BRB No. 08-0405 BLA

V.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LANCE COAL CORPORATION	)	
	)	
and	)	
	)	
R & B FALCON CORPORATION	)	DATE ISSUED: 03/19/2009
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (07-BLA-5420) of Administrative Law Judge Ralph A. Romano rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with six years of coal mine employment[2] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge found that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(c), and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis under 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[3]

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 law. 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).

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[1] Claimant's initial claim, filed on January 20, 2001, was denied by the district director on November 27, 2002 for failure to establish any element of entitlement. Director's Exhibit 1. The record does not reflect that claimant took any further action until filing the instant subsequent claim on March 24, 2006. Director's Exhibit 3.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established six years of coal mine employment, and the existence of a totally disabling respiratory impairment based on the new evidence 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). Therefore, it is undisputed that claimant has demonstrated a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 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*).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Dr. Forehand diagnosed clinical pneumoconiosis based on x-ray evidence, and a severe obstructive pulmonary impairment based on a pulmonary function study, caused by both smoking and coal mine dust exposure. Director's Exhibits 12, 15. Dr. Forehand explained that "[c]laimant's smoking cigarettes for 20 years has severely weakened his lungs. Because of his weakened condition, his exposure to coal mine dust has substantially worsened his respiratory function, totally and permanently disabling him." Director's Exhibit 12 at 17. Dr. Rasmussen diagnosed clinical pneumoconiosis based on x-ray evidence, and opined that the "overwhelming bulk" of claimant's severe respiratory impairment detected by pulmonary function study was "the consequence of his cigarette smoking with only a minimal contribution from his coal mine dust exposure." Claimant's Exhibit 1 at 3. Dr. Rasmussen further clarified his opinion by stating, "While the patient has clinical pneumoconiosis, his coal mine dust exposure contributes in only a minimal fashion to his disabling chronic lung disease." Claimant's Exhibit 1 at 4.

By contrast, Dr. Jarboe opined that claimant does not have clinical pneumoconiosis, and that his respiratory condition results from a combination of asthma, smoking, and underlying heart disease. Employer's Exhibit 5. Dr. Castle stated that claimant does not have clinical pneumoconiosis, and that he did not "demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process." Employer's Exhibit 2 at 5. Dr. Castle reported that he could not obtain a valid pulmonary function study and thus could not assess the degree of claimant's respiratory impairment. Employer's Exhibit 2 at 6. However, Dr. Castle noted that claimant has risk factors for developing pulmonary symptoms because of his smoking history and severe cardiac disease. Employer's Exhibit 2 at 5.

Finding the reports of Drs. Forehand and Rasmussen to be the "best reasoned," the administrative law judge determined that the medical opinion evidence established the existence of pneumoconiosis. In so finding, the administrative law judge explained that the opinions of Drs. Forehand and Rasmussen were well-reasoned and documented because their conclusions were supported by their reports' underlying documentation and by claimant's extensive treatment history for chronic obstructive pulmonary disease (COPD) and pneumoconiosis. Decision and Order at 13. The administrative law judge further explained that Dr. Forehand's opinion was entitled to great weight because it was

based on an accurate coal mine employment history,[4] and that Dr. Rasmussen's opinion was entitled to "slightly persuasive weight" because it was based on a "near" accurate coal mine employment history.[5] *Id*. at 14. By contrast, the administrative law judge determined that the opinions of Drs. Jarboe and Castle were entitled to "little weight" because they were based on inflated coal mine employment histories,[6] and because Dr. Jarboe failed to explain how he ruled out coal dust exposure as a potential etiology or aggravating factor, while Dr. Castle failed to "state the basis for his conclusion." *Id*. at 13-14.

Employer initially asserts that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen without properly examining the documentation and reasoning underlying the opinions. Employer's Brief at 4. We agree. Initially, we note that the administrative law judge's decision does not specify whether he found that the opinions of Drs. Rasmussen and Forehand established the existence of clinical pneumoconiosis, legal pneumoconiosis,[7] or both. To the extent that the administrative law judge credited their opinions as to the existence of clinical coal workers' pneumoconiosis, which the doctors diagnosed based on x-ray readings, he failed to reconcile his finding that the doctors' opinions were documented and reasoned, with his determination that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). Further, although the administrative law judge found that claimant's treatment records supported a diagnosis of pneumoconiosis, he failed to determine whether the diagnoses contained in claimant's treatment records were reasoned and documented. *See Tennessee Consol. Coal Co. v.*

[4] Because the administrative law judge made findings regarding length of coal mine employment under 20 C.F.R. §718.203(c) that are relevant to legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), we address those findings by the administrative law judge under 20 C.F.R. §718.202(a)(4).

[5] Dr. Rasmussen based his opinion on an eight to fifteen year coal mine employment history. Claimant's Exhibit 1.

[6] Dr. Jarboe based his opinion on a seventeen-year coal mine employment history, and Dr. Castle based his opinion on a fifteen-year coal mine employment history. Employer's Exhibits 2, 5.

[7] "Legal pneumoconiosis" includes any chronic disease or impairment of the lung and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

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).

To the extent that the administrative law judge credited the opinions of Drs. Forehand and Rasmussen to find the existence of legal pneumoconiosis, the administrative law judge failed to articulate how their opinions were reasoned medical judgments establishing a relationship between claimant's COPD and his coal mine employment. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge did not explain his finding that Dr. Rasmussen's opinion, that coal dust exposure made "only a minimal contribution" to claimant's respiratory impairment, constituted a diagnosis of an "impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, with respect to both opinions, the administrative law judge did not specify what underlying evidence, beyond claimant's treatment records, supported a diagnosis of legal pneumoconiosis, nor did the administrative law judge address whether the diagnoses of COPD contained in claimant's treatment records were linked to coal mine employment. *See* 20 C.F.R. §718.201(a)(2),(b); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Consequently, we must vacate the administrative law judge's findings at Sections 718.202(a)(4), 718.203(c), and remand the case for further consideration. On remand, the administrative law judge must reconsider the opinions of Drs. Forehand and Rasmussen under Section 718.202(a)(4). In so doing, the administrative law judge must explicitly address their opinions as to the existence of both clinical and legal pneumoconiosis, and explain his credibility findings in accordance with 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Further, if the administrative law judge finds that Dr. Rasmussen's opinion constitutes a diagnosis of legal pneumoconiosis, he must explain the weight accorded to Dr. Rasmussen's opinion in light of the fact that the administrative law judge credited claimant with six years of coal mine employment and Dr. Rasmussen based his opinion on a coal mine employment history of eight to fifteen years. *See Barnes v. Director, OWCP*, 19 BLR 1-71, 1-76 (1995)(*en banc*); *see also Wojtowicz*, 12 BLR at 1-165.

We additionally find merit in employer's contention that the administrative law judge selectively analyzed the opinions of Drs. Jarboe and Castle as to the existence of pneumoconiosis. As employer contends, contrary to the administrative law judge's findings, Drs. Castle and Jarboe explained the bases for their opinions. Employer's Brief at 7-8. Dr. Castle explained that there was no radiographic evidence of, or symptoms of, clinical coal workers' pneumoconiosis, and that, although he could not determine the degree of claimant's impairment, claimant's risk factors for his pulmonary symptoms

were smoking and cardiac disease. Employer's Exhibit 2. Similarly, Dr. Jarboe also stated that there was no radiographic evidence of clinical coal workers' pneumoconiosis. Employer's Exhibit 5. Further, Dr. Jarboe explained that he ruled out coal dust exposure as a cause of claimant's asthma, because asthma has never been shown to be caused by coal dust. Dr. Jarboe also explained that coal dust exposure was unlikely to have caused claimant's emphysema because no dust retention was seen on claimant's chest x-ray or high resolution CT scan. Further, Dr. Jarboe stated that it would be "very unusual" for fifteen to seventeen years of coal mine employment to cause the degree of pulmonary impairment seen in claimant.[8] *Id*. 5 at 7. Therefore, substantial evidence does not support the administrative law judge's finding that Drs. Jarboe and Castle offered no explanation for their opinions. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). The administrative law judge, on remand, must address the credibility of the doctors' reasoning and explanation. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, although the administrative law judge accurately observed that Drs. Jarboe and Castle based their opinions on an inaccurate coal mine employment history, the administrative law judge failed to explain why this factor entitled their opinions, that claimant has neither clinical nor legal pneumoconiosis, to diminished weight, where these physicians credited claimant with an exaggerated coal mine employment history, yet still concluded that coal mine employment did not contribute to his respiratory condition. *See Barnes*, 19 BLR at 1-76; *see also Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge, on remand, must reconsider the opinions of Drs. Jarboe and Castle at 20 C.F.R. §718.202(a)(4). In so doing, the administrative law judge must address the entirety of the physicians' opinions and rationales, and explain his credibility determinations, as required by the APA. Further, on remand, the administrative law judge must bear in mind that it is claimant's burden to affirmatively establish the existence of pneumoconiosis, not employer's burden to establish an absence of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), he must then determine whether claimant has established that his clinical pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(c). If the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis, he need not separately determine whether claimant's legal pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c),

[8] As found by the administrative law judge, claimant had only six years of coal mine employment. Decision and Order at 3.

because that finding is subsumed within the determination that claimant's chronic lung disease constitutes legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2),(b); *Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999).

In light of our determination to vacate the administrative law judge's finding as to the existence of pneumoconiosis, we additionally vacate his finding that pneumoconiosis is a substantially contributing cause of claimant's total disability under 20 C.F.R. §718.204(c). If reached, on remand, the administrative law judge must again consider the relevant evidence on this issue and explain his credibility determinations pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order – Awarding 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge