BRB Nos. 09-0845 BLA
and 09-0845 BLA-A

DONALD R. HAMILTON, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM K MINING, INCORPORATED	)	DATE ISSUED: 09/30/2010
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Donald R. Hamilton, Sr., Pound, Virginia, *pro se*.

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

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Denying Benefits (08-BLA-5731) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a subsequent claim[2] 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). The administrative law judge credited claimant with 14.75 years of coal mine employment.[3] The administrative law judge further found that the x-ray evidence developed since the denial of claimant's prior claim established the existence of clinical pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(1), and the new medical opinion evidence submitted under 20 C.F.R. §718.202(a)(4) did not undercut the x-ray evidence. The administrative law judge therefore found that claimant established the existence of clinical

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed two previous claims. His first claim, filed on March 17, 1998, was finally denied by the district director on June 30, 1998. Director's Exhibit 1. Claimant's second claim, filed on November 6, 2000, was denied by an administrative law judge on April 8, 2003, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 2. Claimant appealed to the Board, but subsequently requested modification. Accordingly, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. The district director denied modification on June 9, 2004, and claimant did not further pursue his 2000 claim. *Id.* Claimant filed his current claim on February 26, 2007. Director's Exhibit 4.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 5, 7.

[4] "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pneumoconiosis, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Considering the merits of the claim, the administrative law judge found that all of the relevant x-ray evidence of record established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the medical opinion evidence did not establish that claimant has legal pneumoconiosis,[5] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Finally, the administrative law judge found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. In the Director's cross-appeal, he asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish legal pneumoconiosis or that his total disability is due to pneumoconiosis. Employer responds to both appeals, urging affirmance of the denial of benefits.[6]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

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[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 or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] We reject employer's assertion that the Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, lacks standing to allege that the administrative law judge committed errors in his consideration of this claim. Employer's Brief at 12 n.5. The Board has held that the Director has standing to ensure the proper enforcement and lawful administration of the Black Lung program. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994).

To establish entitlement 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).

Subsequent to the issuance of the administrative law judge's Decision and Order Denying Benefits, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

By Order dated June 29, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the amendments made to the Act by Section 1556 of Public Law No. 111-148. The Director and employer have responded. The Director states, and employer agrees, that "[b]ecause the [administrative law judge] found fewer than fifteen years of coal mine employment," the amendments do not affect this case. Director's Supplemental Brief at 3; Employer's Supplemental Brief at 1.

For the reasons set forth below, we are unable to agree that Section 1556 does not affect this case, as we cannot affirm the administrative law judge's finding of 14.75 years of coal mine employment. *See McFall*, 12 BLR at 1-177. The administrative law judge stated that claimant alleged approximately twenty-five years of coal mine employment on his application for benefits, and testified that he worked for seventeen years in coal mine employment. The administrative law judge, however, credited claimant with 14.75 years of coal mine employment, noting that this was the length of coal mine employment found established by the district director, and that it was "supported by claimant's Social Security earnings record. . . ." Decision and Order at 3.

The record reflects that claimant's Social Security earnings records list earnings from employers that claimant alleged were coal mine operators, from 1968 through 1985. Director's Exhibits 5, 7. If credited, these records reflect thirty-five quarters, or eight and three-quarter years, of coal mine employment from 1968 through 1977. Director's Exhibit 7. After 1977, the earnings records provide the total amounts paid to claimant annually, and do not specify which quarters claimant worked for each employer. These records report annual earnings in coal mine employment from 1978 through 1985, an additional eight years, if credited in full. Because the administrative law judge did not explain his method of calculation, it is not clear how he reached his determination that the Social Security earnings records support a finding of only 14.75 years of coal mine

employment.[7] His finding, therefore, does not comply with the Administrative Procedure Act (APA), 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). Thus, we must vacate the finding, and remand this case for further consideration. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

On remand, the administrative law judge must reconsider the years of coal mine employment to determine if the requisite fifteen years of qualifying coal mine employment have been established, and he must explain fully the rationale for his finding. *See Wojtowicz*, 12 BLR at 1-165. Consequently, if the administrative law judge finds fifteen or more years of qualifying coal mine employment established, he must consider this claim pursuant to Section 411(c)(4). If claimant can establish fifteen years of qualifying coal mine employment, he would be entitled to invocation of the Section 411(c)(4) presumption, since the administrative law judge found that claimant has established total disability, and that finding is undisputed.

If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge must determine whether employer has met its burden of rebutting the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, must allow for the submission of evidence by the parties to address the change in law, consistent with the evidentiary limitations. *See* 20 C.F.R. §§725.414, 725.456.

Although we have vacated the denial of benefits, in the interest of judicial economy, we will address the administrative law judge's findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4), and whether claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We agree with the Director that the administrative law judge did not explain the basis for his finding that claimant has a smoking history of forty-nine pack years, *see* 5 U.S.C. §557(c)(3)(A), and that he relied on that finding to discredit the medical opinions of Drs. Rasmussen and

[7] In his applications for benefits, claimant has alleged seventeen and eighteen years of coal mine employment. Director's Exhibits 1, 4, 30-1. At the hearing, claimant testified that, "Total of seventeen (17) years is what I worked." Hearing Tr. at 17. When his benefits counselor stated, "I believe the Department of Labor found fourteen (14) plus. Would you agree to that?", claimant responded, "Yes, I would." *Id.* In view of the fact that the amendments to the Act took effect after the hearing, and in view of claimant's *pro se* status, we do not consider claimant's statement, that he would agree to the district director's finding, as dispositive of the length of coal mine employment issue for purposes of our review of this appeal.

Forehand, attributing claimant's disabling obstructive lung disease, in part, to coal mine dust exposure.[8] On remand, the administrative law judge must reconsider the extent of claimant's smoking history and explain his finding, and then must reconsider the relevant medical opinions in light of whatever smoking history he finds established. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Wojtowicz*, 12 BLR at 1-165. Further, in the event that the administrative law judge, on remand, again finds that claimant had 14.75 years of coal mine employment, he should explain the specific basis for his determination that Dr. Rasmussen's reliance on a history of seventeen years of coal mine employment was a significant discrepancy, undermining Dr. Rasmussen's opinion that claimant's disabling obstructive lung disease is due to both smoking and coal mine dust exposure. *See Wojtowicz*, 12 BLR at 1-165.

Finally, employer's argument, that the administrative law judge erred in discounting Dr. Wheeler's negative reading of the September 20, 2007 x-ray when he found that clinical pneumoconiosis was established by the new evidence under 20 C.F.R. §718.202(a)(1), has merit. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991)(*en banc*); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983). The record reflects that Dr. Wheeler checked the box on the x-ray classification form indicating that no abnormalities consistent with pneumoconiosis were present. Employer's Exhibit 5. The fact that Dr. Wheeler noted that the film was underexposed, and that a repeat x-ray might be advisable, does not support the administrative law judge's conclusion that Dr. Wheeler was "not entirely confident in the absence of small opacities consistent with pneumoconiosis," Decision and Order at 12; the doctor classified the x-ray as negative. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Further, the administrative law judge's finding affected his determination that the

[8] The administrative law judge summarized several reports of claimant's smoking history contained in the record. Decision and Order at 3. As the Director notes, these reports consistently recorded a smoking history of 1/2 pack per day for forty to forty-six years, except for the notation contained in an intake record of claimant's 1997 hospitalization for head trauma, which listed a smoking history of 1 and 1/2 packs per day for "40+" years. Director's Exhibit 1. After summarizing these histories, the administrative law judge stated, without elaboration, "[r]esolving the conflicts, I find that [c]laimant smoked cigarettes at the rate of one pack per day between 1958 and 2007, for a smoking history of 49 pack years." Decision and Order at 3. Given that the 1/2 pack per day smoking histories, if credited, would tend to indicate a twenty to twenty-six pack-year smoking history, the administrative law judge, on remand, should explain the specific basis for his resolution of the conflict, to permit review of his finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

September 20, 2007 x-ray was positive for clinical pneumoconiosis. Decision and Order at 11-12. Thus, if, on remand, the administrative law judge finds that claimant is not entitled to the Section 411(c)(4) presumption, he must reconsider whether claimant has established pneumoconiosis by the newly submitted evidence at Section 718.202(a)(1)-(4) and a change in the applicable condition of entitlement, *see* 20 C.F.R. §725.309(d), and, if reached, whether claimant has established, on consideration of all of the evidence of record, all of the elements of entitlement under Part 718. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and this 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