BRB No. 11-0170 BLA

GILES L. DAVIDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 09/30/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Walls, Weaver & Davies, LLP), Birmingham, Alabama, for claimant.

Jeannie B. Walston (Starnes Davis Florie LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (09-BLA-5359) of Administrative Law Judge Ralph A. Romano rendered on a claim 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). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the

presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

By Order dated March 31, 2010, the administrative law judge directed the parties to to submit position statements addressing the applicability of amended Section 411(c)(4) to this case. All parties responded in support of their positions.

The administrative law judge credited claimant with over twenty-eight years of underground coal mine employment, as stipulated by the parties, and determined that claimant met the preliminary requirements for application of the amended Section 411(c)(4) presumption, as his pending claim was filed on February 19, 2008. The administrative law judge then found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but that the weight of the medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Finding that the medical opinion evidence outweighed the x-ray evidence, the administrative law judge concluded that, because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), it was unnecessary to determine whether claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), as required to invoke the amended Section 411(c)(4) presumption. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's weighing of the evidence and his failure to accord claimant the benefit of the Section 411(c)(4) presumption in his analysis of the evidence. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.[1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant met the preliminary requirements for application of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), based on the length of his coal mine employment and the filing date and pendency of his claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The record reflects that claimant's last coal mine employment was in Alabama. Accordingly, the Board will apply the law of the United States Court of Appeals for the

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant maintains that, in requiring claimant to establish the existence of pneumoconiosis, the administrative law judge failed to accord claimant the benefit of the amended Section 411(c)(4) presumption. We agree. After properly finding that the presumption is applicable in this case, the administrative law judge should have proceeded to determine whether the weight of the evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). If so, then claimant would be entitled to invocation of the amended Section 411(c)(4) presumption, and the burden of proof would shift to employer to rebut the presumption, by affirmatively establishing that claimant has neither clinical nor legal 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). Because claimant is not required to establish the existence of pneumoconiosis prior to invocation of the amended Section 411(c)(4) presumption, we vacate the administrative law judge's findings pursuant to Section 718.202(a), and his denial of benefits, and remand this case for further consideration in accordance with the foregoing.

For purposes of judicial efficiency, however, we will address several of claimant's other specific arguments. Claimant maintains that the administrative law judge selectively analyzed Dr. Hawkins's opinion, that claimant has pneumoconiosis, and failed to subject the contrary opinions of Drs. Goldstein and Hasson, that claimant has chronic obstructive pulmonary disease (COPD)/emphysema but not pneumoconiosis, to the same scrutiny. We agree. The administrative law judge found that Dr. Hawkins's opinion was not well-reasoned on the ground that the physician reported, in his first office note of December 17, 2008, that it was likely that claimant has pneumoconiosis "based only on the fact that Claimant had many years of underground coal [mine] employment," and without the benefit of any objective test results or other medical reports. Decision and Order at 13. Claimant correctly notes, however, that Dr. Hawkins's preliminary impression was based on a physical examination, symptoms, and medical, social and employment histories, and that Dr. Hawkins subsequently diagnosed pneumoconiosis in his office notes of December 30, 2008, May 1, 2009 and September 2, 2009, after obtaining a positive x-ray and abnormal pulmonary function studies. Claimant's Brief at 12-13; Claimant's Exhibit 1. As the administrative law judge provided no reason for discrediting Dr. Hawkins's ultimate diagnosis, he is instructed to reassess the opinion on remand and provide an analysis that comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the

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Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

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).

We also agree with claimant's assertion that the administrative law judge credited the opinions of Drs. Goldstein and Hasson, as well-reasoned, without addressing various factors that could bear upon their reliability and validity, *i.e.*, the physicians' reliance on negative x-rays and their testimony reflecting views that may be deemed inconsistent with the Act and implementing regulations. In this regard, Dr. Goldstein interpreted claimant's August 19, 2008 x-ray as negative for pneumoconiosis and diagnosed COPD/emphysema related to smoking, stating that "[i]f coal dust exposure was causing [claimant] to have COPD, his chest x-ray should have some significant abnormalities." Director's Exhibit 11 at 3. Claimant correctly notes, however, that COPD and emphysema may be encompassed within the definition of legal pneumoconiosis, even with a negative x-ray.[3] *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79939-79945 (Dec. 20, 2000); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 125-26 (2009). Moreover, in weighing the x-ray evidence of record at Section 718.202(a)(1), the administrative law judge credited the positive interpretations of the August 19, 2008 x-ray by two dually qualified Board-certified radiologists and B readers over the negative interpretation by Dr. Goldstein, a B reader, and found that the remaining x-rays of March 25, 2008 and December 17, 2008 were uniformly interpreted as positive for pneumoconiosis by dually qualified physicians. As the administrative law judge concluded, without explanation, that the medical opinion evidence outweighed the x-ray evidence, and failed to consider whether Dr. Goldstein's reliance on his own discredited x-ray affected the probative value of his opinion that claimant does not have either clinical or legal pneumoconiosis, the administrative law judge must reassess this evidence on remand and provide an APA-compliant explanation for his credibility determinations.

Similarly, the administrative law judge determined that Dr. Hasson administered two x-rays that showed no evidence of pneumoconiosis but were consistent with COPD/emphysema. Decision and Order at 9; Director's Exhibit 11; Employer's Exhibit 4. While the administrative law judge indicated that he did not consider the x-rays to

[3] Claimant additionally questions the position of Dr. Hasson, as contained in his deposition testimony, that one would expect to see x-ray evidence of nodular proliferation of 3/3 or greater, with some coalescence, for a degree of pneumoconiosis that would result in impairment, *see* Employer's Exhibit 4 at 25-26, 36, 48-49; that COPD and/or emphysema is rarely, if ever, related to coal dust exposure in the absence of positive x-ray evidence of pneumoconiosis, *see* Employer's Exhibit 4 at 40-43; and that simple pneumoconiosis generally will not progress in terms of impairment once exposure to coal dust ceases, *see* Employer's Exhibit 4 at 51. Claimant's Brief at 8-11.

support Dr. Hasson's opinion because they were not entered into the record, the administrative law judge credited the opinion, as well-reasoned, without determining whether Dr. Hasson adequately addressed the issue of legal pneumoconiosis, or the extent to which Dr. Hasson's reliance on inadmissible evidence affected his opinion. *See Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). Consequently, on remand, the administrative law judge is directed to reevaluate Dr. Hasson's opinion, and to reweigh the conflicting medical evidence of record.

Accordingly, the Decision and Order Denying Benefits is affirmed in part, 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