BRB No. 13-0007 BLA

MELVIN E. MUNCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELKAY MINING COMPANY	)	
	)	DATE ISSUED: 09/17/2013
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-On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits-On Remand (10-BLA-5031) of Administrative Law Judge Thomas M. Burke 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). This case, involving a miner's claim filed on December 24, 2008, is before the Board for the second time. Director's Exhibit 2.

In the initial decision, Administrative Law Judge Daniel L. Leland credited claimant with a total of fifteen years and eleven months of coal mine employment,[1] and found that fourteen years and nine months of that time constituted underground coal mine employment. Because claimant did not establish at least fifteen years of underground or "substantially similar" coal mine employment, Judge Leland determined that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Considering whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, Judge Leland found that claimant established that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Leland denied benefits.

Upon review of claimant's appeal, the Board vacated Judge Leland's finding that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Specifically, the Board agreed with claimant and the Director, Office of Workers' Compensation Programs (the Director), that claimant did not need to prove that the conditions in his eleven months of aboveground work at the site of an underground mine were substantially similar to those underground in order to have the benefit of the Section 411(c)(4) presumption. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011), *applying Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979)(Smith, Chairman, dissenting). The Board, therefore, held that Judge Leland erred in subtracting those eleven months from the total of claimant's qualifying coal mine employment on the ground that claimant failed to prove that the aboveground work was substantially similar to underground coal mine employment. *Muncy*, 25 BLR at 1-29.

[1] The record reflects that claimant's coal mine employment was in West Virginia. Hearing Transcript at 29. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

Accordingly, the Board vacated Judge Leland's denial of benefits, and remanded the case for him to reconsider whether claimant established at least fifteen years of qualifying coal mine employment under Section 411(c)(4). The Board further instructed Judge Leland that, if he found that claimant invoked the Section 411(c)(4) presumption, he was to consider whether employer rebutted the presumption.[3]

On remand, due to Judge Leland's unavailability, the case was reassigned, without objection, to Administrative Law Judge Thomas M. Burke (the administrative law judge). The administrative law judge found that claimant established over fifteen years of qualifying coal mine employment, and he noted the previous finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not adequately explain the basis for his finding that employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's denial of benefits. The Director declined to file a substantive response brief.

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).

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that

[3] The Board rejected employer's argument that amended Section 411(c)(4), 30 U.S.C. §921(c)(4), may not be applied in this case. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011). Additionally, the Board affirmed, as unchallenged, Judge Leland's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). *Muncy*, 25 BLR at 1-25 n.2.

employer did not disprove the existence of pneumoconiosis.[4] Therefore, he turned to whether employer could establish that claimant's totally disabling impairment did not arise out of, or in connection with, coal mine employment.

The administrative law judge considered the medical opinions of Drs. Rasmussen, Rosenberg, and Castle, all of whom agree that claimant is totally disabled by a severe obstructive impairment. Dr. Rasmussen opined that claimant's disabling obstructive impairment is due to both smoking and coal mine dust exposure. Director's Exhibit 11 (Dr. Rasmussen's report at 4); Claimant's Exhibit 2 at 44-45. In contrast, Drs. Rosenberg and Castle opined that claimant's disabling obstructive impairment is due solely to smoking and is unrelated to coal mine dust exposure. More specifically, Drs. Rosenberg and Castle opined that particular features in the pattern of claimant's obstructive impairment indicate that it is due to smoking. Employer's Exhibit 1 at 5; Employer's Exhibit 2 at 7; Employer's Exhibit 5 at 4; Employer's Exhibit 6 at 18, 25; Employer's Exhibit 7 at 21. When deposed, Dr. Rasmussen criticized the opinions of Drs. Rosenberg and Castle, disagreeing with their analysis that certain features of claimant's obstructive impairment, such as reversibility, reduced FEV1/FVC ratio, and the presence of hypercarbia and air trapping, are inconsistent with a coal-mine-dust-related obstructive impairment. Claimant's Exhibit 2 at 15-38.

The administrative law judge summarized the conflicting medical opinions, Decision and Order at 5-6, and stated that "Dr. Rasmussen's disagreement with . . . Drs. Rosenberg and Castle centered to some extent" on Dr. Rasmussen's view that an August 3, 2009 pulmonary function study administered by Dr. Rosenberg was invalid.[5] Decision and Order at 7. Noting that Drs. Rosenberg and Castle are Board-certified in Pulmonary Medicine, the administrative law judge found that "their opinions on the validity of a

[4] The administrative law judge found that the x-ray readings and medical opinions were in equipoise regarding the existence of clinical pneumoconiosis and that therefore, employer did not carry its burden to disprove the existence of pneumoconiosis. Decision and Order at 5; *see* 20 C.F.R. §718.201(a)(1).

