BRB No. 13-0528 BLA

DOYLE G. BAILES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C.C. CONLEY & SONS, INCORPORATED	)	DATE ISSUED: 05/13/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Carl E. Hostler (Prim Law Firm, PLLC), Hurricane, West Virginia, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5207) of Administrative Law Judge Richard A. Morgan with respect to a subsequent claim filed on February 11, 2010, pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] The administrative law judge found that claimant established thirteen years of coal mine employment, with eleven years underground or in conditions substantially similar to underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] Based on the newly submitted evidence and the evidence of record as a whole, the administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), but established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant proved that he is totally disabled at 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).[3] Further, the administrative law judge determined that claimant established that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erroneously failed to put the burden on claimant to establish the existence of legal pneumoconiosis. Employer also contends that the administrative law judge erred in failing to give Dr. Figueroa's opinion additional weight, based on his status as claimant's treating physician, and in discrediting the opinions of Drs. Zaldivar and Bellotte at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The

[1] Claimant filed his initial claim for benefits on October 7, 1998, which was denied by the district director on December 9, 1998, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 1. The record does not show that claimant took any other action prior to filing the current claim.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). The administrative law judge properly determined that amended Section 411(c)(4) does not apply in this case, as claimant did not establish at least fifteen years of qualifying coal mine employment. *Id*.; Decision and Order at 31.

[3] The Department of Labor (DOL) has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

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.[5] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

In considering the medical opinion evidence at 20 C.F.R. §718.202(a)(4),[6] the administrative law judge acknowledged that Dr. Figueroa's opinion, that claimant has chronic obstructive pulmonary disease (COPD) and emphysema due to cigarette smoking, had to be considered at 20 C.F.R. §718.104(d), as he was claimant's treating physician. Decision and Order at 24. The administrative law judge summarily concluded, however, that "I do not find a basis to give his opinion additional weight." *Id*. The administrative law judge noted that he considered Drs. Bellotte and Zaldivar, who both diagnosed asthma and COPD/emphysema due solely to cigarette smoking, to be the

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 5. 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).

[6] The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), that there was no biopsy evidence in the record for consideration at 20 C.F.R. §718.202(a)(2), and that there were no applicable presumptions at 20 C.F.R. §718.202(a)(3). Decision and Order at 21-22, 25-26, 31.

"best qualified physicians," based on their status as Board-certified pulmonologists and B readers. *Id*. at 23, 25. Nevertheless, the administrative law judge gave their opinions "lesser credit" because their view that bullous emphysema is not caused by coal dust exposure is "not fully compatible with the Act." *Id*. at 25-26. The administrative law judge also gave their opinions less weight because they did not consider whether coal dust could have aggravated the asthma that they diagnosed, which the administrative law judge found was inconsistent "with the views expressed by the Department of Labor [(DOL)], set forth in the Preamble to the 2001 regulations." *Id*. at 26. The administrative law judge concluded, "[h]aving given these two physician opinions lesser weight, I find that Dr. Rasmussen's diagnosis [of COPD due to coal dust and cigarette smoking] establishes legal pneumoconiosis." *Id*. The administrative law judge then relied on his weighing of the medical opinions at 20 C.F.R. §718.202(a)(4) to determine that claimant established total disability causation at 20 C.F.R. §718.204(c). *Id*. at 35.

Employer contends that the administrative law judge applied an incorrect burden of proof by finding the existence of legal pneumoconiosis established, based on his discrediting of the opinions of Drs. Bellotte and Zaldivar. Employer states that the administrative law judge should have examined Dr. Rasmussen's opinion diagnosing legal pneumoconiosis to determine whether it was credible, well-reasoned, and well-documented. In addition, employer argues that the administrative law judge erred in not giving Dr. Figueroa's opinion additional weight, based on his role as a treating physician, without specifically analyzing the criteria at 20 C.F.R. §718.104(d) and explaining his reasoning in accordance with the Administrative Procedure Act (APA).[7] Further, employer maintains that the administrative law judge erred in discrediting the opinions of Drs. Bellotte and Zaldivar, without addressing all of the factors they cited in support of their conclusion that claimant does not have legal pneumoconiosis. Employer also contends that the administrative law judge "misinterpret[ed] the preamble's language to find 'inconsistency' between it and a medical opinion when in fact there is none." Employer's Brief at 18. Employer also argues that the administrative law judge's interpretation of the preamble created "an irrebuttable 'double presumption.'" *Id.*

