BRB No. 10-0695 BLA

THOMAS J. JARVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/27/2011
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5419) of Administrative Law Judge Joseph E. Kane, with respect to a claim filed on June 8, 2007, 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). After crediting claimant with twenty years of surface coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), and that his twenty years of surface coal mine employment were in conditions substantially similar to those of an underground mine. The administrative law judge then determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption.[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the rebuttable presumption at amended Section 921(c)(4) and that employer failed to rebut it. In addition, employer maintains that due process required the administrative law judge to allow the parties to respond to the new law with new evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief in which he asserts that employer's argument, that claimant's twenty years of surface coal mine

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated, in pertinent part, Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides:

> [I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's . . . claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.

30 U.S.C. §921(c)(4).

employment was not substantially similar to underground coal mine employment, is without merit.

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.[2] 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*).

I. Coal Mine Employment

A. The Administrative Law Judge's Findings

The administrative law judge accepted the parties' stipulation to twenty years of surface coal mine employment. Decision and Order at 3. Relying on claimant's testimony, the administrative law judge determined that "[c]laimant clearly and vividly described how the tasks he performed throughout his surface mine employment resulted in dust exposure."[3] *Id*. at 10. The administrative law judge found this testimony to be

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 5, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant maintained that he worked in surface coal mine employment for various lengths of time from 1962 until 1992, with his most recent work being as a dozer operator and groundman. Director's Exhibits 3, 4. Claimant testified that he was exposed to coal dust while performing his job duties. Hearing Transcript at 15. Claimant stated that while the dozer had a cab on it, dust got into the cab "because the seals get bad and everything." *Id*. Claimant testified that other equipment that he operated did not have cabs and that he wore a mask for protection from the dust, but "it didn't work like it ought to." *Id*. at 15-16. In his work as a groundman, claimant maintained that he was directly exposed to coal dust. *Id*. at 15-17. Claimant indicated that "[a]nytime [he] was around on the bottom[,] dust just covered [him] up." *Id*. at 17. Further, claimant stated that in the winter, a fan was used to blow heat from the motor but the fan also blew coal

"credible and uncontradicted" and concluded, therefore, that the environmental conditions of claimant's surface employment were substantially similar to the conditions in an underground mine. *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge's determination cannot be affirmed, as he did not make any specific findings or provide any supporting rationale concerning how the conditions described by claimant were "substantially similar" to underground mining. Employer's Brief at 10. Further, employer contends that the administrative law judge erred in not permitting the parties to develop new evidence on this issue, which only became relevant after the adoption of the amendments to the Act.

Claimant responds, urging affirmance of the administrative law judge's analysis. The Director contends that, based on claimant's uncontradicted testimony, the administrative law judge permissibly found that claimant was exposed to sufficient coal mine dust to establish the required degree of similarity between claimant's coal mine dust exposure at the surface and dust conditions underground.

We agree with the Director that the administrative law judge permissibly determined that the miner's twenty years of surface coal mine employment were substantially similar to underground conditions. While claimant bears the burden of establishing comparable conditions, claimant does not have to present evidence of the conditions prevailing in an underground mine. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Rather, claimant is required to show that he was exposed to sufficient coal mine dust during his employment. *Id*. The administrative law judge must render factual findings by comparing the surface mining conditions established by claimant to the conditions known to prevail in underground mines. *Id*. A claimant's unrebutted testimony may support such a finding of similarity. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Based on this testimony, the administrative law judge acted within his discretion in concluding that claimant was exposed to a sufficient amount of coal mine dust to establish the requisite similarity between claimant's coal mine dust exposure in surface mining and the dust conditions underground. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

We also reject employer's argument that it be allowed to develop additional evidence regarding the nature of claimant's surface employment. On April 7, 2010, the

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dust. *Id*. at 21. Claimant testified that when he went home at night, he was covered in coal dust. *Id*. at 17.

administrative law judge issued an Order, notifying the parties that the provisions at amended Section 921(c)(4) may apply and providing them with the opportunity to file a position statement about the applicability of the amendments and to submit limited, additional evidence addressing medical issues in light of the potential applicability of the amendments. In its response, employer challenged the constitutionality of the amendments and argued that amended Section 921(c)(4) did not apply to this claim, as claimant's surface coal mine employment was not substantially similar to the conditions in an underground mine. However, employer did not submit any additional evidence or request, if the administrative law judge decided that amended Section 921(c)(4) applied, that it be permitted to do so. Therefore, employer waived this issue. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

