BRB No. 13-0026 BLA

EARON A. HARDISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 09/10/2013
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (07-BLA-5542) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 involves a subsequent claim filed on June 9, 2006,[1] and is before the Board for the second time.

[1] Claimant's two prior claims, filed on November 27, 1992 and November 9, 2001, were finally denied because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

In the initial decision, the administrative law judge credited claimant with at least twenty-three years of coal mine employment,[2] and noted that employer stipulated that claimant suffered from clinical pneumoconiosis,[3] thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2006 claim on the merits. In addition to the existence of clinical pneumoconiosis, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] The administrative law judge further found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §725.309, and held that the administrative law judge properly considered claimant's 2006 claim on the merits. *E.A.H.* [*Hardison*] *v. Peabody Coal Co.*, BRB No. 08-0513 BLA (Apr. 16, 2009) (unpub.). The Board further affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). *Id.* However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board also vacated the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant's

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[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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, 1-202 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "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).

[4] "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).

total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Hardison v. Peabody Coal Co.*, BRB No. 10-0249 BLA (Dec. 23, 2010) (unpub.). The Board further vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). *Id.* Additionally, the Board instructed the administrative law judge that, before addressing those issues on remand, he was to determine whether claimant could invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[5] 30 U.S.C. §921(c)(4). *Id.*

On remand for the second time, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in not providing employer with the opportunity to "rehabilitate its proof" on remand. Employer's Brief at 9. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[6]

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,

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[5] 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 that a miner is totally disabled 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).

[6] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer's Request to Submit Additional Evidence

Employer argues that the administrative law judge erred in denying it an opportunity to submit additional evidence on remand. We disagree. On remand, the administrative law judge issued an Order, advising the parties that they could each submit one additional medical report in response to the enactment of the amendments reinstating Section 411(c)(4) of the Act. In response, employer submitted a medical report from Dr. Rosenberg, and claimant submitted a medical report from Dr. Houser. Because Dr. Houser reviewed and criticized Dr. Rosenberg's medical report, employer filed a "Motion to Revise the Discovery and Briefing Schedules," requesting additional time (thirty days) in which to develop and submit a supplemental report from Dr. Rosenberg.

In an Order dated May 9, 2012, the administrative law judge noted that claimant had not timely filed Dr. Houser's report. The administrative law judge, therefore, granted employer's request for additional time, and allowed the record to remain open until June 15, 2012. The administrative law judge further instructed the parties to "confer with each other as to the new evidence and . . . submit new medical summaries" by June 15, 2012.

Employer contends that the administrative law judge extended only the briefing schedule and neglected to address its motion to submit additional evidence. However, in his Order, the administrative law judge clearly advised the parties that the record would remain open until June 15, 2012. In response to the administrative law judge's Order, claimant submitted a remand brief. Employer did not submit any additional evidence, or respond in any way to the administrative law judge's Order. Instead, on July 18, 2012, employer filed a "Renewed Motion to Revise the Discovery and Briefing Schedules."[7] Again, employer requested that it be allowed to submit additional evidence in response to Dr. Houser's review and criticism of Dr. Rosenberg's report. Claimant objected to employer's request for an extension.

[7] Employer's counsel advised the administrative law judge that he "did not respond to [the] order earlier because he was not aware of it until he received the claimant's remand brief and motion to accept it out of time." Employer's July 18, 2012 Motion at 2 n.2. After noting that it was unclear why the administrative law judge's order was not routed to him, employer's counsel apologized for "this clerical error and any inconvenience it has caused any party." *Id.*

By Order dated August 24, 2012, the administrative law judge denied employer's request, noting that employer had already been granted an extension. Despite the extension, the administrative law judge noted that the parties had failed to comply with his instructions to confer with each other and submit new medical summaries. The administrative law judge further noted that employer had not submitted a brief. The administrative law judge, nevertheless, granted the parties until September 3, 2012 "to fully comply with [his] Orders," noting that no further briefs would be accepted after that date. There is no indication that employer took any action in response to the administrative law judge's Order.

Employer argues that the administrative law judge either "disregarded" its request for an opportunity to submit additional evidence in response to Dr. Houser's medical report, or "mischaracterized it as a request for time to submit a remand brief." Employer's Brief at 9. In his May 9, 2012 Order, although the administrative law judge did not explicitly state that employer could submit additional evidence during the granted extension, the administrative law judge did not indicate that employer was prohibited from doing so. Employer neither sought clarification nor attempted to submit any additional evidence during this time. Instead, employer waited until July 18, 2012 (over thirty days after the administrative law judge's extension had ended) to renew its motion to file additional evidence. On appeal, employer does not explain why it did not submit any evidence during the extension of time granted by the administrative law judge. Under these circumstances, we reject employer's assertion that the administrative law judge deprived employer of the opportunity to submit additional evidence in response to Dr. Houser's medical report. *See Betty B Coal Co. Director, OWCP* [*Stanley*], 194 F.3d 491, 503, 22 BLR 2-1, 2-21 (4th Cir. 1999).

