BRB No. 09-0273 BLA

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| MAUDE S. KILLPACK (Widow of DWIGHT L. KILLPACK) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| BASIN RESOURCES, INCORPORATED | ) | |
| and | ) | |
| LIBERTY MUTUAL INSURANCE COMPANY | ) | DATE ISSUED: 11/09/2009 |
| 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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Wayne A. Freestone, Sandy, Utah, for claimant.

Scott M. Busser (Mosely, Busser & Appleton, P.C.), Denver Colorado, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5649 and 07-BLA-5650) of Administrative Law Judge Richard K. Malamphy granting benefits on claims 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 filed on October 27, 2005,[1] and a survivor's claim filed on August 7, 2006.

The administrative law judge adjudicated both the miner's subsequent claim and the survivor's claim. In regard to the miner's claim, the administrative law judge, after crediting the miner with twenty-one years of coal mine employment,[2] found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). After finding that the miner was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In regard to the survivor's claim, the administrative law judge initially noted that the "presence of clinical and legal pneumoconiosis has been established." Decision and Order at 11. The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in the miner's claim. In regard to the survivor's claim, employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant[3] responds in support of the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions of error.

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[1] The miner initially filed a claim for benefits on January 11, 1991. Director's Exhibit 1. The district director denied the claim on June 18, 1991, because the evidence did not establish that the miner was totally disabled due to pneumoconiosis. *Id.* There is no indication that the miner took any further action in regard to his 1991 claim.

[2] The record reflects that the miner's coal mine employment was in Colorado. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant is the surviving spouse of the miner who died on January 6, 2006. Director's Exhibit 24.

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).

**The Miner's Subsequent Claim**

To be entitled to benefits under the Act, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, the miner had to submit new evidence establishing total disability in order to obtain review of the merits of his 2005 claim. 20 C.F.R. §725.309(d)(2), (3).

In this case, the administrative law judge did not address whether one of the applicable conditions of entitlement had changed since the denial of the miner's prior claim. However, the administrative law judge found that the new evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. *See* Decision and Order at 7-10.

Employer contends that the administrative law judge erred in finding that the new arterial blood gas study evidence established total disability.[4] 20 C.F.R. §718.204(b)(2)(ii). The new medical evidence includes the results of an arterial blood gas study conducted on November 23, 2005. Director's Exhibit 11. Because the values of the study are qualifying,[5] the administrative law judge found that the new arterial

[4] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

blood gas study evidence established total disability. Decision and Order at 8. Employer, however, contends that the administrative law judge erred in failing to address evidence calling into question the validity of the miner's November 23, 2005 arterial blood gas study. We agree. Dr. Repsher opined that this study was invalid because the results were inconsistent with the results of the miner's pulse oximetry.[6] Employer's Brief at 20; Director's Exhibit 11; Hearing Transcript at 19. Because the administrative law judge did not address evidence calling into question the validity of the November 23, 2005 blood gas study, we vacate his finding at 20 C.F.R. §718.204(b)(2)(ii) and remand this case for further consideration. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). On remand, the administrative law judge must address whether the November 23, 2005 arterial blood gas study is valid and explain the basis for his finding. *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).

Employer also contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. However, the presence of a totally disabling respiratory or pulmonary impairment, and whether the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis, are two separate elements of entitlement, which should be addressed separately. *See* 20 C.F.R. §725.202(d). In this case, the administrative law judge erred in combining his consideration of these two separate elements of entitlement.

Moreover, the administrative law judge did not provide any explanation for which medical opinions he found supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) or address whether these opinions are sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), which 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 in the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In light of the above-referenced errors, we vacate the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.

[6] Another physician, Dr. Kennedy, indicated that the November 23, 2005 arterial blood gas study was technically acceptable, noting that it "correlated [with] oximetry but data not shown." Director's Exhibit 11.

If, on remand, the administrative law judge finds that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), he must weigh all the relevant new evidence together, both like and unlike, to determine whether the miner has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), the miner will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider the miner's 2005 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's 2004 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

**The Survivor's Claim**

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.[7] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if

[7] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

Employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[8] In this case, three physicians, Drs. Gagon, King, and Repsher, addressed the miner's cause of death. Although two examining physicians, Drs. Gagon and King, opined that the miner's pneumoconiosis contributed to his death,[9] Dr. Repsher, based upon his review of the medical evidence, opined that the miner's pneumoconiosis did not cause or contribute to his death.[10] Hearing Transcript at 28.

After briefly summarizing the opinions of Drs. Gagon, King, and Repsher, the administrative law judge stated:

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[8] Because employer does not challenge the administrative law judge's finding, in the miner's claim, that the evidence established the existence of pneumoconiosis, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[9] Dr. Gagon completed the miner's death certificate, listing the immediate cause of death as pneumonia. Director's Exhibit 24. Although Dr. Gargon did not list any contributing conditions of death on the death certificate, he subsequently prepared a letter, wherein he stated that "black lung was a contributing factor to [the miner's] death." Director's Exhibit 26.

Dr. King opined that:

> It is almost certain that black lung contributed to [the miner's] death. His pulmonary capacity would have been reduced by the black lung, making his ability to survive pneumonia less likely.

Director's Exhibit 25.

[10] Dr. Repsher opined that it would be "extraordinarily unlikely" that the miner's degree of coal workers' pneumoconiosis would cause, contribute to, or hasten his death. Employer's Exhibit 1. Dr. Repsher explained that there "simply would not be sufficient abnormal lung tissue . . . to cause any clinically significant impairment of his overall lung function." *Id.* Dr. Repsher opined that the miner died, "as is the usual case with patient's [sic] suffering from advanced Parkinson's disease, from a terminal pneumonia and not as a result of his simple [coal workers' pneumoconiosis]." *Id.*

> One could say that these opinions are in equipoise. However, the undersigned finds it reasonable to defer to the opinions of treating or examining physicians rather than to a speculative opinion by a reviewer.

Decision and Order at 12.

We agree with employer that the administrative law judge erred in failing to address whether the opinions of Drs. Gagon and King are sufficiently reasoned. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. The administrative law judge also did not address why the fact that Drs. Gagon and King examined the miner, entitled their opinions regarding the cause of death greater weight than that of Dr. Repsher. The administrative law judge also failed to explain why he found that Dr. Repsher's opinion was "speculative." Consequently, the administrative law judge's analysis fails to comport with the APA. *Wojtowicz*, 12 BLR at 1-165. We, therefore, vacate the administrative law judge's finding at 20 C.F.R. §718.205(c) and remand this case for further consideration. On remand, the administrative law judge must address whether the opinions of Drs. King, Gagon, and Repsher are sufficiently reasoned and documented, and explain the basis for his credibility determinations.[11] *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59.

[11] On March 10, 2009, claimant's counsel filed an attorney fee application with both the Office of Administrative Law Judges and the Board. The attorney fee application included a request for legal services and expenses performed before both the Office of Administrative Law Judges and the Board. Because there is no indication that the administrative law judge has entered an order in regard to claimant's attorney fee request, and if he has, no indication that any party has appealed that decision to the Board, we currently have no jurisdiction over claimant's attorney fee request for work performed before the administrative law judge.

Claimant's counsel's request for legal fees for services rendered while this case was before the Board is premature. Within sixty days of the issuance of a decision by the Board, counsel for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee. 20 C.F.R. §802.203(c). Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim before the Board. However, if the administrative law judge, on remand, issues an award, a fee petition may be filed within sixty days of the decision on remand. 20 C.F.R. §802.203(c).

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 consideration 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