BRB No. 08-0595 BLA

A.K.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MAGNET COAL, INCORPORATED	)	
	)	DATE ISSUED: 05/29/2009
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 on Remand Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2004-BLA-05447) of Administrative Law Judge Daniel F. Solomon rendered on a claim 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). This case involves a subsequent claim and is before the Board for the second time.[1] In his Decision and Order issued on November 8, 2006, the administrative

[1] Claimant filed his initial claim for black lung benefits on November 5, 1998. Director's Exhibit 1. The district director denied benefits on May 4, 1999, finding that while claimant suffered from pneumoconiosis, the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis.

law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant satisfied his burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. Claimant appealed and the Board held that the administrative law judge erred in failing to consider all of the x-ray evidence and medical opinions of record relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[2] *A.K. v. Magnet Coal, Inc.*, BRB No. 07-0253 BLA, slip op. at 4, 6-7. (Oct. 29, 2007) (unpub.). The Board therefore vacated the denial of benefits and remanded the case for further consideration. *Id*. at 7.

On remand, 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)(4), 718.203. The administrative law judge further found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, challenging the administrative law judge's finding that claimant established the existence of legal pneumoconiosis. Employer asserts that the administrative law judge "erred in failing to explain the drastic swing in his credibility determinations" on remand and his decision to now credit Dr. Rasmussen's opinion, that claimant suffers from chronic lung disease due to coal dust exposure, over the contrary opinions of Drs. Hippensteel and Castle, that claimant does not have any respiratory disease attributable to his coal mine employment. Employer's Brief in Support of Petition for Review at 4. Employer contends that the administrative law judge improperly shifted the burden to employer to disprove that claimant suffers from legal pneumoconiosis. *Id*. Employer further contends that the administrative law judge erred in finding that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs, has filed

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Id. Claimant took no further action in regard to his 1998 claim. Claimant filed a subsequent claim on February 5, 2002, which is the subject of this appeal. Director's Exhibit 1.

[2] The Board affirmed, as unchallenged, the administrative law judge's finding that claimant is totally disabled and, thus, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *A.K. v. Magnet Coal, Inc.*, BRB No. 07-0253 BLA, slip op. at 7 (Oct. 29, 2007) (unpub.).

a letter stating that he will not participate in the appeal before the Board, unless specifically requested to do so.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer asserts that the administrative law judge erred on remand in failing to explain why he found Dr. Rasmussen's opinion to be better reasoned than the opinions of Drs. Hippensteel and Castle as to whether claimant's restrictive respiratory disease is due, in part, to coal dust exposure. Employer's assertions of error have merit.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge was instructed by the Board on remand to weigh the opinions of Drs. Porterfield, Rasmussen, Hippensteel and Castle as to whether claimant suffers from either clinical or legal pneumoconiosis. [*A.K.*], BRB No. 07-0253 BLA, slip. op. at 6-7. The administrative law judge, however, limited his analysis to whether claimant

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable because claimant was employed in coal mining in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

established the existence of legal pneumoconiosis in light of Dr. Rasmussen's opinion.[4] The administrative law judge stated:

> Dr. Rasmussen diagnoses the Claimant with legal pneumoconiosis. I previously attributed less weight to Dr. Rasmussen's reasoning based on "undue reliance" on the pulmonary function test in order to establish the presence of pneumoconiosis. He actually found a very marked loss of lung function as reflected by his moderate ventilatory impairment and his marked impairment in oxygen transfer and marked hypoxia with very light exercise. In his testimony, he set out a pattern of exposure that explains how both smoking and mining exposure caused the impairment.

Decision and Order on Remand at 5.[5] After noting Dr. Rasmussen's "extensive experience in pulmonary medicine and the specific area of coal workers' pneumoconiosis," the administrative law judge determined:

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[4] Dr. Rasmussen examined claimant on August 25, 2004, and opined that claimant suffered from a moderate, irreversible restrictive impairment, with total lung capacity and residual volume moderately reduced. Claimant's Exhibit 1. Dr. Rasmussen reported that claimant suffered from moderately reduced diffusion capacity impairment, minimal resting hypoxia and marked impairment in oxygen transfer with exercise. *Id*. Dr. Rasmussen diagnosed coal workers' pneumoconiosis by x-ray, chronic lung disease due to coal dust exposure and interstitial fibrosis. *Id*. Dr. Rasmussen testified that typically coal workers' pneumoconiosis causes an obstructive defect. Claimant's Exhibit 4. When asked why he attributed claimant's respiratory condition to coal dust exposure, independent of any radiographic findings, Dr. Rasmussen replied, "Well, I would say the pattern of impairment, of course, with greater impairment in oxygen transfer than ventilatory impairment is certainly consistent with coal mine dust exposure." *Id*. at 10. Dr. Rasmussen opined that obesity played no role in the development of claimant's restriction. *Id*. at 20. He also stated that claimant's history of heart disease played no significant role in his respiratory condition. *Id.* Dr. Rasmussen was unable to estimate how much smoking contributed to claimant's respiratory condition, but noted that "miners who smoke, even without airway obstruction, have more impairment in oxygen transfer than nonsmokers." *Id*. at 8.

[5] The administrative law judge previously found that Dr. Rasmussen failed to show how "the relationship of fibrosis and restriction compels a finding of pneumoconiosis to a reasonable degree of medical certainty." 2008 Decision and Order at 12.

> I find that Dr. Rasmussen's explanation is consistent with the concept that the smoking and mining had a combined impact. At the time that the "new" regulations were promulgated, the Department of Labor noted that smokers who mine have an additive risk for developing significant obstruction. 65 Federal Register, No. 245, 79940 (December 20, 2000) . . . 68 Federal Register No. 240, p. 69930 (December 15, 2003).

Decision and Order on Remand at 10. The administrative law judge then summarily concluded that Dr. Rasmussen's opinion is better reasoned than the opinions of Drs. Hippensteel and Castle and, thus, found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[6] *Id*.

Employer correctly argues on appeal that the administrative law judge failed to properly explain why he found Dr. Rasmussen's opinion to be better reasoned than the opinions of Drs. Hippensteel and Castle. The Administrative Procedure Act (APA), 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), requires an administrative law judge to provide an explanation for his or her findings of fact and conclusions of law. Because the administrative law judge has not explained the weight accorded all of the medical opinions of record regarding whether claimant has a chronic dust disease of the lung due, in part, to coal dust exposure, his Decision and Order on Remand is not in accordance with the APA and must be vacated.[7] *Wojtowicz*, 12 BLR at 1-162.

We also agree with employer that the reasons cited by the administrative law judge for crediting Dr. Rasmussen's diagnosis of legal pneumoconiosis require further explanation. The administrative law judge stated that he found Dr. Rasmussen's opinion to be consistent with the "concept" that there is "an additive risk for the development of significant obstruction" in cases where an individual has a history of both smoking and coal dust exposure. Decision and Order on Remand at 10. While the administrative law judge is correct that the Department

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[6] Although the administrative law judge discussed Dr. Rasmussen's credentials, he did not mention the credentials of Drs. Hippensteel and Castle. Decision and Order on Remand at 10.

[7] The administrative law judge determined, based on Dr. Rasmussen's testimony, that the exercise arterial blood gas study obtained by Dr. Hippensteel was invalid, but the administrative law judge does not explain why Dr. Rasmussen's opinion was credible on this issue. Decision and Order on Remand at 8.

of Labor has concluded that the weight of the medical and scientific evidence is that coal mine dust may cause chronic *obstructive* pulmonary disease, the administrative law judge's analysis does not address the fact that Dr. Rasmussen diagnosed a primarily *restrictive* respiratory condition. S*ee* 65 Fed. Reg. No. 79940 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003); Claimant's Exhibit 4 at 21-22.[8] The administrative law judge also did not identify the basis in the medical record for his conclusion that claimant suffers from an obstructive respiratory condition, which he noted was the result of an additive effect of smoking and coal dust exposure. *Wojtowicz,* 12 BLR at 1-162. Thus, we are unable to affirm the administrative law judge's cursory conclusion that Dr. Rasmussen's opinion is corroborated by the medical and scientific literature cited in the preamble.

