BRB No. 11-0609 BLA

JOHN O. KINNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/19/2012
	)	
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 *Re* Second Remand of Claims Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order *Re* Second Remand of Claims Award of Benefits (2007-BLA-05065) of Administrative Law Judge Daniel F. Solomon with respect to a claim filed on November 2, 2005, 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 before the Board for a third time.[1] In its most recent decision, the

[1] In the Board's initial decision, it affirmed, as unchallenged on appeal, the administrative law judge's determination that claimant failed to establish the existence of

Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), and the award of benefits, and remanded the case for reconsideration of the evidence relevant to the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. *Kinney v. Peabody Coal Co.*, BRB No. 09-0834 BLA (Sept. 30, 2010)(unpub.). The Board also instructed the administrative law judge to consider whether claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), 30 U.S.C. §921(c)(4). [2]

On remand, the administrative law judge determined that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), based on the pulmonary function study and medical opinion evidence. The administrative law judge also found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability causation at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits without addressing the applicability of amended Section 411(c)(4).

On appeal, employer argues that the administrative law judge did not follow the Board's instructions on remand and erred in again finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

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pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). *J.O.K.* [*Kinney*] *v. Peabody Coal Co.*, BRB No. 08-0382 BLA, slip op. at 1-2 (Feb. 19, 2009)(unpub.). The Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), and the award of benefits, and remanded the case to the administrative law judge for reconsideration. *Id*. at 3-6.

[2] Under amended 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 is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, the administrative law judge accepted the parties' stipulation to forty-three years of coal mine employment, but did not render a finding as to whether this employment was in an underground mine or in conditions substantially similar to those in an underground mine. 2008 Decision and Order at 2.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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 & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. 20 C.F.R. §718.204(b)(2)

We will first address the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i) and (iv), as he relied on these findings to conclude that claimant proved that he has legal pneumoconiosis and is totally disabled by it.

On remand, the administrative law judge found that there was conflicting evidence concerning the validity of the pulmonary function studies dated January 5, 2006, February 13, 2006, and August 1, 2006.[4] Decision and Order *Re* Second Remand at 2-3. With respect to the most recent study, obtained on May 2, 2007, the administrative law judge noted that Dr. Simpao, who administered the study, indicated that it was valid and

[3] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] Dr. Simpao obtained the pulmonary function study dated January 5, 2006, which produced qualifying values, i.e., values equal to, or less than, those set forth in Appendix B to 20 C.F.R. Part 718. Director's Exhibit 12. Because Dr. Mettu invalidated this study, Dr. Simpao obtained a second study on February 13, 2006, which produced nonqualifying values, i.e., results that exceed the values set forth in Appendix B. *Id*. The pulmonary function study that Dr. Repsher performed on August 1, 2006, was nonqualifying. Employer's Exhibit 1. Dr. Repsher stated that all of the pulmonary function studies of record were invalid due to claimant's morbid obesity. *Id*. Dr. Fino indicated that all of claimant's pulmonary function studies were invalid due to inadequate effort. Employer's Exhibit 3.

qualifying and determined that there was "nothing concrete" to undermine Dr. Simpao's opinion. *Id*. at 3. Based on this study, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 3. The administrative law judge also determined that Dr. Simpao's opinion was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), because his diagnosis of a totally disabling impairment was entitled to greater weight than the contrary opinions of Drs. Repsher and Fino. *Id*.

Employer asserts, *inter alia*, that the administrative law judge erred in failing to resolve the disputes concerning the validity and reliability of the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i). Further, employer argues that the administrative law judge did not properly weigh the medical opinions relevant to 20 C.F.R. §718.204(b)(2)(iv). Employer also maintains that the administrative law judge ignored the Board's instruction to weigh the evidence supportive of a finding of total disability against the contrary probative evidence, and that his discussion of the exertional requirements of claimant's coal mine employment impermissibly focused on the heaviest demands of all of the mining work he has done, instead of the duties of his last regular job as a truck driver.

Employer's allegations of error have merit. As employer maintains, the Board held in its previous Decision and Order that the May 2, 2007 pulmonary function study was nonqualifying as a matter of law, because no MVV value was recorded and the FVC and FEV1/FVC values were not qualifying.[5] *Kinney*, slip op. at 7. Therefore, we vacate the administrative law judge's finding that this study was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

There is also merit to employer's allegations concerning the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Although the administrative law judge indicated that he was discussing the exertional requirements of claimant's last coal mine employment, the duties that he listed were from various jobs that claimant performed during the entirety of his coal mine employment, not his last, or usual, coal mine employment.[6] *See Cornett v. Benham Coal, Inc.*, 227

[5] The regulations provide that, in addition to a qualifying FEV1 value, claimant must establish either a qualifying FVC or MVV value or an FEV1/FVC ratio equal to or less than fifty-five percent. 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

[6] The administrative law judge stated that claimant testified that, at his last job, he had to lift eighty pound bags of sand. Decision and Order *Re* Second Remand at 3. However, claimant actually testified that he had to lift eighty-pound bags when he worked for six years at the river dock. *See* Hearing Transcript at 14. Claimant's last coal

F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, the administrative law judge's understanding of the exertional requirements of claimant's usual coal mine employment was flawed.

Employer also asserts correctly that the administrative law judge erred in concluding that Drs. Repsher and Fino opined that claimant is disabled due to morbid obesity. *See* Decision and Order *Re* Second Remand at 3. While Dr. Repsher indicated that claimant's morbid obesity affected the validity of the objective studies, he found that claimant did not have any "objective pulmonary impairment" and that his pulmonary function and blood glass studies were within normal limits for his "body habitus." Employer's Exhibit 1. Dr. Fino concurred with Dr. Repsher, that there was no objective evidence of a respiratory impairment, but that there were some abnormalities in the pulmonary function and blood gas studies due to claimant's obesity. Employer's Exhibit 3. Because the administrative law judge did not accurately consider the exertional requirements of claimant's usual coal mine employment and mischaracterized the opinions of Drs. Repsher and Fino, we vacate his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

In addition, as employer has alleged, the administrative law judge did not comply with the Board's instruction to weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2). *Kinney*, slip op. at 7, *citing 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). Accordingly, we vacate the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2).

II. 20 C.F.R. §718.202(a)(4)

In considering whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge gave greatest weight to the opinion in which Dr. Simpao attributed claimant's respiratory impairment to smoking and

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mine employment was as a truck driver, and was not as a worker on the river dock. *Id*.; Director's Exhibit 12.

coal dust exposure.[7] Decision and Order *Re* Second Remand at 4-5. In contrast, the administrative law judge discredited the opinions of Drs. Repsher and Fino, that claimant had no discernible impairment, because he determined that they did not address the statutory definition of pneumoconiosis. *Id*. at 5.

Employer argues that the administrative law judge again neglected to follow the Board's instructions on remand and, therefore, repeated the errors that he made in his prior decisions. Employer contends that the administrative law judge did not adequately explain his reasons for crediting Dr. Simpao's opinion, as the objective evidence, and Dr. Simpao's testimony, do not support his conclusions. Employer also maintains that the administrative law judge improperly relied on the preamble to the regulations to credit Dr. Simpao's opinion, because the preamble "may not serve as a source of legal standards" and Dr. Simpao's opinion is not consistent with the preamble. Employer's Brief at 16. In addition, employer asserts that the administrative law judge selectively analyzed and mischaracterized the opinions of Drs. Repsher and Fino.

There is merit, in part, to employer's assertions. As employer argues, the administrative law judge relied on the objective medical evidence, including his findings concerning the pulmonary function studies, which we have vacated, to credit Dr. Simpao's diagnosis of legal pneumoconiosis. *See* Decision and Order *Re* Second Remand at 4. In addition, the administrative law judge did not render a determination as to whether Dr. Simpao's identification of coal dust exposure as a contributing cause of claimant's alleged impairment, is adequately reasoned and documented.[8] As the Board indicated in its most recent decision, although a physician is not required to precisely identify the portion of the impairment attributable to coal dust exposure, a medical opinion that purports to contain a diagnosis of legal pneumoconiosis must be reasoned and documented. *Kinney*, slip op. at 5, *citing Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett*, 227 F.3d at 576, 22 BLR at 2-120-121. Consequently, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[7] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] In his deposition, Dr. Simpao testified that claimant has chronic obstructive pulmonary disease due to the combined impact of his coal dust exposure and significant smoking history. Claimant's Exhibit 3 at 9, 11-12, 14. On cross-examination, Dr. Simpao acknowledged that claimant's symptoms could be consistent with a disease other than one caused by coal dust exposure. *Id*. at 21-22.

