BRB No. 13-0433 BLA

FRANK B. GRUBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 05/29/2014
	)	
Employer-Respondent	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (2010-BLA-5126) of Administrative Law Judge Michael P. Lesniak rendered on a request for modification of the denial of a claim filed on February 5, 2001, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

[1] Amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 30, 2013) (to be

This case has been before the Board previously. In the administrative law judge's initial decision, he noted that claimant requested modification of the denial of his claim, based on a mistake in a determination of fact regarding the existence of legal pneumoconiosis. The administrative law judge further found that, if claimant established a mistake in a determination of fact, granting his request for modification under 20 C.F.R. §725.310 would render justice under the Act.[2] However, the administrative law judge concluded that, because the newly submitted evidence was insufficient to prove the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), claimant could not establish a basis for modification. Consequently, the administrative law judge denied claimant's request for modification and the claim for benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's determination that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, failed to establish a mistake in a determination of fact under 20 C.F.R. §725.310.[3] *Grubb v. Valley Camp Coal Co.*, BRB No. 11-0682

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codified at 20 C.F.R. §718.305). The amendments do not apply to this claim, as it was filed before January 1, 2005.

[2] Claimant's initial claim, filed on February 5, 2001, was denied by the district director on May 14, 2002, on the ground that claimant did not establish the existence of pneumoconiosis. Director's Exhibit 24. Claimant filed a request for modification on July 22, 2002, which was denied by the district director on May 2, 2003. Director's Exhibits 26, 30. At claimant's request, the case was transferred to the Office of Administrative Law Judges for a hearing and was assigned to Administrative Law Judge Daniel L. Leland. Director's Exhibit 31. Judge Leland issued a Decision and Order denying benefits, in which he found that claimant had not established the existence of pneumoconiosis and, therefore, had not established a change in conditions. Director's Exhibit 75. The Board affirmed the denial of benefits. *Grubb v. Valley Camp Coal Co.*, BRB No. 06-0183 BLA (Sept. 22, 2006) (unpub.). On July 17, 2007, claimant filed a request for modification in which he alleged a mistake in a determination of fact regarding the existence of legal pneumoconiosis. Director's Exhibit 83. The district director denied claimant's request. Director's Exhibit 88. Claimant requested a hearing and the claim was again assigned to Judge Leland for a hearing. Judge Leland issued a Decision and Order denying benefits on October 2, 2008, finding that claimant failed to prove that he has legal pneumoconiosis and, therefore, failed to establish a basis for modification. Director's Exhibits 90, 111. Claimant did not appeal this decision, but filed his current request for modification on June 9, 2009. Director's Exhibit 112.

[3] The Board affirmed, as unchallenged, the administrative law judge's determination that claimant had twenty-five years of coal mine employment. *Grubb v.*

BLA, slip op. at 4-5 (July 24, 2012) (unpub.). Accordingly, the Board remanded the case to the administrative law judge to reconsider whether the evidence submitted on modification, considered in conjunction with the previously submitted evidence, is sufficient to establish a mistake in the prior determination that claimant does not have legal pneumoconiosis. *Id*. at 5.

In his Decision and Order on Remand, the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis and, therefore, did not establish a basis for modification of the prior denial of benefits. Accordingly, the administrative law judge denied claimant's request for modification and the claim for benefits.

On appeal claimant argues that the administrative law judge erred in finding that he did not establish a mistake in a determination of fact as to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

An administrative law judge may grant modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

On remand, the administrative law judge reconsidered the medical opinions of Drs. Rosenberg, Castle, Crisalli, Rasmussen and Cohen pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge determined that the opinions in which Drs.

Valley Camp Coal Co., BRB No. 11-0682 BLA, slip op. at 3 n.4 (July 24, 2012) (unpub.).

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 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).

Rosenberg, Castle and Crisalli ruled out the presence of legal pneumoconiosis,[5] were not entitled to significant weight. Decision and Order on Remand at 6-7. The administrative law judge also determined, however, that the diagnoses of legal pneumoconiosis rendered by Drs. Rasmussen and Cohen were insufficient to carry claimant's burden under 20 C.F.R. §718.202(a)(4). *Id*. at 4-5.

With respect to Dr. Rasmussen's opinion, the administrative law judge concluded that it was equivocal and entitled to little weight. Decision and Order on Remand at 4. The administrative law judge also noted that Dr. Rasmussen's opinion was based solely on the examination that he performed in 2001 and that he did not review any of claimant's medical records. *Id*. The administrative law judge accorded Dr. Cohen's medical reports and deposition testimony "some weight" because "Dr. Cohen's understanding that there is no way to rule out either smoking or coal dust exposure as a cause of [chronic obstructive pulmonary disease (COPD)], when a miner has had substantial exposure to both, and that the effects of these exposures [are] additive," is consistent with the preamble to the amended regulations. *Id*. at 5, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Nevertheless, the administrative law judge determined that:

> Dr. Cohen's most recent deposition does not cure the problem with his previous opinions; namely, that he was unable to explain why this particular miner's COPD was due at least in part to coal dust exposure; rather, he relied on the general principle that both exposures could cause an obstructive impairment in a susceptible host, a determination that is insufficient to support claimant's burden [to establish the existence of legal pneumoconiosis].

Decision and Order on Remand at 5; *see* Director's Exhibit 111. The administrative law judge further indicated that he agreed with employer's position that:

> The problem with Drs. Rasmussen and Cohen is not that they are unable to formulate an exact percentage of coal dust's alleged contribution to [claimant's] impairment. Rather, the problem is that the doctors assume that coal dust *must have been* a significant causal factor in the respiratory impairment because coal dust *can* cause respiratory impairment.

[5] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory of pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Decision and Order on Remand at 6, *quoting* Employer's Closing Brief at 19. Based on these findings, the administrative law judge concluded that the opinions of Drs. Cohen and Rasmussen were insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 6.

Claimant argues that the administrative law judge mischaracterized Dr. Rasmussen's opinion and failed to provide a "meaningful discussion" of his supplemental report dated April 6, 2007. Brief in Support of Petition for Review at 11; *see* Director's Exhibit 83. Claimant further contends that the administrative law judge's "decision to reject Dr. Rasmussen's opinion because he did not review any of the medical records is not explained or rational." Brief in Support of Petition for Review at 11. With respect to the administrative law judge's weighing of Dr. Cohen's opinion, claimant alleges that he "failed to properly set forth his findings . . . on the critical issue of legal pneumoconiosis and include the underlying rational[e]." *Id*. at 12. Claimant's allegations of error have merit.

As claimant contends, in according little weight to Dr. Rasmussen's opinion on the etiology of claimant's COPD because it is equivocal, the administrative law judge did not fully address Dr. Rasmussen's supplemental medical report and did not adequately explain his finding. The administrative law judge quoted Dr. Rasmussen's supplemental report dated April 6, 2007, as follows:

> Dr. Rasmussen noted that [claimant's] respiratory condition "*could* be entirely due to the consequence of his coal mine dust exposure, or *could* be due solely to the cigarette smoking effect, [but] neither scenario is medically realistic. Based on everything that is known . . . both contribute . . . .

Decision and Order on Remand at 4, *quoting* Director's Exhibit 83 (ellipses in original). The administrative law judge further stated, "I agree with [e]mployer's contention that this opinion is equivocal and must be afforded little weight on this basis." Decision and Order on Remand at 4, *citing* Employer's Closing Brief at 7. By emphasizing the word "could," the administrative law judge indicated that Dr. Rasmussen's use of it, in conjunction with both of the potential causes of claimant's COPD, rendered his opinion equivocal. However, the administrative law judge did not reconcile this determination with Dr. Rasmussen's definitive statement that "neither scenario" in which claimant's COPD has a single cause is "medically realistic." Director's Exhibit 83. Similarly, in finding that Dr. Rasmussen merely assumed that coal dust exposure was a significant contributing cause of claimant's obstructive impairment, the administrative law judge did not address Dr. Rasmussen's statements that claimant "has had significant exposure to coal mine dust, particularly to silicon dioxide because of his many years as a surface coal

miner" and that "there is evidence to support a diagnosis of legal pneumoconiosis in [claimant] and reason to state that his disabling chronic lung disease is due in significant part to his coal mine employment." *Id*. Claimant is also correct in asserting that the administrative law judge did not explain why the omission of a review of claimant's treatment records from Dr. Rasmussen's medical reports justified giving his opinion less weight, when these records do not appear to contain information germane to determining the cause of claimant's COPD.

In finding that, like Dr. Rasmussen, Dr. Cohen assumed that coal dust exposure was a contributing cause of claimant's obstructive impairment, the administrative law judge did not address the significance of Dr. Cohen's statement that before he renders such a diagnosis, a miner who smoked must have a documented and substantial history of both exposures, and no history of other possible disease processes. Director's Exhibit 114 at 51, 101. The administrative law judge also did not consider Dr. Cohen's opinion in conjunction with the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). In *Williams*, the court held that a physician's opinion that was very similar to Dr. Cohen's opinion in this case, was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. 718.202(a)(4).[6] The court noted that the physician: acknowledged that either cigarette smoking or coal mine dust could have caused the miner's airflow obstruction; refuted the opinions of employer's experts that there are particular objective test values that allow a physician to distinguish between the effects of smoking and coal dust inhalation; and supported his view that coal dust exposure contributed to the miner's obstruction by citing, *inter alia*, scientific studies, objective test results, and the miner's extensive history of coal mine employment. *Williams*, 453 F.3d at 622, 23 BLR at 2-372.

Because the administrative law judge did not fully and accurately address the opinions of Drs. Rosenberg and Cohen in light of the applicable law, and did not explain his findings, we must vacate his determination that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703

[6] A medical opinion authored by Dr. Cohen was among the evidence submitted by the miner in *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 612-13, 23 BLR 2-345, 2-369 (4th Cir. 2006). The court affirmed the administrative law judge's decision to admit Dr. Cohen's opinion, but did not reach the issue of whether the administrative law judge properly credited Dr. Cohen's diagnosis of legal pneumoconiosis, as it held that the administrative law judge's finding that the miner satisfied his burden of proof at 20 C.F.R. §718.202(a)(4) was supported by substantial evidence, regardless of the presence in the record of Dr. Cohen's opinion. *Williams*, 453 F.3d at 622, 23 BLR at 2-372.

(1985). We also vacate, therefore, the administrative law judge's determination that claimant did not establish a mistake in a determination of fact on the issue of legal pneumoconiosis under 20 C.F.R. §725.310.

On remand, the administrative law judge must reconsider whether the opinions of Drs. Rasmussen and Cohen are sufficient to satisfy claimant's burden of proving the existence of legal pneumoconiosis. In so doing, the administrative law judge must consider "the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998). The administrative law judge must also consider the medical opinions of Drs. Rasmussen and Cohen in conjunction with the Fourth Circuit's holding in *Williams* when determining whether claimant has met his burden under 20 C.F.R. §718.202(a)(4). The administrative law judge must set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record," as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines that claimant has established the existence of legal pneumoconiosis, and a mistake in a determination of fact, he must address claimant's entitlement to benefits on the merits of the claim.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is vacated and the case is remanded to the administrative law judge for further proceedings 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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REGINA C. McGRANERY
Administrative Appeals Judge