BRB No. 13-0465 BLA

JEFFERY D. KEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETTY COAL COMPANY	)	DATE ISSUED: 06/19/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart (Spilman, Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5208) of Administrative Law Judge Richard A. Morgan rendered on a claim filed on November 2, 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 at least 5.09 years of coal mine employment and found that, although the evidence was insufficient to establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4), claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant's legal pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), and that the evidence was sufficient to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge concluded that the evidence was sufficient to establish that claimant is totally disabled due to legal pneumoconiosis at 20 C.F.R §718.204(c), and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of legal pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

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.[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).

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[1] Amended Section 411(c)(4), which provides a presumption of total disability due to pneumoconiosis if the miner has at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment, does not apply in this case, based on the administrative law judge's finding of 5.09 years of coal mine employment. 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).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 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 (1989)(en banc).

To establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *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).

In evaluating the evidence of record relevant to the existence of legal pneumoconiosis,[4] the administrative law judge considered the opinions of Drs. Forehand, Splan, Gallai and Zaldivar, along with claimant's medical treatment records. All of these physicians examined claimant, while Drs. Gallai and Zaldivar also reviewed claimant's medical treatment records and/or the medical reports submitted by the other physicians of record. Drs. Forehand, Splan and Gallai diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibits 1, 2. In contrast, Dr. Zaldivar opined that claimant is suffering from allergic alveolitis and asthma caused by cotton dust exposure and obesity. Employer's Exhibit 5.

Upon weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge observed that "[e]ach of the physician opinions had its deficiencies." Decision and Order at 19. With respect to Dr. Forehand's opinion, the administrative law judge found:

> Dr. Forehand initially was unaware of [claimant's] significant exposures to other industrial irritants. When made aware and he corrected his opinion, he summarily stated that coal mine dust is more toxic than cotton dust without providing any references or support for that conclusion. Moreover, although [claimant] was clearly morbidly obese, Dr. Forehand gave that no consideration when it clearly can have an effect.

Id. Regarding Dr. Splan's opinion, the administrative law judge determined:

[4] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

> Dr. Splan was unaware of the significant textile dust and tobacco plant exposure and accepted [claimant's] representation he had no history of asthma, when in fact he was being treated for it.

Id. at 19-20. Upon reviewing Dr. Gallai's opinion, the administrative law judge stated:

> Dr. Gallai was unaware of the significant tobacco plant exposure and accepted [claimant's] representation he had no history of asthma, when in fact he was being treated for it. He also noted [claimant] was obese, but gave that no consideration when it clearly can have an effect.

Id. at 20. With respect to Dr. Zaldivar's opinion, the administrative law judge found:

> [A]lthough Dr. Zaldivar's opinion was the most thorough, comprehensive, and supported in large part by medical studies, he wrote that coal mine dust cannot cause asthma; that is clearly contrary to the views of the Department of Labor set forth in the Preamble to the 2001 regulations. Thus, I give his opinion lesser weight for he did not believe that coal dust could have caused the obstruction. Moreover, he failed to provide any authority for such conclusion. On the other hand, the remaining physicians did not diagnose asthma, but rather COPD. In fact, Dr. Zaldivar observed [claimant's pulmonary function study] showed a mild irreversible obstructive lung disease, a finding consistent with those of the claimant's doctors.

Id. After setting forth these credibility determinations, the administrative law judge resolved the conflict in the evidence by according "lesser weight" to Dr. Zaldivar's opinion and relying on the opinions of Drs. Forehand, Splan and Gallai to find that claimant has legal pneumoconiosis, stating, "considering the three medical opinions finding legal pneumoconiosis in toto, despite some individual shortcomings, I find it established." *Id*.

Employer contends that the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis rendered by Drs. Forehand, Splan and Gallai, when each of these opinions contained numerous deficiencies. Employer's Brief at 11-13. Employer also contends that the administrative law judge failed to provide a valid reason for discounting Dr. Zaldivar's opinion. *Id*. at 13-16. Employer's allegations of error have merit.

As indicated previously, pursuant to 20 C.F.R. §718.202(a), claimant bears the burden of affirmatively establishing the existence of pneumoconiosis, by a preponderance of the evidence. *See Hicks*, 138 F.3d at 529, 21 BLR at 2-326. In the present case, absent additional explanation, the administrative law judge's determination that the medical opinions of Drs. Forehand, Splan and Gallai satisfied claimant's burden, cannot be reconciled with his findings that these opinions were either inadequately explained, or were based on inaccurate information regarding claimant's medical history and his exposure to irritants other than coal mine dust. Accordingly, the administrative law judge's Decision and Order does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), which requires that every adjudicatory decision include 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(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We must vacate, therefore, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With respect to the administrative law judge's weighing of Dr. Zaldivar's opinion, employer is correct in asserting that the administrative law judge's finding that Dr. Zaldivar stated that coal dust exposure cannot cause asthma, or obstructive lung disease, is not supported by substantial evidence. In contrast to the administrative law judge's determination, Dr. Zaldivar stated:

> Among his occupations . . . cotton dust is far more likely to produce asthma than coal dust. In fact, coal dust does not, but cotton does produce two entities. One is extrinsic allergic alveolitis and the other one is asthma.
> . . . .
>
> [Claimant] certainly worked longer in the textile industry than he did in coal mining.

Employer's Exhibit 5 at 6. Moreover, as employer maintains, Dr. Zaldivar did not say that coal mine employment could never cause an obstructive impairment. *Id*. at 6-8. Rather, the record indicates that he opined that claimant's obstructive impairment was caused by his asthma, which was related to his obesity and exposure to cotton dust, as opposed to coal dust exposure. *Id*. at 7. Because the administrative law judge did not accurately characterize Dr. Zaldivar's opinion, we must vacate his decision to give it "lesser weight" at 20 C.F.R. §718.202(a)(4). Decision and Order at 20; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In light of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of legal

pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case to the administrative law judge for reconsideration of this issue. On remand, the administrative law judge must reconsider the medical opinions of Drs. Forehand, Splan, Gallai and Zaldivar, and render a finding as to the probative value of each opinion, based upon "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335. In rendering his ultimate finding under 20 C.F.R. §718.202(a)(4), the administrative law judge must place the burden of proof on claimant to establish the existence of pneumoconiosis by a preponderance of the reasoned and documented medical opinion evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-164.

Regarding the issue of whether claimant's pneumoconiosis arose out of his coal mine employment, we agree with employer that the administrative law judge erroneously found that claimant is entitled to the presumption set forth in 20 C.F.R. §718.203, as the administrative law judge credited claimant with less than the ten years of coal mine employment required for invocation of the presumption. *See* 20 C.F.R. §718.203(b); Decision and Order at 3, 20. Nevertheless, if the administrative law judge determines on remand that claimant has established the existence of legal pneumoconiosis, he need not address the cause of claimant's pneumoconiosis separately at 20 C.F.R. §718.203(c). A finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) subsumes a finding that the legal pneumoconiosis arose out of coal mine employment, as required under 20 C.F.R. §718.203. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159 n.18 (2006).

Employer next challenges the administrative law judge's determination that claimant is totally disabled due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Because the administrative law judge relied on his determination, at 20 C.F.R. §718.202(a)(4), that the medical opinion evidence is sufficient to establish that coal dust exposure caused claimant's disabling obstructive impairment, and we have vacated that finding, we also vacate his finding at 20 C.F.R. §718.204(c). The administrative law judge must reconsider this issue, if reached, on remand.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and vacated in part, and 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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JUDITH S. BOGGS
Administrative Appeals Judge