However, we disagree with employer's contention that it is improper for the administrative law judge to rely on the preamble in assessing the probative value of a physician's opinion. The preamble to the amended regulations sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with DOL's discussion of sound medical science in the preamble. *See Harman Mining Co. v. Director, OWCP* [*Looney*], F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 (4th Cir. May 15, 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

We also reject employer's argument that the administrative law judge erred in requiring employer to rule out coal dust as a cause of claimant's impairment. The administrative law judge did not impose an improper burden on employer but, rather, rationally discredited the opinions of Drs. Repsher and Fino, based on their failure to explain why claimant's forty-three years of coal dust exposure did not contribute to the respiratory symptoms that they observed. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

III. 20 C.F.R. §718.204(c)

Relying on his weighing of the evidence under 20 C.F.R. §718.202(a)(4), the administrative law judge stated that he "accept[ed]" Dr. Simpao's opinion that, claimant's totally disabling impairment was due to coal dust exposure and smoking, and concluded that claimant established total disability causation at 20 C.F.R. §718.204(c). Decision and Order on Second Remand at 6. The administrative law judge gave little weight to the opinions of Drs. Repsher and Fino because they did not diagnose coal workers' pneumoconiosis or any type of disabling respiratory impairment. *Id*. Because the administrative law judge based his conclusions on the findings that we vacated at 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), we vacate his determination that claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c).

IV. Request for Reassignment

Employer has asked that this case be remanded to a different administrative law judge, if the Board vacates the award of benefits. In light of the Board's two previous remands of this case, the repetition of error on remand and the failure to consider the

applicability of the amended Section 411(c)(4) presumption, despite our instruction to do so, we conclude that "review of this claim requires a fresh look at the evidence… ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); 20 C.F.R. §§802.404(a), 802.405(a). Thus, we reluctantly grant employer's request and direct that this case be assigned to a different administrative law judge on remand.

V. Conclusion

In summary, we vacate the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c) and the award of benefits. On remand, the new administrative law judge should first consider whether the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) is available to claimant. The administrative law judge must determine whether claimant has established at least fifteen years of qualifying coal mine employment, *i.e.*, that claimant was employed for at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co*. [*Leachman*], 855 F.2d 509 (7th Cir. 1988). If the requisite coal mine employment has been established, the administrative law judge must then determine whether claimant has established a totally disabling pulmonary or respiratory impairment and, thus, has established invocation of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b).

In reconsidering whether claimant has established total disability, the administrative law judge is required to render a finding under each subsection of 20 C.F.R. §718.204(b)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge must resolve the conflict among the physicians as to the validity of the pulmonary function study evidence and must address all of the pulmonary function studies of record. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). If the administrative law judge determines that total disability has been demonstrated under one or more of the subsections, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record, and reach a determination as to whether claimant satisfied his burden to establish a totally disabling respiratory impairment. *See Fields*, 10 BLR at 1-20-21; *Shedlock*, 9 BLR at 1-198.

If the administrative law judge finds that claimant is entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative

law judge must then determine whether employer has rebutted the presumption.[9] 30 U.S.C. §921(c)(4). Alternatively, if claimant is unable to invoke the amended Section 411(c)(4) presumption, the administrative law judge must consider whether claimant has established each element of entitlement by a preponderance of the evidence.

In weighing the medical opinions on remand, the administrative law judge must determine whether the opinions of Drs. Simpao, Repsher and Fino are adequately reasoned and documented, and explain his decision to credit or discredit the physicians' opinions. *See Crockett*, 478 F.3d at 356, 23 BLR at 2-483-84; *Williams*, 338 F.3d at 513, 22 BLR at 2-647. Finally, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the Administrative Procedure Act.[10] *See Wojtowicz*, 12 BLR at 1-165.

[9] The administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). The admission of any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.456(b)(1).

[10] The Administrative Procedure Act 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. . . ." 5 U.S.C. §557(c)(3)(A), 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).

Accordingly, the Decision and Order *Re* Second Remand of Claims Award of Benefits of the administrative law judge is vacated and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance 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