Furthermore, we agree with employer that the analysis employed by the administrative law judge in crediting Dr. Rasmussen incorrectly places the burden on employer to prove that claimant does not suffer from legal pneumoconiosis based on his combined history of smoking and coal dust exposure. Contrary to the administrative law judge's determination, however, the burden of proof rests on claimant to establish that his respiratory condition is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.202(a); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994).

Moreover, employer is correct that "the administrative law judge has failed to address the distinctions between the reasoning" provided by Dr. Rasmussen for attributing claimant's respiratory condition to coal dust exposure, and those of Drs. Hippensteel and Castle.[9] Employer's Brief in Support of Petition for Review

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[8] Dr. Rasmussen diagnosed that claimant has interstitial fibrosis. Claimant's Exhibit 4. He testified that emphysema "usually accompanies" interstitial fibrosis and "some people believe that's one of the reasons we'll see impairment in gas exchange, without airway obstruction . . because they think somehow the fibrosis masks the obstruction." *Id*. at 13. Dr. Rasmussen then stated, "I would say, if you were to get a piece of [claimant's] lung, he would show interstitial fibrosis with pneumoconiosis, and he would also show emphysema." *Id*. at 14. The administrative law judge should address on remand whether Dr. Rasmussen made a reasoned diagnosis of chronic obstructive pulmonary disease (COPD) in the form of emphysema in this case or whether his discussion of the role of emphysema was speculative. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

[9] Dr. Hippensteel examined claimant on April 22, 2003, and opined that claimant does not have clinical or legal pneumoconiosis. Director's Exhibit 12. He noted that claimant had rales and interstitial markings in the lung bases

at 7. Because the administrative law judge has provided no explanation as to why he rejects the rationales provided by Drs. Hippensteel and Castle for attributing claimant's restrictive respiratory condition to other etiological factors, such as obesity, coronary artery disease or smoking, we vacate his finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Wojtowicz*, 12 BLR at 1-165; *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988). In addition, because the administrative law judge relied upon his finding of legal pneumoconiosis to conclude that claimant established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, and to find that claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we are compelled to also vacate his findings under those sections.[10]

On remand, the administrative law judge must reconsider whether the medical opinions by Drs. Porterfield,[11] Rasmussen, Hippensteel or Castle are sufficient to establish the existence of either clinical or legal pneumoconiosis

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consistent with heart disease. *Id*. Dr. Hippensteel indicated that pulmonary function tests showed a restrictive defect that was explained by claimant's obesity as opposed to intrinsic lung disease. *Id*. According to Dr. Hippensteel, "the typical pattern for ventilatory impairment one expects to see in [coal workers' pneumoconiosis] is a mixture of restriction and obstruction. Employer's Exhibit 2. Dr. Castle reviewed the medical record and also opined that claimant's pattern of a purely restrictive impairment was not consistent with impairment from coal dust exposure. Employer's Exhibit 4. Dr. Castle indicated that he could not exclude heart disease as a cause of claimant's desaturation and hypoxemia during exercise arterial blood gas testing. *Id*.

[10] The administrative law judge, having found that Dr. Rasmussen's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201, 718.202(a)(4), also determined that coal mine employment caused the pneumoconiosis as it was "subsumed in [his] discussion," obviating the need for a separate inquiry under 20 C.F.R. §718.203(a). Decision and Order on Remand at 10; *see Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-342 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[11] Dr. Porterfield diagnosed both coal workers' pneumoconiosis and emphysema secondary to coal dust exposure and smoking. Director's Exhibit 10.

pursuant to 20 C.F.R. §718.202(a)(4).[12] The administrative law judge must 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." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-336-37 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the administrative law judge must explain the basis for all of his findings of fact and conclusions of law as required by the APA. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335. If the administrative law judge determines that the medical opinion evidence is sufficient to establish that claimant has either clinical or legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), he must also determine whether claimant has established the existence of pneumoconiosis based on a preponderance of all of the relevant evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). If so, the administrative law judge must determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and whether claimant is totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

[12] Under 20 C.F.R. §718.201(a), "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). Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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