BRB No. 12-0670 BLA

SUSAN NOREUIL (o/b/o JOHN NOREUIL) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/23/2013 DECISION and ORDER

Appeal of the Decision and Order on Subsequent Claim - Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order on Subsequent Claim[1] Awarding Benefits (2009-BLA-5668) of Administrative Law Judge Robert B. Rae (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Upon stipulation of the parties, the administrative law judge credited the miner with thirty-four years of coal mine employment, found that all of the work was performed underground, and adjudicated this claim, filed on July 17, 2008, pursuant to 20 C.F.R. Parts 718 and 725. 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(d). The administrative law judge further found that claimant[2] was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal of the presumption.[3] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge's reliance on the preamble to the revised regulations as a criterion for evaluating the medical opinion

[1] The miner's first claim was filed on August 31, 1992, and was denied by the district director on February 8, 1993. Director's Exhibit 1. The miner filed a second claim on January 12, 1998, which was denied by the district director on May 13, 1998, because the miner failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2. The miner filed the current claim on July 17, 2008. Director's Exhibit 4. The miner died on November 27, 2011, while the case was pending before the administrative law judge.

[2] Claimant is the widow of the miner, and is pursuing the claim on the miner's behalf. Claimant's Exhibit 3.

[3] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the evidence establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

evidence is contrary to law. Employer challenges the administrative law judge's weighing of the evidence in finding it sufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Employer also argues that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge acted within his discretion in consulting the preamble to the regulations to assess the credibility of the medical opinion evidence. Employer has filed a combined reply brief in support of its position.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in relying on the preamble to the amended regulations when weighing the medical opinion evidence relevant to the issues of pneumoconiosis, total disability, and disability causation. Employer argues that measuring the credibility of evidence against the discussion in the preamble violates the Administrative Procedure Act, 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)(the APA); that use of the preamble without notice to the parties deprived employer of its constitutional right to a fair hearing; and that because the preamble was not subject to notice and comment rulemaking, the discussion in the preamble is entitled to no weight. Employer further asserts that if the Board concludes that the administrative law judge's consideration of the preamble was permissible, it should be allowed an opportunity to submit evidence to address the preamble. Employer's Brief at 14-22. Employer's arguments lack merit.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment occurred in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

The preamble to the amended regulations sets forth how the Department of Labor (DOL) has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The Board and multiple circuit courts have held that an administrative law judge, as part of his deliberative process, may permissibly evaluate expert opinions in conjunction with DOL's discussion of prevailing medical science in the preamble to the revised regulations. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Additionally, the Director correctly notes that the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Accordingly, we reject employer's assertion that the administrative law judge erred in using the preamble as guidance in evaluating the medical opinion evidence.

Employer next contends that the administrative law judge, in finding invocation of the amended Section 411(c)(4) presumption established, erred in weighing the evidence relevant to total respiratory disability pursuant to Section 718.204(b). Employer challenges the administrative law judge's reliance on the medical opinion of Dr. Cohen, arguing that he failed to critically analyze the basis for Dr. Cohen's opinion, that the miner's reduced diffusion capacity was totally disabling from a respiratory standpoint. Employer asserts that the administrative law judge failed to compare the exertional requirements of the miner's usual coal mine employment with Dr. Cohen's assessment of the miner's impairment, and erroneously discounted the contrary opinions of Drs. Repsher and Tuteur on the ground that they were contrary to the Act. Employer also argues that the administrative law judge failed to consider the contrary probative evidence weighing against a finding of total respiratory disability. Employer's Brief at 22-26. Some of employer's arguments have merit.

At Section 718.204(b)(i), the administrative law judge found that the pulmonary function study evidence failed to establish total pulmonary disability, as neither of the pulmonary function studies of record produced qualifying results.[6] Decision and Order at

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed the requisite table values.

5. The administrative law judge further determined that the blood gas studies of record, conducted by Drs. Cohen and Repsher, failed to establish total respiratory disability at Section 718.204(b)(ii), as neither of the studies produced qualifying results. Decision and Order at 5. After determining that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(iii), the administrative law judge considered the medical opinions of Drs. Cohen, Repsher, and Tuteur at Section 718.204(b)(2)(iv). The administrative law judge initially noted that "the doctors are in agreement that the blood gas studies and spirometry studies did not show total disability." Decision and Order at 12. The administrative law judge further noted that Dr. Cohen[7] opined that "the miner was totally disabled from performing his previous coal mine employment of heavy manual labor due to a severe impairment in his diffusing capacity," while Dr. Repsher[8] opined that a "reduced diffusing capacity does not indicate total

[7] Dr. Cohen performed a pulmonary evaluation of the miner for the Department of Labor (DOL) on September 12, 2008. Although he found that the miner's spirometry and lung volumes were completely normal, Dr. Cohen opined that the miner had a severe diffusion impairment that disabled him from performing his last coal mine job that required heavy manual labor. Director's Exhibit 9; Claimant's Exhibit 2 at 9. At his deposition, Dr. Cohen stated that the FEV_1 and the diffusing capacity of the lung for carbon monoxide (DLCO), adjusted for hemoglobin, not for alveolar volume, are the most important measures for determining impairment. Claimant's Exhibit 2 at 80. Dr. Cohen opined that the miner's severe diffusion impairment was related to interstitial lung disease due to coal dust exposure, and emphysema due to a 50 pack-year smoking history and coal dust exposure. Claimant's Exhibit 2 at 21. He found no evidence of any active cardiac impairment when he examined the miner, although he noted that the miner had a history of significant coronary artery disease (CAD). Claimant's Exhibit 2 at 30.

[8] Dr. Repsher performed an examination on January 13, 2009 and provided a deposition on July 28, 2010. He opined that the miner's lung volumes were normal and that the miner had a severe diffusing capacity impairment, Employer's Exhibit 27 at 55, suggesting underlying centrilobular emphysema due to a long and heavy history of cigarette smoking. He opined that the miner had no clinically significant pulmonary impairment and that, from a respiratory point of view, he was fully fit to perform his usual coal mine work or work of a similarly arduous nature. Dr. Repsher stated that disability could not be determined solely by the diffusing capacity number, but must be considered in conjunction with a graduated exercise test. Employer's Exhibit 27 at 56. He explained that the FEV_1 is the most important of all the parameters, as the diffusing capacity measures anatomic situation, whereas the FEV_1 measures one's actual ability to move air into and out of the lungs. Employer's Exhibit 27 at 42. He further explained that the centrilobular emphysema that was causing the reduction in diffusing capacity was not due to coal dust exposure, because coal dust causes focal emphysema which does not affect lung function or the alveoli. Employer's Exhibit 27 at 43-44. Dr. Repsher found

disability," and Dr. Tuteur[9] stated that, while the miner had a reduced diffusing capacity, this reduction "in and of itself is not an influencing factor leading to disability." Decision and Order at 12; Director's Exhibits 9, 20; Claimant's Exhibit 2; Employer's Exhibits 9, 22, 26, 27. After summarizing the doctors' respective opinions, the administrative law judge accorded greatest weight to Dr. Cohen's opinion because "the other two opinions are contrary to the Act." Decision and Order at 12. Noting that the regulations at 20 C.F.R. §718.202(a)(1)(ii)(B)[10] specifically define a respiratory impairment as including impaired diffusion, the administrative law judge accorded very little weight to the opinions of Drs. Repsher and Tuteur with respect to total disability, as "Dr. Repsher stated that most people have more alveoli than they require," and Dr. Tuteur determined that "this type of impairment was not an influencing factor leading to disability." The administrative law judge further noted that neither doctor "cite[d] to any

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no evidence of clinical or legal pneumoconiosis. Director's Exhibit 20; Employer's Exhibit 27.

[9] Dr. Tuteur provided a consulting opinion on October 20, 2009, examined the miner on March 5, 2010, and provided a deposition on July 27, 2010. He identified a reduction in the miner's diffusing capacity due to tobacco smoke, which was not disabling. Employer's Exhibit 26 at 78, 95, 110. Dr. Tuteur diagnosed a primary pulmonary process of chronic obstructive pulmonary disease (COPD), manifested by chronic bronchitis and emphysema due entirely to cigarette smoke, that was minimal and not associated with a measurable airflow impairment. He stated that the process of diffusion is one of the five parts of lung function. Employer's Exhibit 26 at 58. He testified that a diffusing capacity impairment, in and of itself, is not an influencing factor leading to disability, but is a test of carbon monoxide transfer, which is not a physiologic phenomenon. Employer's Exhibit 26 at 38. Dr. Tuteur opined that the miner did not have a totally disabling respiratory or pulmonary impairment, despite his abnormal diffusing capacity, and did not have medical or legal pneumoconiosis. Employer's Exhibit 26 at 60, 82. However, Dr. Tuteur opined that the miner was totally disabled from returning to work in the coal mines or work requiring similar effort due solely to severe CAD, which caused left heart dysfunction. Dr. Tuteur stated that the CAD, which resulted in advanced ischemic dilated cardiomyopathy, fully explained the development of exercise intolerance and recurrent hospitalizations for chest pain and breathlessness. Employer's Exhibits 9, 22, 26.

[10] Section 718.202(a)(1)(ii)(B) defines a pulmonary or respiratory impairment as an "inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion." 20 C.F.R. §718.202(a)(1)(ii)(B).

medical literature finding that diffusing capacity would not influence pulmonary function," and concluded that "these opinions discounting the significance of impaired diffusion as disabling contradict the Act, which describes the three components of respiration and defines impairment as a deficit in any one of these." Decision and Order at 12. According the greatest weight to Dr. Cohen's opinion "because it recognized the heavy labor the miner performed and is consistent with the regulations," the administrative law judge found that claimant established total respiratory disability through the medical opinion evidence.[11] *Id.*

We agree with employer that the administrative law judge, in finding that the weight of the medical opinion evidence established the presence of a totally disabling respiratory or pulmonary impairment, erred in determining that the opinions of Drs. Repsher and Tuteur contradict the Act. Contrary to the administrative law judge's finding, Section 718.202(a)(1)(ii)(B), which defines a respiratory impairment under the Act and recognizes the components of respiration, does not mandate a finding of total disability when an impairment is found in any of the components. Drs. Repsher and Tuteur both acknowledged that diffusion is a component of respiration and that the miner had a diffusion impairment, but explained why this impairment was not disabling. The administrative law judge credited Dr. Cohen's opinion, that the miner's impairment in his diffusing capacity was totally disabling, and focused on Dr. Cohen's explanations for his conclusions, but did not analyze and weigh the bases for the contrary opinions of Drs. Repsher and Tuteur against those of Dr. Cohen. As the administrative law judge is charged with resolving conflicts in the evidence, we vacate the administrative law judge's finding of total disability at Section 718.204(b), his finding that claimant is entitled to invocation of the presumption at amended Section 411(c)(4), and his finding that claimant establish a change in an applicable condition of entitlement at Section 725.309(d), and remand this case for further consideration. Because the administrative law judge's weighing of the evidence on the issue of total disability affected his consideration of the evidence relevant to rebuttal, we must also vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).

On remand, the administrative law judge must reevaluate and weigh the medical opinions of record in light of their reasoning, documentation, and the physicians'

[11] We find no merit to employer's contention that the administrative law judge failed to compare the exertional requirements of the miner's usual coal mine employment with Dr. Cohen's assessment of respiratory impairment, as the administrative law judge considered the miner's description of his coal mine employment duties and found that the miner performed heavy manual labor, and Dr. Cohen also described the miner's duties as requiring heavy manual labor. Decision and Order at 3; Director's Exhibit 9.

qualifications; provide a detailed rationale for his crediting or discrediting of the evidence, in compliance with the APA, *see Wojtowicz v. Duquesne Light Co*., 12 BLR 1-126 (1989); and determine whether the weight of the evidence, like and unlike, is sufficient to establish a totally disabling respiratory or pulmonary impairment at Section 718.204(b). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc).

If, on remand, the administrative law judge again determines that claimant has established total disability pursuant to Section 718.204(b), a change in an applicable condition of entitlement pursuant to Section 725.309(d), and is entitled to invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal of the presumption with affirmative proof that the miner did not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, BLR (7th Cir. 2013); *accord Morrison v. Tenn. Consol. Coal Co*., 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order on Subsequent Claim Awarding Benefits is affirmed in part and vacated in part, and this 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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BETTY JEAN HALL
Administrative Appeals Judge