BRB No. 13-0427 BLA

JOHN T. MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT	)	DATE ISSUED: 06/30/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-5618) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed on August 14, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with twenty-five and one-half years of coal mine employment. Based on the filing date of the claim, and his determinations that claimant established fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[3] However, the administrative law judge further found that employer established rebuttal of the amended 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in determining the length of his coal mine employment. Claimant also challenges the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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,

[1] Claimant filed an initial claim for benefits on March 24, 2003, which was denied by the district director by reason of abandonment. Director's Exhibit 1. Claimant filed a second claim for benefits on December 16, 2004, which was denied by Administrative Law Judge Michael P. Lesniak on April 10, 2007, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 4.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

and in accordance with applicable law.[4] 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).

I. LENGTH OF COAL MINE EMPLOYMENT

The administrative law judge credited claimant with twenty-five and one-half years of coal mine employment, with at least fifteen years in underground coal mines. Decision and Order at 6. Claimant argues that he should have been credited with twenty-nine and one-quarter years of coal mine employment. Brief on Behalf of Claimant at 33. We consider any error on the part of the administrative law judge in calculating the length of claimant's coal mine employment to be harmless, as the administrative law judge found that claimant established the requisite number of years necessary to invoke the amended Section 411(c)(4) presumption, and claimant has not explained how crediting him with more years of coal mine employment would affect the outcome of the case.[5] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [he] points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We therefore affirm the administrative law judge's determination that claimant worked twenty-five and one-half years in coal mine employment, with at least fifteen years in underground coal mines.

II. REBUTTAL OF THE AMENDED SECTION 411(c)(4) PRESUMPTION

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to

[4] Because claimant worked in coal mine employment in West Virginia and Kentucky, claimant correctly asserts that jurisdiction for this claim arises in the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Sixth Circuit. The Board will apply, however, the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine work was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5. We note that the laws of those circuits are compatible with each other on the issues raised in this case, and that claimant has not asserted otherwise. The Board's decision to apply the law of the Fourth Circuit does not affect claimant's right to initiate an appeal of the Board's Decision and Order in any circuit in which claimant was engaged in coal mine employment, 33 U.S.C. §921(c). *See Danko v. Director, OWCP*, 846 F.2d 366, 368, 11 BLR 2-157, 2-159 (6th Cir. 1988).

[5] Employer's physicians, Drs. Rosenberg and Zaldivar, rendered their opinions relevant to rebuttal based on their assumption that claimant worked for twenty-nine years in coal mine employment. Director's Exhibit 12; Employer's Exhibits 1, 6, 7.

disprove that claimant has clinical and legal pneumoconiosis,[6] or establish that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

A. Clinical Pneumoconiosis

Claimant argues that the administrative law judge's finding of rebuttal must be vacated because he did not conduct a proper analysis of the x-ray evidence with the burden of proof on employer to disprove the existence of the disease. We agree. The presumption of total disability due to pneumoconiosis effectuated by amended Section 411(c)(4) includes a presumption of both clinical and legal pneumoconiosis. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65. The administrative law judge determined that claimant failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). However, he determined that claimant established the existence of pneumoconiosis, based on invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). *See* 20 C.F.R. §718.202(a)(3). The administrative law judge then weighed the evidence on rebuttal, but focused his analysis on whether employer disproved the existence of legal pneumoconiosis. Thus, because the administrative law judge did not address whether employer satisfied its burden to affirmatively disprove the existence of clinical pneumoconiosis, we must vacate his finding that employer rebutted the amended Section 411(c)(4) presumption, and the denial of benefits. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. We specifically instruct the administrative law judge, on remand, to reweigh the x-ray evidence with the burden of proof on employer. The administrative law judge should first consider whether each individual x-ray is positive or negative for clinical pneumoconiosis, and then determine, based on a weighing of all of the x-ray evidence

[6] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes 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).

together, whether employer has affirmatively established that claimant does not have clinical pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

B. Legal Pneumoconiosis

In considering whether employer rebutted the presumed fact of legal pneumoconiosis, the administrative law judge first summarized the opinion of Dr. Rasmussen, who conducted the examination of claimant on behalf of the Department of Labor. Dr. Rasmussen opined that claimant is totally disabled by chronic obstructive pulmonary disease (COPD) due to a combination of smoking and coal dust exposure.[7] Dr. Rasmussen specifically stated that coal dust exposure was a significant contributing factor to claimant's respiratory disease. Director's Exhibit 11; Claimant's Exhibit 3. Yet when the administrative law judge analyzed Dr. Rasmussen's opinion, he seized upon the doctor's explanation that it was impossible to differentiate between impairments caused by smoking and coal dust exposure, and concluded that, "at most, Dr. Rasmussen's opinion only supports the conclusion that it is not possible to know which of the two (smoking or coal dust inhalation), or if both, causes COPD and/or emphysema in a coal miner who smoked." Decision and Order at 19. The administrative law judge stated that Dr. Rasmussen's opinion was "fundamentally flawed" and is "neither very helpful in

[7] Dr. Rasmussen stated:

> The two known factors which are likely responsible for [claimant's] disabling lung disease are his cigarette smoking of over a 38 year period at 1/2 pack a day and his 29 years of coal mine employment mostly as a continuous miner operator in underground mechanized mining. Both smoking and mine dust cause emphysema, primarily centriacinar but also panacinar. The mechanisms by which cigarette smoke and coal mine dust cause emphysema are identical. There is no way to distinguish the effects of these two toxic exposures. [Claimant] has no radiographic changes consistent with pneumoconiosis[;] however, it is well known that coal mine dust causes COPD and emphysema in the absence of radiographic changes. . . . In addition, coal mine dust causes emphysema independently from localized pneumoconiotic lesions. This phenomenon is recognized in both Europe and by the U.S. [Department of Labor].

Director's Exhibit 10.

either meeting a burden of proof or rebutting a presumption." *Id*. Claimant correctly argues that, contrary to the administrative law judge's analysis, Dr. Rasmussen's attribution of claimant's disabling obstructive respiratory disease to the combination of claimant's smoking history and his coal mine employment, and his specific opinion that claimant's COPD was "significantly related" to coal dust exposure, is sufficient to support a finding that claimant has legal pneumoconiosis. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gross v. Dominion Coal Corp.*, 23 BLR 1-18 (2003). Thus, we vacate the administrative law judge's determination that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "fundamentally flawed" and has no probative value.

With regard to employer's physicians, the administrative law judge briefly summarized the opinions of Drs. Zaldivar and Rosenberg. Decision and Order at 20. He noted that Dr. Zaldivar opined that claimant does not have clinical or legal pneumoconiosis, and attributed claimant's irreversible airway obstruction to asthma and emphysema related to smoking. Employer's Exhibits 2, 7. The administrative law judge also noted Dr. Rosenberg's opinion that claimant's COPD was due entirely to smoking and his explanation that the "spirometric pattern, the marked decrease in the FEV1 in relationship to the FVC, the variable nature of the air flow over time and the bronchodilator response" do not support the existence of legal pneumoconiosis. Decision and Order at 20, *quoting* Employer's Exhibit 6 at 28. The administrative law judge then summarily concluded:

> Based upon a totality of the evidence, I find that Employer has successfully rebutted the presumption contained at 20 C.F.R. § 718.305. Doctors Rosenberg's and Zaldivar's opinions are compelling in how they explain how Claimant's decades of smoking, and not coal dust inhalation, are responsible for his pulmonary or respiratory impairments. They support their opinions with references to both diagnostic testing data and medical literature. Doctor Rasmussen's opinion, on the other hand, is fundamentally flawed[.] While Claimant has a total pulmonary or respiratory impairment, based upon the evidence I find that it was neither caused by nor contributed to from coal dust exposure.

Decision and Order at 20-21.

Claimant contends that the administrative law judge erred in failing to explain, in accordance with the Administrative Procedure Act (APA),[8] why he credited the opinions

[8] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the

of Drs. Zaldivar and Rosenberg. We agree. The administrative law judge erred by failing to identify the specific explanations that he found to be "compelling" and by not discussing how the diagnostic testing and medical literature cited by employer's physicians supports their conclusions that coal dust exposure can be ruled out as a causative factor for claimant's respiratory disability. Decision and Order at 20-21; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Moreover, to the extent that the administrative law judge appears to credit Dr. Rosenberg's explanation that it is possible to distinguish between impairments caused by smoking and coal dust exposure based on the FEV1/FVC ratio, the administrative law judge erred in failing to consider whether Dr. Rosenberg expressed views that are inconsistent with the medical science endorsed by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations. *See* 65 Fed. Reg. 79,920, 79,939-43, 79,994 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. The administrative law judge also erred in failing to address whether Drs. Zaldivar and Rosenberg credibly explained why coal dust exposure is not a causative factor for claimant's irreversible respiratory impairment. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Thus, because the administrative law judge has failed to explain the bases for his reliance on the opinions of Drs. Zaldivar and Rosenberg, we vacate his finding that employer rebutted the presumed fact of legal pneumoconiosis.

On remand, the administrative law judge must consider whether the opinions of Drs. Zaldivar and Rosenberg are reasoned and documented, and affirmatively establish that claimant does not have either clinical or legal pneumoconiosis or that his disability did not arise out of, or in connection with coal mine employment.[9] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge is instructed to evaluate the credibility of the medical opinions in light of the physicians' qualifications and the

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rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[9] Because employer bears the burden of proof, the administrative law judge must determine whether the opinions of Drs. Zaldivar and Rosenberg are reasoned and credible, irrespective of the weight accorded Dr. Rasmussen's opinion. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *see also Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). In rendering his decision and order on remand, the administrative law judge must explain the bases for all of his findings of fact and credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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 consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL
Acting Chief Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge