097) of Administrative Law Judge Daniel L. Leland rendered 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 is on appeal to the Board for the second time. In the last appeal, the Board affirmed, as uncontested, the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3). However, the Board vacated the administrative law judge's finding that claimant failed to establish either the existence of pneumoconiosis by x-ray evidence and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), or disability causation at 20 C.F.R. §718.204(c), and remanded the case for further findings. The Board instructed the administrative law judge, on remand, to adequately explain his determination at Section 718.202(a)(1) that the x-ray evidence was in equipoise, and to reassess the medical opinions of record at Sections 718.202(a)(4), 718.204(c), and provide an explanation for his credibility determinations that comported with the requirements of 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). On remand, the administrative law judge was directed, if reached, to consider whether claimant established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. *L.L.* [*Lutsko*] *v. Eighty Four Mining Co.*, BRB No. 08-0211 BLA (Sept. 25, 2008)(unpub.).

On remand, the administrative law judge again found that the x-ray evidence of record was inconclusive, and therefore failed to establish the existence of pneumoconiosis under Section 718.202(a)(1). The administrative law judge also found that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), and thus, claimant could not establish disability causation at Section 718.204(c). Accordingly, benefits were denied.

In the present appeal, claimant does not challenge the administrative law judge's findings on the merits, but contends that he was not provided with a complete pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406, because the administrative law judge found that the medical opinion of Dr. Cho, who examined claimant for the Department of Labor (DOL), was unreasoned and entitled to little weight. Claimant urges the Board to vacate the administrative law judge's denial of benefits and remand the case to the district director for a second pulmonary evaluation with a different physician at DOL's expense. Employer responds, urging the Board to affirm the administrative law judge's denial of benefits and reject claimant's request for a second pulmonary evaluation. Employer maintains that claimant is precluded from raising the issue of the sufficiency of Dr. Cho's DOL pulmonary evaluation, for the first time, in the instant appeal. Further, employer argues that the administrative law judge's determination to assign little weight to Dr. Cho's medical opinion, as unreasoned and unexplained, is a rational assessment of the opinion, and does not entitle claimant to a second DOL pulmonary evaluation. The

Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response regarding the merits of this appeal.

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.[1] 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, because our previous remand of this case specifically directed the administrative law judge, *inter alia*, to explain his assessment of Dr. Cho's medical opinion, we reject employer's assertion that claimant is precluded from contesting its sufficiency as a DOL-sponsored pulmonary evaluation. While claimant could have raised the issue when the case was first before the Board, the administrative law judge's assessment of Dr. Cho's opinion was made subject to further proceedings pursuant to the Board's remand instructions. We therefore reject employer's assertion that the issue was waived. *See generally Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Claimant argues that, because the administrative law judge discounted Dr. Cho's diagnosis of a totally disabling pulmonary impairment, caused by coal dust exposure and smoking, on the ground that it was not well-reasoned, the Director violated his statutory duty to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim. We disagree. The administrative law judge determined, and claimant acknowledges, that Dr. Cho conducted a physical examination and the full range of testing required by the regulations, and addressed every element of entitlement on the DOL examination form. Decision and Order on Remand at 4; Director's Exhibit 15. The administrative law judge did not reject Dr. Cho's opinion as not credible *per se*. Rather, the administrative law judge gave little weight to Dr. Cho's diagnosis because the physician did not offer a medical rationale for his conclusions, and the administrative law judge found that the contrary opinions of Drs. Renn and Fino were better reasoned and entitled to greater weight. Decision and Order on Remand at 4; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). In these circumstances, where the physician's pulmonary evaluation was complete, documented, and inherently credible, but his opinion was found to be outweighed by the contrary evidence of record, the Director's statutory obligation is discharged. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406(a); *see generally Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *Newman v. Director, OWCP*, 745 F.2d 1162, 78 BLR 2-25 (8th Cir. 1984). Consequently, we

[1] The record indicates that claimant was employed in the coal mining industry in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

reject claimant's argument that he is entitled to a second pulmonary evaluation at DOL's expense. Nevertheless, as fully explained *infra*, we cannot affirm the administrative law judge's denial of benefits.

By Order dated April 1, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Lutsko v. Eighty Four Mining Co.*, BRB No. 09-0555 BLA (Apr. 1, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. The Director and employer have responded.

The Director states, and employer agrees, that the recent amendments to the Act are applicable in this case, as the present claim was filed after January 1, 2005; claimant was credited with thirty years of coal mine employment; and the administrative law judge found that claimant had established total respiratory disability pursuant to Section 718.204(b). Thus, the Director maintains that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of claimant's entitlement to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456(b)(1).

Employer contends that remand to the administrative law judge for consideration of the claim in light of the amendments to the Act is not warranted. Employer asserts that, because the sole issue raised by claimant in the present appeal is the sufficiency of the DOL-sponsored pulmonary evaluation, claimant has waived consideration of other issues. Employer further argues that, based on the administrative law judge's finding that claimant failed to establish the existence of clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a), the Section 411(c)(4) presumption of total disability due to pneumoconiosis has been rebutted. Accordingly, employer urges the Board to affirm the administrative law judge's decision denying benefits because it is supported by substantial evidence, rational, and in accordance with law.

[2] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4)).

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings pursuant to Section 718.202(a), and the denial of benefits, must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to invocation of the Section 411(c)(4) presumption. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis at Section 718.202(a), or to establish that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits on the ground that claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's findings under Section 718.202(a), and remand this case to the administrative law judge.

On remand, the administrative law judge must consider this claim under Section 411(c)(4) of the Act. He must also allow both parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge