BRB No. 10-0268 BLA

HOEY DOBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McCOY COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF INSURANCE FUND	)	DATE ISSUED: 02/24/2011
	)	
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K & L Gates 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 – Award of Benefits (2008-BLA-5588) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim, filed on April 16, 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).[1] Adjudicating the claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation of 13.47 years of coal mine employment and determined that claimant established each element of entitlement by a preponderance of the newly submitted evidence. Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the Board must vacate the award of benefits, as the administrative law judge did not address the medical evidence contained in Director's Exhibits 2 and 3, which was submitted in conjunction with claimant's previously denied claims. Employer specifically challenges the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c), asserting that he has not provided, in accordance with the Administrative Procedure Act (APA), any valid reason for crediting the opinions of Drs. Ammisetty and Baker, over the contrary opinions of Drs. Dahhan, Westerfield, Broudy and Wicker, on the issues of legal pneumoconiosis and disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response to employer's appeal, unless specifically requested to do so by the Board. Employer also filed a reply brief, reiterating its argument that the administrative law judge erred in weighing the evidence.

[1] Claimant has filed four prior claims, on July 8, 1992, June 15, 1994, April 19, 2000 and December 19, 2002. Director's Exhibits 1-4. The prior claim filed on December 19, 2002 was denied by reason of abandonment and was administratively closed by the district director on June 4, 2004. Director's Exhibit 4. Claimant took no action with regard to that denial until he filed the current subsequent claim on April 16, 2007. Director's Exhibit 6. The district director awarded benefits and employer requested a hearing, which was held on October 28, 2008. Director's Exhibit 36. Thereafter, the administrative law judge issued a Decision and Order – Award of Benefits on December 16, 2009, which is the subject of this appeal.

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

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). If a miner establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, he is then entitled to have the merits of his claim reviewed based on the record evidence as a whole. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

In this case, because claimant's prior claim was denied by reason of abandonment, he had to submit new evidence establishing at least one of the requisite elements of entitlement in order to have his claim reviewed on the merits.[3] The administrative law judge found that claimant established total disability based on newly submitted evidence pursuant to 20 C.F.R. §718.204(b)(2), and we affirm that finding as it is unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. Thus, we also affirm the administrative law judge's finding that claimant has demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 25.

Turning to the merits, we agree with employer that the award of benefits must be vacated, as the administrative law judge did not address all of the record evidence in deciding that claimant satisfied his burden to establish the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis.[4] Employer correctly

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 7.

[3] The regulation at 20 C.F.R. §725.409(c) provides, in pertinent part, that, "[f]or purposes of [20 C.F.R. §]725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[4] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20

asserts that, while the administrative law judge indicated that he had conducted a *de novo* review of the record, he did not summarize any of the evidence that was submitted in the prior claims, and did not explain the weight he accorded that evidence. *See* Director's Exhibits 1-4. Rather, the totality of the administrative law judge's analysis focused on the evidence submitted with the subsequent claim. Because the administrative law judge has not addressed all of the relevant evidence in reaching his determinations at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), his decision fails to satisfy the requirements of the APA.[5] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the award of benefits and remand this case for further consideration. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99, 2-103 (1983); *Flynn*, 353 F.3d at 480, 23 BLR at 2-66; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

In the interest of judicial economy, however, we will address certain arguments raised by employer with regard to the weight the administrative law judge accorded the opinions of Drs. Ammisetty, Baker, Dahhan and Westerfield pursuant to 20 C.F.R. §718.202(a)(4), 718.204(c). Dr. Ammisetty performed an examination of claimant on June 6, 2007, at the request of the Department of Labor, and completed the Form CM-988, indicating that claimant had x-ray evidence of pneumoconiosis, and evidence of chronic obstructive pulmonary disease (COPD), based on the results of the pulmonary function test, which he attributed to smoking and coal dust exposure. Director's Exhibit 16. He also diagnosed chronic bronchitis due to coal dust exposure and cigarette smoking. *Id*. In a July 29, 2007 supplemental report, Dr. Ammisetty indicated that claimant had "over [twenty-four] years" of coal mine employment and listed the following diagnoses:

1. Pneumoconiosis -1/1 (chest x-ray)

C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] The Administrative Procedure Act, 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), 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. . . ." 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).

2. Severe COPD - (PFTs with significant decreased FEV1)

3. Chronic bronchitis (cough and productive sputum)

4. Lung cancer status post left upper lobe removed

IMPRESSION:

1. Legal Pneumoconiosis (x-ray findings)

2. Clinical Pneumoconiosis (cough/productive sputum/short of breath dyspnea/PFT) . . . .

Id. Dr. Ammisetty stated that "Legal Pneumoconiosis is 100% due to coal dust exposure" while "Clinical pneumoconiosis is secondary to coal dust exposure as well as cigarette smoking." *Id*.

In a September 24, 2007 letter, Dr. Ammisetty indicated that claimant worked in the coal mines for fifteen and one-half years, as opposed to the twenty-four years of coal mine employment he previously recorded. He specifically stated:

> I agree that years of exposure/concentration of coal dust have different affect [sic] on the symptoms but in this case scenario years of duration do not have any affect [sic] *due to already established clinical pneumoconiosis*. It will not change the diagnosis of pneumoconiosis/COPD/chronic bronchitis.
>
> His clinical pneumoconiosis is due to his chronic exposure to coal dust and also his symptoms are due to a combination of coal dust exposure/cigarette smoking.

Director's Exhibit 16.

Employer argues that the administrative law judge erred in finding Dr. Ammisetty's opinion to be reasoned and documented because the physician reported an erroneous coal mine employment history. Contrary to employer's assertion, the administrative law judge acknowledged that Dr. Ammisetty relied upon a coal mine history of twenty-four years in his initial reports, but that Dr. Ammisetty based his supplemental opinion on a corrected history of fifteen and one-half years of coal mine employment. Furthermore, the administrative law judge specifically noted that while he credited claimant with 13.47 years of coal mine employment, "the difference is not so great that [Dr. Ammisetty's opinion] should be given less weight because [he] considered two additional years of coal mine employment." Decision and Order at 17. Thus, we reject employer's assertion of error. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21

BLR 2-615, 2-626 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

However, we agree with employer that, on remand, the administrative law judge should specifically address whether Dr. Ammisetty's opinion is undermined by the fact that he "confused the terms legal and clinical pneumoconiosis." Decision and Order at 8. The administrative law judge must determine whether Dr. Amissetty provided a reasoned and documented opinion, as to the existence of legal pneumoconiosis, taking into consideration what specific objective evidence the physician relied upon to reach his diagnoses in this case, and whether he explained his findings based on that evidence. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

With respect to Dr. Baker, we reject employer's assertion that Dr. Baker's opinion is legally insufficient to satisfy claimant's burden of proving the existence of legal pneumoconiosis.[6] Contrary to employer's assertion, it is not necessary for a physician to provide an exact apportionment of the degree of impairment attributable to coal dust exposure, in order to satisfy the definition of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Because Dr. Baker specifically opined that claimant's impairment was "significantly related to[,] or substantially aggravated by[,] coal dust exposure," the administrative law judge may credit Dr. Baker's opinion on remand, if reasoned and documented, as sufficient to satisfy claimant's burden of proof.

Additionally, employer contends that the administrative law judge erred in giving less probative weight to the opinions of Drs. Dahhan and Westerfield, based on the fact that they cited to claimant's improvement in respiratory function on bronchodilator as part of their rationale for excluding coal dust exposure as a causative factor for claimant's disabling respiratory condition. Employer specifically contends that the administrative law judge improperly substituted his opinion for that of a medical expert when he stated

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[6] Dr. Baker stated:

> The patient also has legal pneumoconiosis. He has chronic bronchitis with mild resting arterial hypoxemia and a moderate obstructive ventilatory defect. These can be caused by coal dust exposure. These can also be caused by cigarette smoking. Some articles suggest, including the latest edition of the GOLD statement, that the combination of coal dust and cigarette smoking may be synergistic in producing obstructive airway disease. On this basis, I feel his condition has been significantly contributed to[,] or substantially aggravated by[,] dust exposure in his coal mine employment.

Claimant's Exhibit 3.

that "treatment with bronchodilator agents and partial reversibility are not credible evidence that [c]laimant's impairment is entirely reversible, and therefore, are not a credible basis to opine that coal dust played no contributing role in claimant's obstructive lung impairment." Decision and Order at 20. We disagree.

Dr. Dahhan diagnosed that claimant had *a partially reversible* obstructive ventilatory impairment, finding that the "obstructive defect that [claimant] demonstrates improved significantly after the administration of bronchodilators, indicating that it is not related to the inhalation of coal dust or coal workers pneumoconiosis." Director's Exhibit 19 (emphasis added). Dr. Westerfield opined that claimant has "obstructive lung disease" with "significant respiratory impairment," and an element of reversible airways disease in that he has a response to bronchodilator medication on spirometry testing. Employer's Exhibit 3. In weighing these opinions, the administrative law judge had discretion to question whether the doctors had accounted for the non-reversible portion of claimant's respiratory disease and sufficiently explained why it was not due to coal dust exposure. *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Clark*, 12 BLR at 1-155. The administrative law judge properly noted that while a pulmonary function study may show partial reversibility, this fact does not necessarily preclude the presence of a coal-dust related lung disease. *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227 (4th Cir. May 11, 2004) (unpub.). Thus, we reject employer's assertion that the administrative law judge erred in failing to credit the opinions of Drs. Dahhan and Westerfield, that claimant does not have legal pneumoconiosis, based on their discussion of the pulmonary function evidence.

To summarize, on remand the administrative law judge must determine whether claimant is entitled to benefits, based on a consideration of all of the evidence of record. In resolving the conflict in the medical opinions, 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 sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge must also explain the bases for all of his findings of fact and conclusions of law, and address the weight accorded the conflicting evidence as to the issues of legal pneumoconiosis, total disability and disability causation, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

II. Recent Amendments to the Act

Subsequent to the issuance of the administrative law judge's Decision and Order – Award of Benefits, amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, were passed affecting claims filed after January 1, 2005. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which

provides a presumption of pneumoconiosis and that total disability is due to pneumoconiosis in cases where the miner has established fifteen or more years of underground coal mine employment, or work in a surface mine in substantially similar conditions to those of an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

We conclude that the recent amendments are applicable to this case and should be considered by the administrative law judge on remand. Claimant filed his current claim after January 1, 2005, and has established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Claimant alleged twenty-seven years of coal mine employment in his most recent application for benefits and the district director found that claimant established fifteen years of coal mine employment. Director's Exhibits 6, 36. Although the parties stipulated to "at least 13.47" years of coal mine employment, the administrative law judge must make a specific determination on remand as to whether claimant has the requisite number of qualifying years of coal mine employment for invocation of the presumption. *See* Hearing Transcript at 7. If the administrative law judge finds that claimant has established at least fifteen years of qualifying coal mine employment and is, thus, entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then consider whether employer has satisfied its burden to rebut that presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order – Award of 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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BETTY JEAN HALL
Administrative Appeals Judge