BRB No. 10-0574 BLA

HAROLD L. FLEMING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN EDGE MINING, INCORPORATED	)	DATE ISSUED: 06/03/2011
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (08-BLA-5974) of Administrative Law Judge Michael P. Lesniak denying 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 claim filed on October 22, 2007.[1] After crediting

[1] While the miner's claim was pending before the administrative law judge, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Relevant to this living miner's claim, Section 1556 reinstated

claimant with 23.55 years of coal mine employment,[2] the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also challenges the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

By Order dated April 5, 2010, the administrative law judge provided the parties with the opportunity to address whether the Section 411(c)(4) presumption is applicable in this case. Claimant asserted that the presumption is applicable to his claim. Employer asserted that the presumption is inapplicable, based on its contention that the evidence is insufficient to establish the existence of a totally disabling respiratory impairment. The Director took no position on whether the Section 411(c)(4) presumption was applicable to the instant claim.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Hearing Transcript at 23; Director's Exhibit 3. 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*).

[3] Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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. 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*).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that claimant's usual coal mine work was that of a roof bolter, a position that required "heavy manual labor."[4] Decision and Order at 7. The record contains three medical reports addressing whether claimant suffers from a totally disabling respiratory or pulmonary impairment. While Dr. Rasmussen opined that claimant's respiratory impairment prevented him from performing his usual coal mine job as a roof bolter,[5] Claimant's Exhibit 6 at 23-29, Drs. Repsher and Castle opined that, from a pulmonary standpoint, claimant was capable of performing his work as a roof bolter. Employer's Exhibits 8 at 31, 9 at 39-40.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that:

> Claimant does not have any qualifying blood gas or pulmonary function tests. Drs. Castle and Repsher find that Claimant is not disabled from a pulmonary standpoint. Dr. Rasmussen states that Claimant is disabled from

[4] The administrative law judge found that, as part of his duties as a roof bolter, claimant was required to bend roof bolts and move 50 pound bags of rock dust approximately 80 feet. Decision and Order at 7.

[5] Dr. Rasmussen based his disability assessment on the results of a December 13, 2007 exercise arterial blood gas study that revealed gas exchange abnormalities. Dr. Rasmussen noted that, during light exercise, claimant achieved an oxygen consumption of 19.8 millimeters of oxygen per kilogram per minute. Dr. Rasmussen explained that this measurement revealed that claimant would be unable to perform heavy manual labor. Claimant's Exhibit 6 at 23-24.

> performing his previous coal mine employment. He primarily relies on Claimant's exercise arterial blood gas test, which Drs. Castle and Repsher did not perform because Claimant has difficulty exercising due to arthritis and gout. Both Drs. Castle and Repsher found that Claimant's arterial blood gas test produced normal results; indeed, the results are not qualifying under the Department of Labor's standards. Dr. Castle states that Claimant demonstrated normal ventilatory function and diffusing capacity, making it unlikely that Claimant would have a decline in PO2 during exercise. (EX-9 at 17). While all of the medical opinion evidence is documented and well-reasoned, the greater weight of the evidence, namely the opinions of Drs. Castle and Repsher and the objective medical data, show that claimant is not disabled from a pulmonary standpoint.

Decision and Order at 7.

Claimant contends that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). We agree. The administrative law judge failed to resolve the conflicts in the medical opinion evidence.[6] Consequently, the administrative law judge's finding regarding the medical opinion evidence 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, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7] On remand, the administrative law judge must consider the documentation and reasoning underlying the medical opinions,

[6] The administrative law judge erred to the extent that he found that Dr. Rasmussen's opinion is undermined by the non-qualifying nature of the exercise blood gas study. Test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[7] Because the administrative law judge similarly failed to provide any basis for his finding that the x-ray evidence does not establish the existence of pneumoconiosis, Decision and Order at 7, we also vacate his finding pursuant to 20 C.F.R. §718.202(a)(1). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

along with the physicians' qualifications, and explain whether the medical opinions, when considered in light of the exertional requirements of claimant's usual coal mine employment, establish the existence of a totally disabling respiratory impairment, and must explain the bases for his credibility determinations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

If, on remand, the administrative law judge finds that the medical evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he would be required to weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

Application of the Recent Amendments

On remand, should the administrative law judge determine that the evidence establishes the existence of a totally disabling respiratory impairment, he must consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant is entitled to invocation of, the administrative law judge must then determine whether the medical evidence rebuts the presumption. 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow the parties the opportunity to submit 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 affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings 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