[5] The record reflects that Dr. Rasmussen disagreed with Dr. Rosenberg's opinion that claimant's obstructive impairment is reversible, because Dr. Rasmussen believed that the variation between the two best FEV1 values obtained by Dr. Rosenberg on the August 3, 2009 pulmonary function study exceeded the criteria for a valid study. Claimant's Exhibit 2 at 21-22, 28-29. Thus, Dr. Rasmussen concluded that Dr. Rosenberg lacked an objective basis for concluding that the pulmonary function study showed significant reversibility. *Id*. Dr. Rasmussen further opined, however, that even if the impairment were partially reversible, that feature would not exclude coal mine dust exposure as a cause of the obstruction. Claimant's Exhibit 2 at 23.

pulmonary function test are deserving of more weight." *Id.* The administrative law judge further found that Dr. Rasmussen based his opinion regarding the cause of claimant's disability on a history of "22 to 22.5 years of underground coal mine employment," when the administrative law judge found "15 years and eleven months of coal mine employment, one year and two months of which were spent working on the surface." *Id.* Noting Dr. Rasmussen's testimony that his disability causation opinion would not change even if claimant had only 17.69 years of coal mine employment, the administrative law judge found that Dr. Rasmussen's employment history was "still significantly higher than [claimant's] period of actual exposure to coal dust." *Id.* Having discredited Dr. Rasmussen's opinion on the grounds stated above, the administrative law judge concluded:

> Accordingly, it is determined that the opinions of Drs. Rosenberg and Castle that [c]laimant's pulmonary condition is not significantly contributed to by coal mine dust are credited and [e]mployer has met its burden of rebuttal of the Section 411(c)(4) presumption by showing through . . . their reports that [c]laimant's pulmonary disability was not caused or contributed to by coal dust exposure.

Id.

Claimant argues that the administrative law judge did not adequately explain his basis for crediting the opinions of Drs. Rosenberg and Castle. Specifically, claimant contends that the administrative law judge erred in relying on the opinions of Drs. Rosenberg and Castle without determining whether they are sufficiently documented and reasoned to carry employer's burden to establish rebuttal of the Section 411(c)(4) presumption.[6] Claimant's Brief at 13-14. Claimant's contention has merit.

Employer bears the burden of proof to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Further, an administrative law judge must set forth valid reasons for both crediting and discrediting conflicting medical opinions. *See*

[6] Claimant argues that the opinions of Drs. Rosenberg and Castle are not well-reasoned, because they are based on medical beliefs that are at odds with the medical literature set forth by the Department of Labor in the preamble to the regulations. Claimant's Brief at 17, 18, 21-22. Further, claimant argues that the administrative law judge did not resolve the conflict between the opinions of Drs. Rasmussen, Rosenberg, and Castle on whether the specific characteristics of claimant's disabling obstructive impairment indicate that the impairment is unrelated to coal mine dust exposure. *Id.* at 22-25.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Here, the administrative law judge discredited portions of Dr. Rasmussen's opinion, but did not specifically address whether the opinions of Drs. Rosenberg and Castle submitted by employer are sufficiently documented and reasoned to establish rebuttal of the Section 411(c)(4) presumption. Consequently, the administrative law judge's decision does not comply with the Administrative Procedure Act, and the Board is unable to determine whether substantial evidence supports the administrative law judge's determination that employer met its rebuttal burden in this case. *See* 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); *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Therefore, we vacate the administrative law judge's finding that employer established rebuttal of the Section 411(c)(4) presumption, and remand this case for further consideration of whether employer has established that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). On remand, the administrative law judge must specifically address whether the opinions of Drs. Rosenberg and Castle are sufficiently documented and reasoned to meet employer's burden to establish rebuttal. In this regard, the administrative law judge must consider the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, and must explain his findings. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In considering the credibility of the rebuttal opinions, on remand, the administrative law judge should indicate how he resolves the conflict in the medical opinions on the issue of whether the characteristics of claimant's disabling obstructive impairment indicate that the impairment is unrelated to coal mine dust exposure.[7] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[7] The Board is mindful of the administrative law judge's determination that, on the issue of "the validity of a pulmonary function test," he accorded greater weight to the opinions of Drs. Rosenberg and Castle, based on their Board-certifications in Pulmonary Disease. Decision and Order at 7. With respect to the other conflicts in the medical opinions that have not yet been specifically resolved by the administrative law judge, the Board is also mindful of the administrative law judge's finding that Dr. Rasmussen possesses "significant expertise in pulmonary medicine, particularly black lung." *Id*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits-On Remand is affirmed in part and 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