Rebuttal of the Section 411(c)(4) Presumption

Upon invocation of the Section 411(c)(4) presumption, it is presumed that claimant has clinical and legal pneumoconiosis, and that his disabling respiratory impairment arose out of his coal mine employment. Because claimant invoked the presumption of total disability due to pneumoconiosis at 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 totally 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 Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

After finding that employer could not disprove the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer could

disprove the existence of legal pneumoconiosis.[8] The administrative law judge considered the opinions of Drs. Simpao, Baker, Houser, Repsher, and Rosenberg.[9] Dr. Simpao diagnosed legal pneumoconiosis, in the form of a moderate pulmonary impairment due to both coal mine dust exposure and cigarette smoking. Director's Exhibit 18 Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, each of which he attributed to coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1. Dr. Houser also diagnosed legal pneumoconiosis, in the form of COPD due to both coal mine dust exposure and cigarette smoking. Claimant's Remand Evidence.

Conversely, Drs. Repsher and Rosenberg opined that claimant does not suffer from legal pneumoconiosis. Dr. Repsher diagnosed a moderate to severely reduced diffusing capacity, which he opined was "overwhelmingly most likely due to [claimant's] long history of cigarette smoking." Director's Exhibit 19. Dr. Repsher opined that this condition was not due to claimant's coal mine dust exposure. *Id.* Dr. Rosenberg diagnosed COPD and fibrosis, each of which he attributed to claimant's cigarette smoking. Employer's Exhibit 1. Dr. Rosenberg opined that claimant does not have any impairment caused by his coal mine dust exposure. *Id.*

Employer argues that the administrative law judge failed to provide a proper basis for finding that the opinions of Drs. Repsher and Rosenberg were insufficient to disprove the existence of legal pneumoconiosis. We agree. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to Dr. Rosenberg's opinion, because the doctor did "not rule out clinical pneumoconiosis." Decision and Order on Second Remand at 4. The administrative law judge, however, did not address the relevant issue, namely, whether Dr. Rosenberg's opinion, that claimant's chronic obstructive pulmonary disease and fibrosis are not attributable to coal mine dust exposure, is sufficient to support employer's burden to disprove the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

In regard to whether Dr. Repsher's opinion supported employer's burden to

[8] Because employer failed to disprove the existence of clinical pneumoconiosis, employer could not establish rebuttal by proving that claimant does not have pneumoconiosis. However, because legal pneumoconiosis is relevant to the second method of rebuttal, the administrative law judge appropriately addressed whether employer could disprove the existence of legal pneumoconiosis.

[9] Drs. Baker, Simpao, Houser, Repsher, and Rosenberg each diagnosed clinical pneumoconiosis.

disprove the existence of legal pneumoconiosis, the administrative law judge stated:

> Dr. Repsher did diagnose clinical pneumoconiosis but Dr. Repsher's opinion is that [c]laimant's breathing impairments were due to his cigarette smoking, heart disease and numerous other health conditions none of which were due to his coal dust exposure. In testing Dr. Repsher found a moderately reduced diffusing capacity. DX 19. His report does not discuss the restrictive impairment discussed by Dr. Simpao. I previously noted that he is in the minority as to whether there is evidence of a pulmonary impairment and total disability. His opinion is internally conflicted as although in the body he notes a reduced diffusing capacity, he relates no impairments in his conclusion. I find that his opinion is contrary to the preponderance of the record and is not reasoned or persuasive.

Decision and Order on Second Remand at 4.

The administrative law judge erred to the extent that he discredited Dr. Repsher's opinion because the doctor did "not discuss the restrictive impairment discussed by Dr. Simpao." As employer accurately notes, the administrative law judge failed to explain why he accorded Dr. Simpao's diagnosis of a restrictive impairment controlling weight, especially in light of conflicting medical evidence on that issue.[10] *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Moreover, contrary to the administrative law judge's characterization, Dr. Repsher's opinion is not inconsistent regarding the presence of a moderate to severely reduced diffusing capacity. Although Dr. Repsher did not find that claimant's pulmonary impairment was totally disabling, he opined that claimant suffered from a pulmonary impairment, evidenced by a reduced diffusing capacity. Director's Exhibit 19. Consequently, the administrative law judge erred in his characterization of Dr. Repsher's opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Because the administrative law judge failed to provide a valid basis for discrediting the opinions of Drs. Repsher and Rosenberg, we vacate the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. On remand, when considering whether employer satisfied its burden to disprove the existence of legal pneumoconiosis, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the

[10] Dr. Rosenberg opined that Dr. Simpao's diagnosis of a restrictive impairment was incorrect. Employer's Exhibit 1 at 8-9. The administrative law judge did not address this evidence.

sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

After determining whether employer has disproved the existence of legal pneumoconiosis, the administrative law judge must address whether employer can establish rebuttal by proving that claimant's totally 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 Morrison*, 644 F.3d at 480, 25 BLR at 2-9.[11]

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits 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

[11] Employer requests that the case be remanded for reassignment to a different administrative law judge. Employer's Brief at 13-14. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).