BRB No. 11-0114 BLA

BERNARD CLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ECONOMY FUEL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND, c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 10/24/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order (09-BLA-5408) of Administrative Law Judge Janice K. Bullard denying benefits on a subsequent claim[1] filed pursuant to the provisions of 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). Adjudicating this claim pursuant to 20 C.F.R. Parts 718 and 725, the administrative law judge adopted the calculation of the Director, Office of Workers' Compensation Programs (the Director), and credited claimant with 27.22 years of qualifying coal mine employment. The administrative law judge found that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge additionally found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and concluded that employer rebutted the presumption by establishing that claimant's totally disabling respiratory condition was not caused by pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the medical evidence of record, and contends that the administrative law judge erred in finding rebuttal of the Section 411(c)(4) presumption established based, in part, on her determination that claimant failed to establish the existence of pneumoconiosis pursuant

[1] Claimant, Bernard Cline, filed his first application for benefits on June 1, 1988, which was denied by Administrative Law Judge Frederick D. Neusner in a Decision and Order issued on August 22, 1990. Director's Exhibit 1. Claimant subsequently filed a second claim on April 11, 2001, which was denied by Administrative Law Judge Richard A. Morgan in a Decision and Order issued on January 28, 2004, for failure to establish any element of entitlement. Director's Exhibit 3. Claimant filed a third application on April 1, 2008, which is pending herein on appeal. Director's Exhibit 4.

[2] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

to Section 718.202(a).[3] Employer responds, urging affirmance of the denial of benefits. The Director has declined to participate in this appeal.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge, after finding that claimant had successfully invoked the Section 411(c)(4) presumption, incorrectly placed the burden of proof on claimant to establish the existence of pneumoconiosis. We agree. Upon invocation of the Section 411(c)(4) presumption, the burden of production and persuasion shifts to the employer. In order to establish rebuttal of the presumption, employer must affirmatively prove that claimant does not have pneumoconiosis, or that claimant's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). As the administrative law judge shifted the burden of proof to claimant to establish the existence of pneumoconiosis, we vacate the administrative law judge's findings pursuant to Section

[3] We reject claimant's additional argument, that the opinions of Drs. Castle and Zaldivar are entitled to less weight due to their review of inadmissible evidence. Claimant's Brief at 17-19. Employer correctly notes that the "inadmissible" evidence specified by claimant was admitted into the record in claimant's two prior claims. Employer's Brief at 14; Director's Exhibits 1, 2. As the present claim is a subsequent claim, the evidence of record in any previous claim "shall be made a part of the record in the subsequent claim…." 20 C.F.R. §725.309(d)(1); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 27.22 years of qualifying coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(c), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 15, 20-21.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

718.202(a), and her denial of benefits, and remand this case for a reassessment of the evidence of record relevant to rebuttal, under the appropriate standard.

Claimant also contends that the administrative law judge erred in according less weight to Dr. Forehand's opinion, that claimant has both clinical and legal pneumoconiosis, and that pneumoconiosis is a contributing cause of his disabling impairment, on the basis that Dr. Forehand substantially underestimated claimant's cigarette smoking history. Claimant asserts that Dr. Forehand obtained a smoking history in April 2008 that was similar to the other smoking histories contained in the record, and that was consistent with claimant's testimony, *i.e.*, that he smoked over a period of approximately fifty years at the usual rate of one-half pack per day, stopping and starting again during that period, and continuing to smoke "every once in a while" after he stopped smoking in February 2008. Hearing Transcript at 17-18; Claimant's Brief at 13-17. As Dr. Forehand recorded a smoking history of one-half pack per day for fifty years, indicated that claimant's smoking and coal dust exposure histories were both significant, and explained why his opinion would not change if claimant had smoked a pack of cigarettes per day, claimant maintains that substantial evidence does not support the administrative law judge's finding that Dr. Forehand's opinion merited little weight, due to the physician's reliance on an inaccurate smoking history. We agree. In evaluating the conflicting medical opinions of record, the administrative law judge stated that:

> I accord some weight to the opinions of Drs. Castle[6] and Zaldivar[7] on the issue of claimant's smoking history. Dr. Forehand agreed that a much larger smoking history could explain the degree of Claimant's impairment (although he also inconsistently testified that his opinions would remain unchanged by the knowledge that Claimant has smoked more than he reported). Dr. Zaldivar documented a record of smoking that greatly exceeded the amount claimant reported, and I accord weight to this opinion, as it is consistent with the record. It is also significant that although

[6] In a report dated October 7, 2008, Dr. Castle indicated that claimant "started smoking in his 20s [1954 – 1964] and last stopped this past February [2008] . . . . [h]e indicates he smoked less than a pack of cigarettes daily [and] stopped for several years during this time." Director's Exhibit 13.

