BRB No. 10-0367 BLA

LAWRENCE D. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PANTHER BRANCH COAL COMPANY	)	
	)	DATE ISSUED: 03/07/2011
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (07-BLA-5628) of Administrative Law Judge Michael P. Lesniak on a claim[1] filed pursuant to the

[1] Claimant, Lawrence D. Miller, filed his application for benefits on July 26, 2006. Director's Exhibit 2.

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). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited claimant with eighteen and one-half years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded, commencing as of July 1, 2006, the month in which the claim was filed.

On appeal, employer contends that the administrative law judge erred in finding that the weight of the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and disability causation pursuant to 20 C.F.R. §718.204(c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief limited to addressing the impact of Section 1556 of Public Law No. 111-148 on this claim. This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The Director asserts that the amended Section 411(c)(4) applies to this claim because it was filed on July 20, 2006, and employer has not challenged the administrative law judge's determinations that claimant established eighteen and one-half years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). However, the Director contends that the amended Section 411(c)(4) will have no bearing on this case unless the Board vacates the administrative law judge's award of benefits and remands the case for further consideration of the evidence. In that event, the Director maintains that the administrative law judge should determine whether claimant worked for fifteen years in underground coal mine employment or in substantially similar conditions and, if so, consider whether claimant is entitled to invocation of the amended Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). In addition, the Director asserts that the administrative law judge must allow the parties to proffer additional evidence on remand, consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a

[2] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if the evidence exceeds the limitations.[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 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).

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis[4] at Section 718.202(a)(4). Employer argues that the administrative law judge failed to provide a rational explanation for crediting the opinions of Drs. Agarwal, Rasmussen, Stollings, and Grey, to support a finding of legal pneumoconiosis, over the contrary opinions of Drs. Zaldivar and Crisalli, in violation of 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). Specifically, employer argues that it was irrational for the administrative law judge to accord greater weight to Dr. Agarwal's opinion on the basis that the physician performed the most recent examination of claimant by a period of almost two years, when Dr. Agarwal's examination findings and test results were substantially similar to those of the other doctors. Employer additionally asserts that the opinions of claimant's treating physicians, Drs. Stollings and Grey, suffer from various deficiencies and are insufficient to establish either clinical[5] or legal pneumoconiosis. Employer argues that Dr. Stollings failed to provide a rationale for his diagnosis of coal workers' pneumoconiosis under the "impression" section of his reports; did not identify the etiology of claimant's pulmonary

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen and one-half years of coal mine employment and total respiratory disability at 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 16.

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

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

fibrosis or chronic obstructive pulmonary disease (COPD); and did not provide copies of any pulmonary function or blood gas testing. Thus, it is not clear whether the physician ordered or administered any such tests. Likewise, employer argues that Dr. Grey's failure to render a "concrete diagnosis" of either clinical or legal pneumoconiosis, or to definitively attribute claimant's pulmonary fibrosis to coal mine dust exposure, diminishes the probative value of his opinion. Employer maintains that Dr. Grey's use of conditional language in the "impression" section of his reports, absent any explanation or discussion to clarify his diagnosis, renders his opinion problematic, fails to constitute a definitive opinion as to the etiology of claimant's lung disease and, as such, fails to affirmatively establish the existence of pneumoconiosis under Section 718.202(a)(4). Employer's arguments have some merit.

In assessing the probative value of the medical opinions rendered by Drs. Agarwal, Rasmussen, Zaldivar, and Crisalli, the administrative law judge initially found that they were all well-documented and well-reasoned, and that they also were "quite similar" in that all four physicians "diagnose[d] or recognize[d] the potential of Claimant having some sort of pulmonary fibrosis." Decision and Order at 13. The administrative law judge found that the opinions of Drs. Agarwal, Zaldivar, and Crisalli were worthy of "considerable weight," given these doctors' demonstrated medical expertise as Board-certified pulmonologists. The administrative law judge further found that, even though Dr. Rasmussen was not a Board-certified pulmonologist, his opinion was entitled to "some weight" due to his "extensive experience in diagnosing and treating coal workers' pneumoconiosis." Decision and Order at 13. The administrative law judge accorded increased weight to Dr. Agarwal's diagnosis of pneumoconiosis on the grounds that "his examination of Claimant was, by a period of almost two years, the most recently performed." Decision and Order at 13-14. While characterizing Dr. Agarwal's opinion as "significantly more recent," the administrative law judge ultimately found that the four opinions were "in equipoise," since there was genuine disagreement as to whether claimant's pulmonary fibrosis was related to coal dust exposure, and as:

> Two highly qualified physicians [Drs. Zaldivar and Crisalli] diagnose Claimant with idiopathic pulmonary fibrosis unrelated to coal mine employment, whereas another highly qualified physician [Dr. Agarwal] who performed the most recent examination finds that Claimant suffers from coal workers' pneumoconiosis that either contributes to the Claimant's pulmonary fibrosis or potentially coexists with it. A third, somewhat less qualified physician [Dr. Rasmussen] also finds that coal workers' pneumoconiosis contributed to Claimant's pulmonary fibrosis. With the x-ray evidence not supporting a finding of coal workers' pneumoconiosis and the medical opinion evidence lying in equipoise, Claimant thus far has failed to meet his burden. . . .

Decision and Order at 14. The administrative law judge then analyzed the opinions of the treating physicians, Drs. Stollings and Grey, and accorded "some deference" to the opinion of Dr. Stollings, who saw claimant seven times over a three-year period for lung problems and listed coal workers' pneumoconiosis in his impressions of each visit, Claimant's Exhibit 2; and "considerable deference" to the opinion of Dr. Grey, a pulmonary specialist who saw claimant five times over a one-year period and opined that claimant's lung disease is related to "his COPD and/or CWP." Decision and Order at 14-15; Claimant's Exhibit 8. The administrative law judge concluded that, after considering all the evidence, "the opinions of the treating physicians tilt the balance of evidence in the favor of Claimant," as they "align more with those of Drs. Rasmussen and Agarwal with regards to the question of whether or not Claimant's pulmonary fibrosis is related to coal workers' pneumoconiosis." Decision and Order at 15.

We agree with employer's contention that the administrative law judge credibility determinations at Section 718.202(a)(4) cannot be affirmed. While the administrative law judge properly noted that pneumoconiosis is a progressive disease and that a pulmonary evaluation based on the most recent physical examination may be accorded greater weight where it better reflects the miner's current condition, *see* Decision and Order at 14, the administrative law judge did not explain why the recency of Dr. Agarwal's pulmonary evaluation of claimant by a period of two years should be considered a salient factor in this case. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993) ("A bare appeal to 'recency' is an abdication of rational decisionmaking"); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-65 (4th Cir. 1992). Specifically, the administrative law judge did not explain how Dr. Agarwal's most recent examination better enabled him to diagnose pneumoconiosis or identify the etiology of claimant's pulmonary fibrosis. *See* Decision and Order at 14; Claimant's Exhibit 1. Additionally, we agree with employer's argument that it is difficult to discern from the treatment records of Drs. Stollings and Grey whether either physician was, in fact, rendering an independent diagnosis of pneumoconiosis or merely relying on a reported history of coal workers' pneumoconiosis. A review of the record reflects that Dr. Stollings listed "coal workers' pneumoconiosis" under the "impression" section in his reports, but he also listed "*history of* coal workers' pneumoconiosis" and "*possible* coal workers' pneumoconiosis." Claimant's Exhibit 2 [emphasis added]. Further, Dr. Stollings did not provide any rationale for diagnosing coal workers' pneumoconiosis (CWP) in his reports, nor does he specify the etiology of claimant's pulmonary fibrosis or COPD. *Id.* Similarly, Dr. Grey's various treatment records indicate that claimant has pulmonary fibrosis "with characteristic appearance on HRCT scan of IPF. . . some of this *could be* related to his prior history of CWP," "*may be* related to coal workers' pneumoconiosis," or is "*probably* related to chronic obstructive pulmonary disease and/or coal workers' pneumoconiosis." Claimant's Exhibit 8. As the administrative law judge did not discuss the equivocal nature of the opinions of claimant's treating physicians and determine whether they constituted adequately reasoned and documented diagnoses of

either clinical or legal pneumoconiosis, we vacate the administrative law judge's findings pursuant to Section 718.202(a)(4) and remand this case for a reassessment of the conflicting medical opinions thereunder. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Because the administrative law judge's credibility determinations at Section 718.202(a)(4) affected his weighing of the medical opinion evidence on the issue of disability causation, we also vacate the administrative law judge's findings at Section 718.204(c).

On remand, as a preliminary matter, the administrative law judge must consider whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). As invocation of the presumption requires a determination that claimant worked 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), the administrative law judge must determine whether claimant's eighteen and one-half years of coal mine employment were equivalent to at least fifteen years of underground employment. If the administrative law judge determines that the presumption is invoked, he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must 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). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the Decision and Order - Awarding Benefits of the administrative law judge 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