BRB No. 05-1024 BLA

JAMES J. PINKSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/21/2006
	)	
Employer-Petitioner	)	
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (04-BLA-6268) of Administrative Law Judge Stephen L. Purcell with respect to a subsequent claim 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).[1] The administrative law judge found that this claim was a subsequent claim and that it was timely filed. The administrative law judge further found that claimant had a cigarette smoking history of one-half pack to one pack daily for twenty-seven years, a coal mine employment history of nineteen years, and that claimant left coal mine employment on disability in 1988 because of knee problems. Considering the evidence, the administrative law judge found the existence of pneumoconiosis established, that claimant's pneumoconiosis arose out of coal mine employment, and that claimant's was totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), 718.204(b), (c). Benefits were, accordingly, awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established because the administrative law judge failed to consider CT scan evidence which suggested the absence of pneumoconiosis, failed to consider x-rays taken between March 1996 and August 2004, which did not show the existence of pneumoconiosis, and failed to comply fully with the Administrative Procedure Act[2] when considering the medical opinion evidence of record.

Employer contends that the administrative law judge erred in finding the existence of legal pneumoconiosis established based on the opinion of Dr. Cohen for the reason that it was "consistent with the prevailing medical opinion regarding the development of chronic obstructive lung disease as adopted by the Department of Labor in the amended regulations." Decision and Order at 23. Employer contends, however, that the administrative law judge did not cite to any particular regulation or view and that it is, in fact, Dr. Cohen's view that is at odds with the Department's regulations because "[n]othing in the regulations serves to eliminate claimant's burden of proving that his coal dust exposure caused his obstructive lung disease. Employer's Brief at 18. Rather, employer contends that the regulations simply hold that such a connection may be "possible", which employer does not dispute. Thus, employer contends that while Dr. Cohen devotes several pages discussing the regulations, the doctor fails to explain "why" claimant's coal dust exposure caused his obstructive lung disease, which is what is required under the regulations, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501,

[1] Claimant's first claim for benefits was filed on January 30, 1991. Director's Exhibit 1. That claim was ultimately denied by the Department of Labor on May 2, 1991, on the basis of abandonment. *Id.* Under the regulations, a denial by reason of abandonment is deemed a finding that claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c).

[2] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(c), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

514, 22 BLR 2-623 (6th Cir. 2003); *National Mining Assn. v. Dep't of Labor*, 292 F.3d 849, 862-63 (D.C. Cir. 2002).

Further, employer contends that the administrative law judge erred in finding fault with the opinion of Dr. Tuteur because the doctor failed to explain why claimant's nineteen years of coal mine employment did not cause his chronic obstructive pulmonary disease. Regarding the opinion of Dr. Repsher, employer contends that the administrative law judge erred in according it little weight because the doctor could not rule out the possibility that claimant's exposure to coal mine dust was a cause of his chronic obstructive pulmonary disease. Employer contends that this reasoning is irrational because it impermissibly shifts the burden of proof to employer to show why chronic obstructive pulmonary disease is not due to coal mine employment. Employer also contends that the administrative law judge erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis (disability causation). Claimant responds, urging that the administrative law judge's award of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) while taking no position on the ultimate issue of entitlement, challenges employer's assertion that the administrative law judge erred in his analysis of the evidence relevant to disability causation.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

To be entitled to benefits under the Act, claimant 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer's arguments have merit. The administrative law judge's failure to discuss and weigh the CT scan evidence and all of the x-ray evidence requires remand. *See* 20 C.F.R. §§ 718.107, 718.202(a)(1), 718.202(a)(4); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). Likewise, because the administrative law judge did not consider whether the medical opinion evidence established that claimant's specific chronic obstructive pulmonary disease was due to coal mine employment, as opposed to finding generally that chronic obstructive pulmonary disease was due to coal mine employment, *see Williams*, 338 F.3d 501, 514, 22 BLR 2-623, 515-516; *Nat'l Mining Assn*, 292 F.3d 849, 862-63, the administrative law

judge's finding of legal pneumoconiosis must be vacated and the case remanded for reconsideration of the medical opinion evidence under 20 C.F.R. §718.202(a)(4).

Employer next asserts that the administrative law judge's finding of disability causation must be vacated because the administrative law judge erred in finding that claimant was entitled to the rebuttable presumption of disability causation at 20 C.F.R. §718.305, 30 U.S.C. §921(c)(4). Employer contends that this presumption is not available in claims, like this one, filed after January 1, 1982, and argues that claimant cannot affirmatively establish disability causation, because claimant's disability was caused exclusively by knee problems and not by pneumoconiosis.

We agree that the administrative law judge erred in according claimant the benefit of the disability causation presumption at 20 C.F.R. §718.305, as this claim was filed after January 1, 1982. 20 C.F.R. §718.305(c); *Langerud v. Director, OWCP*, 9 BLR 1-101, 1-102 (1986).[3] Accordingly, the administrative law judge's finding that disability causation was established is vacated and the case is remanded for consideration of the evidence pursuant to Section 718.204(c) and to determine whether claimant has met his burden of establishing disability causation.[4]

[3] We reject, however, employer's assertion that a finding of disability causation and thus a finding of entitlement to benefits is precluded, as a matter of law, because claimant had disabling knee problems and we reject employer's argument that the revised regulation at 20 C.F.R. §718.204(a) is impermissibly retroactive. 20 C.F.R. §718.204(a); *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Nat'l Mining Assn.*, 292 F.3d 849, 865.

[4] A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause of the miner's disability if it:

> (i) Has a material adverse effect on the miners respiratory condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is vacated and the case is remanded 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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JUDITH S. BOGGS
Administrative Appeals Judge