II. 20 C.F.R. §718.204(b)(2)(iv)

A. The Administrative Law Judge's Findings

After determining that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered the medical opinions of Drs. Simpao, Repsher, and Fino at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge determined that the exertional requirements of claimant's previous coal mine work as a groundman, were substantial, as it involved heavy manual labor.[4] Decision and Order at 13. Regarding Dr. Simpao's opinion, that claimant was totally disabled from performing his job as a groundman, the administrative law judge found that, although the objective testing obtained by Dr. Simpao was non-qualifying,[5] his conclusion was credible and entitled to probative weight. *Id.*; *see* Director's Exhibit 11. The administrative law judge indicated that Dr. Simpao opined that claimant was disabled, regardless of the non-qualifying objecting testing, and that claimant's work history, symptoms, and physical examination supported Dr. Simpao's conclusion, that legal pneumoconiosis prevented claimant from performing his previous coal mine employment. Decision and Order at 13. The administrative law judge stated that Dr.

[4] Claimant reported that his job duties included climbing up and off of a dozer when running it, lifting approximately one hundred pounds a day, pushing up under the dozer bucket, working on a machine using a sledge hammer and other tools, and climbing approximately one hundred steps. Director's Exhibit 4; Hearing Transcript at 18-19.

[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the applicable table values set out in tables at 20 C.F.R. Part 718 Appendices B and C. A "non-qualifying" study exceeds the values listed therein. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

Simpao's reliance on a slightly higher coal mine employment history of 24.75 years was inconsequential because the twenty years to which the parties stipulated is substantial and the difference was only a few years. *Id*.

In contrast, the administrative law judge found that the opinions of Drs. Repsher and Fino, that claimant was not totally disabled, were less probative, as these physicians based their opinions solely on the fact that claimant's testing was non-qualifying. Decision and Order at 13; Employer's Exhibits 1, 3. Crediting Dr. Simpao's opinion over the opinions of Drs. Repsher and Fino, the administrative law judge concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 13-14. Based on a weighing of all of the evidence at 20 C.F.R. §718.204(b)(2), the administrative law judge found that Dr. Simpao's opinion outweighed the contrary probative evidence because Dr. Simpao acknowledged this evidence, yet credibly found claimant to be totally disabled. *Id*. at 14.

B. Arguments on Appeal

Employer asserts that the administrative law judge's "bare assertions," that Dr. Simpao's opinion is "credible and entitled to probative weight" and that it is "based on medically acceptable clinical and laboratory diagnostic techniques," do not comply with 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), 30 U.S.C. §932(a). Employer's Brief at 12, *quoting* Decision and Order at 13. Employer maintains that Dr. Simpao did not explain how the underlying documentation supported his opinion that claimant is totally disabled. In addition, employer argues that the administrative law judge did not consider that the pulmonary function study Dr. Simpao relied on was invalidated by an expert and that Dr. Simpao did not reconsider his opinion in light of the invalidated test. Employer also asserts that the administrative law judge did not address the evidence that detracted from Dr. Simpao's opinion, including Dr. Simpao's own statement that he could not say whether claimant was totally disabled solely due to a respiratory impairment.

Employer alleges that the administrative law judge mischaracterized the opinions of Drs. Repsher and Fino, as their conclusions "that there is no objective evidence supporting a finding of total disability is not the same as saying that the objective testing is not qualifying under the regulations." Employer's Brief at 14. Additionally, employer asserts that, while the administrative law judge acknowledged that he must compare the exertional requirements of claimant's last coal mine employment with the physicians' assessments of claimant's respiratory capabilities, he never actually conducted this analysis. Employer also argues that, based on the erroneous findings that the administrative law judge made at 20 C.F.R. §718.204(b)(2)(iv), he did not properly weigh the evidence supportive of total disability against the contrary probative evidence. *Id*.

Employer's allegations of error have merit. Dr. Simpao indicated that the pulmonary function study that he obtained was consistent with moderate restrictive and obstructive airway disease. Director's Exhibit 11. He concluded that claimant "is totally disabled due to his pulmonary status and would not be able to perform his last job at the coal mines as a groundman due to its physical demands." *Id*. In a subsequent letter, Dr. Simpao acknowledged that claimant's "objective testing does not meet the disability standards as set forth in the [F]ederal [R]egister," yet concluded, "it is my medical opinion that he is totally disabled due to the physical demands of his last coal mine employment." *Id*. Dr. Fino reviewed the pulmonary function study that Dr. Simpao obtained and determined that the FVC and FEV1 values were not valid, "because of premature termination to exhalation and a lack of reproducibility in the expiratory tracings. There was also a lack of an abrupt onset to exhalation." Employer's Exhibit 3. Dr. Fino further concluded that the MVV values were invalid. *Id*.

After reviewing Dr. Simpao's diagnosis of a totally disabling impairment, the administrative law judge stated, "[a]lthough the objective testing was not qualifying (and in fact unreliable, according to Dr. Fino's report), Dr. Simpao opined that [c]laimant was disabled regardless of the non-qualifying objective testing. Claimant's work history, symptoms and results of the physical examination support Dr. Simpao's diagnosis." Decision and Order at 13. As employer contends, however, the administrative law judge did not provide an adequate explanation for his decision to credit Dr. Simpao's opinion. Although the administrative law judge noted that Dr. Fino invalidated the pulmonary function study obtained by Dr. Simpao, it is not clear whether he accepted Dr. Fino's assessment. In addition, the administrative law judge did not explain his determination that "[c]laimant's work history, symptoms and results of the physical examination" bolstered Dr. Simpao's diagnosis of total disability, when it appears that Dr. Simpao relied on the pulmonary function study to determine that claimant has a totally disabling respiratory impairment. *Id*.; *see* Director's Exhibit 11. Because the administrative law judge's findings with respect to Dr. Simpao's opinion are not in accord with the requirements of the APA, we must vacate the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and at 20 C.F.R. §718.204(b)(2) overall.[6] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

There is also merit in employer's contention that the administrative law judge did not accurately characterize the opinions of Drs. Repsher and Fino. Contrary to the

[6] The Administrative Procedure Act 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).

administrative law judge's finding that "Drs. Repsher and Fino relied solely on the fact that [c]laimant's testing was not qualifying," Decision and Order at 13, neither physician discussed whether the objective test results met the regulatory criteria for establishing total disability. Rather, they both noted that the pulmonary function studies were not valid and that claimant's blood gas studies were normal. Employer's Exhibits 1, 3. Because the administrative law judge did not accurately characterize the opinions of Drs. Repsher and Fino, we must vacate his credibility determinations with respect to these physicians and his finding that claimant established total disabiltiy. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991). Because the administrative law judge relied on his weighing of the medical opinions of Drs. Repsher and Fino at 20 C.F.R. §718.204(b)(2)(iv) to determine that employer did not rebut the presumption of total disability due to pneumoconiosis, we also vacate this finding.

On remand, the administrative law judge must determine whether the pulmonary function study that Dr. Simpao relied on was valid. If the administrative law judge finds that the study was not valid, he must assess whether Dr. Simpao has provided a reasoned and documented opinion, on the issue of total disability, that is sufficient to satisfy claimant's burden under 20 C.F.R. §718.204(b)(2). *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In so doing, the administrative law judge must make a specific determination as to whether Dr. Simpao had an accurate understanding of the exertional requirements of claimant's coal mine employment and whether his diagnosis of a moderate restrictive and obstructive impairment is documented.[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-123-24 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

The administrative law judge must also reconsider the relative weight to which Dr. Simpao's opinion is entitled, when compared to the opinions of Drs. Repsher and Fino. When weighing the conflicting medical opinions on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If the administrative law judge finds that claimant has established total disability and, therefore, invocation of the presumption of total disability

[7] If the administrative law judge determines that Dr. Simpao's diagnosis of a moderate impairment is documented, but the doctor was not sufficiently aware of the exertional requirements of claimant's last coal mine work, the administrative law judge must compare the diagnosed impairment to the relevant exertional requirements. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-123-24 (6th Cir. 2000).

due to pneumoconiosis, he must reconsider whether employer has established rebuttal of the presumption, based upon his reconsideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge is required to set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

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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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