[7] On May 20, 2009, Dr. Zaldivar obtained a smoking history from claimant of one-half to one pack of cigarettes per day, starting in his mid-20s. Claimant indicated that he was still smoking, but had been quitting on and off. Employer's Exhibit 4. Dr. Zaldivar additionally reviewed various medical records and reports, and concluded in his May 29, 2009 report that claimant was a lifelong "heavy" smoker, and not an intermittent smoker. *Id.*

> Claimant advised Dr. Forehand that he had stopped smoking, carboxyhemoglobin levels contradicted that assertion. Dr. Forehand did not resolve this discrepancy. In consideration of the full record, it is clear that Claimant under-reported his smoking history to the physicians, and that Dr. Forehand's conclusions are not based on the best documentation.

Decision and Order at 24. As the administrative law judge failed to render a determination as to the length and extent of claimant's smoking history, however, we cannot discern why she found that "Dr. Forehand's conclusions are not based on the best documentation." *Id.* Moreover, the administrative law judge failed to explain the basis in the record for her determinations: that claimant "under-reported his smoking history to the physicians;" that Dr. Zaldivar documented a smoking history "that greatly exceeded the amount claimant reported;" and that Dr. Zaldivar's smoking history was "consistent with the record." *Id.* Thus, the administrative law judge's decision does not comport with the requirements of 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Further, it appears that the administrative law judge selectively analyzed Dr. Forehand's opinion, in finding that the physician "inconsistently testified that his opinions would remain unchanged by the knowledge that Claimant has smoked more than he reported." Decision and Order at 24. While Dr. Forehand stated that smoking alone could not account for the degree of claimant's respiratory impairment, and acknowledged that a smoking history of a pack a day "would come closer to explaining [the degree of the] impairment," Employer's Exhibit 3 at 29, the physician consistently opined that claimant's severe impairment was directly attributable to his cigarette smoking and coal dust exposures, both of which Dr. Forehand repeatedly characterized as "significant." Director's Exhibit 12; Claimant's Exhibit 7 at 20; Employer's Exhibit 3 at 29. A review of the record also does not support the administrative law judge's finding that Dr. Forehand failed to resolve the discrepancy between claimant's carboxyhemoglobin levels and claimant's statement that he stopped smoking in February 2008. Dr. Forehand testified that claimant's carboxyhemoglobin levels of 1.92 percent on his treadmill stress test were close to those of "an active smoker . . . . [s]o again, [it] looks like he is starting and stopping and he is continuing to smoke." Employer's Exhibit 3 at 15-16. In view of the foregoing, the administrative law judge is directed to determine the length and extent of claimant's smoking history on remand, and to reevaluate the conflicting medical opinions of record in light of that factual determination, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988), with the burden of proof on employer to affirmatively show that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues, except with respect to the determination that the administrative law judge misplaced the burden of proof. The administrative law judge found the testimony of Drs. Zaldivar and Castle generally credible, and the testimony of Dr. Forehand not credible, and then determined that, based on the totality of the evidence, employer had rebutted the presumption established by 30 U.S.C. §921(c)(4). The administrative law judge found that employer had established, by a preponderance of the evidence, that claimant's totally disabling respiratory condition is not related to the presence of pneumoconiosis caused by his coal mine employment. Such a weighing of the evidence is not a misallocation of the burden of proof, despite later confusing statements by the administrative law judge. However, remand is nonetheless compelled, because the administrative law judge selectively analyzed the evidence by failing to determine the length and extent of claimant's smoking history, and evaluate all of the physician testimony against that single standard. *See Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Further, she did not adequately explain the basis on which she discredited Dr. Forehand's opinion, considering it in its entirety. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988). Accordingly, her weighing of the evidence and ultimate conclusion is affected by these errors and cannot be upheld. Remand therefore is required, as set forth in the penultimate paragraph of the majority opinion.

JUDITH S. BOGGS
Administrative Appeals Judge