Employer is correct in asserting that claimant bears the burden of establishing each element of entitlement, including the existence of legal pneumoconiosis. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because the administrative law judge did not explain, in accordance with the APA, his reason for giving more weight to Dr. Rasmussen's

[7] The Administrative Procedure Act, 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), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

opinion diagnosing legal pneumoconiosis, aside from discrediting the contrary opinions, we vacate his finding at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In addition, because the administrative law judge based his findings concerning disability causation on his weighing of the evidence at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's determination that claimant established total disability causation at 20 C.F.R. §718.204(c) and further vacate the award of benefits.

On remand, when weighing the medical opinion evidence, the administrative law judge must specifically determine whether Dr. Rasmussen has provided a reasoned and documented opinion sufficient to affirmatively establish that claimant has legal pneumoconiosis. The administrative law judge is further instructed to reassess the conflicting medical opinions in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). When weighing Dr. Figueroa's opinion, the administrative law judge is required to render specific findings under 20 C.F.R. §718.104(d)(1)-(5), as to whether his diagnosis of COPD/emphysema due solely to smoking is entitled to additional weight, in light of his status as claimant's treating pulmonologist. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, 22 BLR 2-564, 2-571 (4th Cir. 2002).

When weighing the opinions of Drs. Bellotte and Zaldivar on remand, the administrative law judge may rely on the preamble "as a source of explanation as to the DOL's rationale in amending the regulations" and may accord weight to a medical opinion, based on the extent to which it is consistent with that rationale.[8] *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). However, if he does so, the administrative law judge must

[8] Contrary to employer's contention, if the administrative law judge reasonably determines that one of the rationales that Dr. Bellotte or Dr. Zaldivar provided for excluding coal dust exposure as a contributing cause of claimant's respiratory impairment detracts from the credibility of his entire opinion, or that the valid rationales are inextricably linked to the invalid rationale, he need not, for purposes of weighing that physician's opinion, separately address the validity of each rationale provided. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

clearly explain how their opinions are inconsistent with the preamble.[9] Additionally, the administrative law judge must weigh together all of the evidence relevant to the existence of pneumoconiosis and determine whether a preponderance of that evidence establishes the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). Further, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge determines that claimant has failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), an award of benefits is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. However, should the administrative law judge determine that claimant has proven that he has legal pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge must next determine whether claimant has proven that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c).

[9] The administrative law judge indicated that the opinions of Drs. Zaldivar and Bellotte, that coal dust causes focal, rather than bullous, emphysema, conflict with the view endorsed by the DOL in the preamble. Decision and Order at 25-26. However, the case that the administrative law judge cited in support of his assertion is inapposite, as it involved the Board's holding that an administrative law judge could properly discredit, as contrary to the preamble, a physician's opinion that the amount of coal dust observed on x-ray determined whether coal dust exposure contributed to a miner's emphysema. *Id*. at 26 nn.42-43, *citing Sexton v. Buck Creek Coal Co.*, BRB Nos. 10-0191 BLA and 10-0192 BLA (Feb. 11, 2011)(unpub.)(Boggs, J., concurring), *aff'd on other grounds sub nom. Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 25 BLR 2-221 (6th Cir. 2013). The administrative law judge also discredited the opinions of Drs. Zaldivar and Bellotte because they stated that "asthma is not caused by coal mine dust exposure; thus, they did not consider it as a potential etiology." Decision and Order at 26. The administrative law judge then acknowledged that Dr. Zaldivar did not actually make this statement. *Id*. On remand, the administrative law judge must clarify his finding regarding Dr. Zaldivar's opinion as to whether claimant's asthma was related to coal dust inhalation.

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 proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge