BRB No. 10-0499 BLA

GERALDINE LEFLER (Widow of and on behalf of RAYMOND LEFLER)	)	
Claimant-Petitioner	)	
v.	)	
OLD BEN COAL COMPANY	)	
and	)	
ZEIGLER COAL HOLDING COMPANY	)	DATE ISSUED: 05/16/2011
Employer/Carrier-Respondent	)	
SAFECO INSURANCE COMPANY	)	
Intervenor	)	
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham and Tara Dahl (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits (2006-BLA-05974) of Administrative Law Judge Jeffrey Tureck rendered on a miner's subsequent claim,[2] filed on September 9, 2002, and a survivor's claim, filed on January 27, 2003, pursuant to 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).[3] In his prior Decision and Order, issued on July 17, 2008, the administrative law judge credited the miner with at least fifteen years of coal mine employment, and adjudicated both claims under the regulations at 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge determined that the newly submitted evidence was sufficient to establish that the miner was totally disabled by a respiratory or pulmonary impairment and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, the administrative law judge found that the evidence was insufficient to establish that the miner had simple pneumoconiosis or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304. The administrative law judge further determined that claimant failed to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In the survivor's claim, the administrative law judge also found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

Claimant appealed, and the Board affirmed, as unchallenged, the administrative law judge's finding in the miner's claim, that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *G.L.* [*Lefler*] *v. Old Ben Coal Co.*, BRB No. 08-0792 BLA, slip op. at n.5 (Aug. 26, 2009) (unpub.). However, the Board agreed

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[1] Claimant is the widow of the miner, Raymond Lefler, who died on September 26, 2002. Director's Exhibit 13.

[2] A procedural history of both claims is set forth in the Board's prior decision and is incorporated herein. *G.L.* [*Lefler*] *v. Old Ben Coal Co.*, BRB No. 08-0792 BLA, slip op. at 2 (Aug. 26, 2009) (unpub.).

[3] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Based on the filing dates of both claims, the recent amendments are not applicable to either the miner's claim or the survivor's claim.

with claimant that the administrative law judge erred in weighing the autopsy and medical opinion evidence in both claims, relevant to the existence of simple pneumoconiosis, and, thus, vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(2), (4). *Id*. at 3-10. Because the Board concluded that the administrative law judge erred in weighing the evidence on the issue of pneumoconiosis, the Board also vacated the administrative law judge's finding, in the miner's claim, that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. § 718.204(c), and his finding, in the survivor's claim, that claimant failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id*. at 10, 12. Furthermore, because the administrative law judge did not address the medical rationale underlying the pathologists' conflicting conclusions as to whether the miner had complicated pneumoconiosis, the Board vacated the administrative law judge's finding that claimant was unable to invoke the irrebuttable presumption at 20 C.F.R. §718.304. *Id*. at 9-10. Thus, the Board vacated the award of benefits in both claims and remanded the case for further consideration.

In his Decision and Order on Remand, issued on May 6, 2010, the administrative law judge again found that the evidence was insufficient to establish either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304. The administrative law judge also found that claimant failed to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Additionally, the administrative law judge concluded that claimant was not entitled to the irrebuttable presumption of total disability and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, benefits were denied in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge failed to follow the Board's remand instructions and did not address all of the relevant evidence on to the issues of the existence of simple and complicated pneumoconiosis, the cause of the miner's total disability, and whether pneumoconiosis substantially contributed to the miner's death. Claimant requests that the Board review this case *de novo* and award benefits or, in the alternative, that the case be remanded with instructions that it be assigned to a different administrative law judge. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, 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

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. THE MINER'S CLAIM

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

A. Autopsy Evidence

Relevant to both the miner's claim and the survivor's claim, the Board vacated the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the autopsy evidence at 20 C.F.R. §718.202(a)(2) because the administrative law judge relied solely on qualifications and made no attempt to "assess the probative value of the pathologists' opinions or the quality of their comparative reasoning." *Lefler*, BRB No. 08-0792 BLA, slip op. at 5, 11. The Board specifically directed the administrative law judge on remand to resolve the conflict in the evidence between Drs. Perper and Naeye, as to whether coal dust exposure caused, or substantially contributed to, the miner's extensive fibrosis:

> As claimant asserts, Dr. Naeye's conclusions, that the miner's lung fibrosis was unrelated to coal dust exposure, was based in part on Dr. Naeye's belief that silica is the only component of coal mine dust that causes fibrosis, and in Dr. Naeye's opinion, tiny silica crystals were absent from the miner's lung tissue. As claimant further asserts, the literature that Dr. Naeye offered in support of this premise was an article that he co-authored in 1979, whereas Dr. Perper, whom the administrative law judge also found to be well-qualified, stated that the article does not support Dr. Naeye's opinion. Moreover, Dr. Perper stated that two peer-reviewed articles, issued in 2000 and 2002, demonstrate that coal dust contains other fibrogenic agents such as bio-available iron and amorphous silica and silicates. Although Dr. Naeye responded to Dr. Perper's criticisms, the

[4] Because the miner's coal mine employment was in Illinois, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

> administrative law judge did not address these criticisms or resolve the conflict in the medical opinions. Therefore, because the administrative law judge did not provide a medical reason for preferring Dr. Naeye's opinion over that of Dr. Perper, we must vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(2), and remand this case for further consideration. On remand, the administrative law judge should consider the respective analyses and quality of the physicians' comparative reasoning in addition to their qualifications. Further, the administrative law judge must render an explicit finding under 20 C.F.R. §718.202(a)(2), and explain his credibility determinations.

Id. at 5 (internal citations omitted). The Board also instructed the administrative law judge to explain the basis for his finding that Dr. Caffrey's opinion was supportive of Dr. Naeye's opinion,[5] and also address inconsistent statements by Dr. Naeye regarding how to identify silica in the lungs.[6] *Id*.

In his Decision and Order on Remand, the administrative law judge stated:

> The [Board] stated that I erred because I "did not provide *a medical reason* for preferring Dr. Naeye's opinion over that of Dr. Perper . . . ." I have no idea what the [Board] means in saying that I did not provide a medical reason for my determination. Surely, the [Board] does not want me to independently decide whether silicate crystals must be found in the miner's lung tissue in order to diagnose pneumoconiosis, or "whether a darkened

[5] Dr. Caffrey specifically opined that claimant had pathological evidence of silica sufficient to warrant a diagnosis of silicosis. *Lefler*, BRB No. 08-0792 BLA, slip op. at 11.

[6] In his written report, Dr. Naeye discounted Dr. Caffrey's opinion, stating that there was "not nearly enough very tiny crystals in this man's lung tissue to have caused the widespread fibrosis that Dr. Caffrey attributes to silicosis. The crystals that cause such fibrosis have to be present in the thousands at a magnification of x1000 in a very dark room to be responsible for any fibrosis that is present." Employer's Exhibit 4. However, during his deposition, Dr. Naeye testified that toxic silica, pathologically, is "easy to see. All you have to do is look under a microscope. You wouldn't even need a dark room. You could just use polarized light, the silica particles stand out like stars in the sky on a black night in the middle of the desert. I mean, they are very easy to see." Employer's Exhibit 8 at 17-18.

> room and 'microscopic magnification x1000' are necessary to see toxic silica." That would require me to "play doctor[,]" something Administrative Law Judges have been admonished against *ad infinitum*. Moreover, I have no basis to make such a determination. All I can do is examine the opinions of the medical experts and determine whose opinion is more persuasive. Dr. Naeye has extraordinary expertise in the pathology of coal workers' pneumoconiosis. A major focus of Dr. Naeye's professional life has been the study of the pathology of the lungs of coal miners, including his co-authorship of the seminal report in the field. On the other hand, Dr. Perper, although a well-qualified pathologist, has no particular expertise in the pathological diagnosis of occupational lung disease. Under these conditions, it would be illogical to give more weight to the opinion of Dr. Perper absent an overwhelming reason to reject Dr. Naeye's opinion in this case. I found no such reason before, and I find no such reason now. Similarly, I credit Dr. Naeye's opinion over that of Dr. Johnson, whose qualifications are not in the record.

Decision and Order on Remand at 2 (internal citations omitted) (emphasis in original).

We agree with claimant that the administrative law judge has not followed the Board's remand instructions to "consider the respective analyses and quality of the physicians' comparative reasoning," nor has the administrative law judge addressed the alleged inconsistencies in Dr. Naeye's report, as to the method by which he identifies silica in the lungs. *Lefler*, BRB No. 08-0792 BLA, slip op. at 5; *see Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). Contrary to the administrative law judge's suggestion, the Board did not require him to act as a medical expert, but rather to consider whether Dr. Naeye's opinion is reasoned and documented, irrespective of his qualifications. The administrative law judge should consider whether Dr. Naeye's rationale for excluding coal dust exposure as the etiology of the miner's respiratory condition is consistent with the definition of clinical pneumoconiosis[7] at 20 C.F.R. §718.201(a)(1), and determine whether his reports and

[7] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). This definition "includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id*.

deposition testimony contain any inconsistencies that might detract from the credibility of his opinion. The administrative law judge must also explain why Dr. Naeye's opinion is not contradicted by the opinion of Dr. Caffrey, who specifically found sufficient amounts of silica present on autopsy to justify a diagnosis of silicosis in this case. Therefore, we must vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(2). Additionally, because the administrative law judge assigned weight to Dr. Naeye's opinion on the issues of the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c), but did not follow the Board's instruction to specifically determine whether Dr. Naeye's opinion was reasoned and documented, based on a review of the rationale underlying his conclusions, we vacate administrative law judge's findings under those subsections.

B. Complicated Pneumoconiosis

Because the administrative law judge did not address the medical rationale underlying the pathologists' opinions, the Board previously vacated the administrative law judge's finding at 20 C.F.R. §718.304, and remanded the case for him to resolve the conflict between Drs. Perper and Naeye as to whether the miner had complicated pneumoconiosis.[8] *Lefler*, BRB No. 08-0792 BLA, slip op. at 9. On remand, the administrative law judge summarily concluded that claimant failed to establish complicated pneumoconiosis:

> Dr. Perper's diagnosis of complicated pneumoconiosis stands alone in this record. None of the other medical evidence in this huge record, whether interpretations of x-rays or CT scans, autopsy reports or physicians'

[8] Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003).

opinions, contains a diagnosis of complicated pneumoconiosis.

Decision and Order on Remand at 3. Because the administrative law judge did not follow the Board's remand instructions, we vacate his finding that claimant is not entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Thus, for all of the above reasons, we vacate the denial of benefits in the miner's claim, and remand the case for further consideration.

II. SURVIVOR'S CLAIM

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

The Board previously instructed the administrative law judge on remand to reconsider whether claimant established that the miner's death was due to pneumoconiosis. The pathology evidence in the survivor's claim is the same as in the miner's claim. Because we have vacated the administrative law judge's findings with regard to the weight accorded the opinions of Drs. Naeye, Perper, and Caffrey, we also vacate the administrative law judge's findings, in the survivor's claim, that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), complicated pneumoconiosis at 20 C.F.R. §718.304, and death due to pneumoconiosis under 20 C.F.R. §718.205(c). Thus, we vacate the denial of benefits in the survivor's claim and remand the case for further consideration.

III. REMAND INSTRUCTIONS

Claimant requests on appeal that the Board review this case *de novo* and award benefits or, in the alternative, that the case be remanded for consideration by a different administrative law judge. The Board is not permitted to undertake a *de novo* adjudication of the claim. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Furthermore, because Judge Tureck has retired, it is not necessary that we include a specific instruction for reassignment. The case will be assigned to a different

administrative law judge on remand, who will consider the merits of the miner's subsequent claim and the survivor's claim, and render specific findings pursuant to 20 C.F.R. §§718.202(a), 718.204(c), 718.304 and 718.205(c). *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 277 (7th Cir. 1990); *Railey*, 972 F.2d at 183, 16 BLR at 2-128. In rendering his or her decision on remand, the administrative law judge must consider the respective rationales of the physicians in determining whether their opinions are reasoned and documented. *See Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318. The administrative law judge must also explain the bases for all of the findings of fact and conclusions of law, as required by the Administrative Procedure Act.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge