BRB No. 09-0695 BLA

LARRY VASS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PATIENCE, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/28/2010
	)	
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. McDonnell (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (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 appeals the Decision and Order Awarding Benefits (2007-BLA-5281) of Administrative Law Judge Thomas M. Burke on a living miner's claim filed on January 16, 2006 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). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with twenty-eight years of coal mine employment. He found the existence of legal pneumoconiosis established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4),[1] and that claimant, therefore, established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. The administrative law judge further found that the evidence of record established total disability and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4). Employer further contends that the administrative law judge failed to sufficiently explain the basis of his disability causation finding at Section 718.204(c).[2] Claimant responds, asserting that employer does not argue that the administrative law judge's findings are not supported by substantial evidence but, rather, argues that the administrative law judge should have accorded more weight to employer's medical experts, essentially requesting the Board to impermissibly reweigh the evidence. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in response to employer's appeal.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of totally disabling pneumoconiosis in cases where the miner has established

[1] The administrative law judge found that the evidence did not establish pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3).

[2] Employer does not challenge the administrative law judge's finding that total disability was established at 20 C.F.R. §718.204(b). That finding is, accordingly, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment.[3] 30 U.S.C. §921(c)(4).

By Order issued on April 8, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments in this claim. In response to this Order, employer contends that retroactive application of the amendments is unconstitutional. Employer also contends that claimant is not entitled to the Section 411(c)(4) presumption because claimant's employment as a truck driver does not constitute qualifying coal mine employment.[4] The Director contends that if the Board affirms the administrative law judge's findings, *i.e.*, the findings on the issues of legal pneumoconiosis and disability causation, and the resulting award of benefits, there would be no need to address the impact of the 2010 amendments on this claim. However, the Director contends that if the Board does not affirm the administrative law judge's Decision and Order awarding benefits, then the case must be remanded to the administrative law judge to consider the impact of the recent amendments to the Act on this case, *i.e.*, whether claimant is entitled to the presumption of totally disabling pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Director's Brief at 2. Claimant responds, contending that if the administrative law judge's Decision and Order is not affirmed on the merits, the case should be remanded to the administrative law judge for consideration under Section 411(c)(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. 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).[5]

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

[3] In addition, under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), as amended, a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor's benefits without the burden of establishing entitlement.

[4] Employer raises this issue for the first time in response to the Board's April 8, 2010 Order.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge observed that, while all of the physicians agreed that claimant had emphysema, they disagreed as to whether coal mine employment or smoking caused the emphysema. Specifically, the administrative law judge found that Drs. Rasmussen and Cohen opined that claimant's bullous emphysema was caused by both coal dust exposure and smoking, while Drs. Crisalli and Zaldivar opined that claimant's bullous emphysema was due to smoking alone.[6] Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 6, 7. In evaluating the opinions, the administrative law judge credited those of Drs. Rasmussen and Cohen over the opinions of Drs. Crisalli and Zaldivar, because he found them more in keeping with the position of the Department of Labor (DOL), that coal dust exposure may cause obstructive lung disease, such as emphysema, and that the "risk is additive with cigarette smoking." Decision and Order at 10, *citing* 65 Fed. Reg. 79940 (Dec. 21, 2000). Specifically, the administrative law judge noted:

> the Department concluded that the medical literature "support[s] the theory that *dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms*." [Emphasis added]. Medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is not clinically significant, are, therefore, contrary to the premises underlying the

[6] The administrative law judge stated that Dr. Rasmussen concluded that "smoking and occupational dust exposure [cause] identical forms of emphysema." Decision and Order at 8-9; Director's Exhibit 12. The administrative law judge further stated that Dr. Cohen found that smoking and coal dust exposure caused similar types of emphysema, including centrilobular, panacinar and bullous, and that "it is impossible to distinguish between the effects of coal dust and cigarette use." Decision and Order at 9; Claimant's Exhibit 1. The administrative law judge noted that Dr. Cohen went on to opine that laboratory testing indicates only "the presence, nature and extent of lung disease," not its cause, which must be determined based on patient history and medical and scientific authority. Decision and Order at 9; Claimant's Exhibit 1. In contrast, the administrative law judge noted that Drs. Crisalli and Zaldivar maintain that only "focal," not bullous, emphysema is caused by coal dust exposure. Further, the administrative law judge noted that Drs. Crisalli and Zaldivar opine that laboratory testing can show whether emphysema is caused by coal mine employment or smoking, as the effect of smoking is more potent than that of coal dust exposure, and is reflected in the amount of obstruction to air flow seen on pulmonary function testing. Employer's Exhibit 6; Tr. at 32.

> regulations. *See W.C. v. Aberry Coal Co*., BRB No. 07-0974 BLA (Sept. 8, 2008) (unpub.). These principles have guided the weighing of the medical opinion evidence.

Decision and Order at 10.

The administrative law judge found, therefore, that inasmuch as the opinions of Drs. Crisalli and Zaldivar were based, "in large part, on their contention that bullous emphysema is not caused by coal dust exposure[,]" and they have "offered little support for their position[,]" their opinions regarding legal pneumoconiosis were "problematic," in light of the comments to the regulations. Decision and Order at 10. Instead, the administrative law judge found the opinions of Drs. Rasmussen and Cohen "more credible and persuasive "because they [were] consistent with the position adopted by the DOL, as to the cause of emphysema, and because they were "well-reasoned and well-documented," as they were based on claimant's objective medical evidence, occupational exposure histories and subjective complaints. Further, the administrative law judge credited the opinions of Drs. Rasmussen and Cohen because of their credentials and their "impressive background in the study and treatment of coal dust induced diseases." Decision and Order at 10. While the administrative law judge noted that Drs. Crisalli and Zaldivar had excellent credentials, he found that "their experience with and study in the area of occupational pneumoconiosis [did] not match those of Drs. Rasmussen and Cohen." Decision and Order at 11. The administrative law judge, therefore, found that Drs. Rasmussen and Cohen were "the most qualified physicians offering opinions in this record." Decision and Order at 11. Consequently, based on his analysis of the medical opinion evidence, the administrative law judge properly found that legal pneumoconiosis was established at Section 718.202(a)(4).

Employer first contends that the administrative law judge erred in finding the opinion of Drs. Rasmussen and Cohen better reasoned and documented than the opinions of Drs. Crisalli and Zaldivar. Instead, employer contends that the opinions of Drs. Crisalli and Zaldivar are equally, if not better, reasoned and documented. Employer next contends that the administrative law judge should not have accorded greater weight to the opinions of Drs. Rasmussen and Cohen because they were in keeping with the DOL's position on the cause of emphysema, as set forth in the comments to the regulations. Employer asserts that the comments are not law, and that the opinions of Drs. Crisalli and Zaldivar are not antithetical to the DOL's position, because both doctors opined that chronic obstructive pulmonary disease may be caused by coal dust exposure and may be disabling. Employer contends that, in crediting the opinions of Drs. Rasmussen and Cohen as in keeping with the DOL's position as to the cause of emphysema, the administrative law judge improperly substituted his judgment for that of a physician. Finally, employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen over those of Drs. Crisalli and Zaldivar, due to their

superior qualifications. Employer contends that Dr. Rasmussen does not possess the same qualifications as Drs. Zaldivar, Crisalli and Cohen, as the latter physicians are dually certified in both Internal Medicine and Pulmonary Diseases and Dr. Rasmussen is not. Further, employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Rasmussen and Cohen because of their professorships, work on government committees, and published articles on pneumoconiosis, when, in fact, Drs. Crisalli and Zaldivar also held professorships, served on government committees and published articles on pneumoconiosis. Claimant responds, asserting that employer's arguments amount to no more than a request to reweigh the evidence, which the Board is not empowered to do.

At the outset, we address employer's contention that the opinions of Drs. Rasmussen and Cohen should not have been accorded greater weight because they were in keeping with the DOL's position on the cause of emphysema, as set forth in the comments to the regulations. The administrative law judge properly noted that the DOL's position in the comments to the regulations reflected the majority position of the medical community on the issue of whether emphysema is caused by coal mine employment. Thus, the administrative law judge properly considered the opinions in light of the comments, properly finding that the opinions of Drs. Crisalli and Zaldivar were inconsistent with the DOL's position, as set forth in the comments, and further found that they lacked substantiation for opinions they offered as to the cause of claimant's emphysema. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79,940-45 (Dec. 20, 2000); *Crockett Colleries, 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). The administrative law judge found their opinions in sharp contrast to the opinions of Drs. Rasmussen and Cohen, who both cited medical literature that was accepted by the DOL in support of their position. Decision and Order at 10. The administrative law judge, therefore, properly credited the opinions of Drs. Rasmussen and Cohen, over the opinions of Drs. Crisalli and Zaldivar, as more in keeping with the position of medical authority on the cause of pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). Contrary to employer's argument, the administrative law judge did not substitute his judgment for that of a medical expert in considering the medical opinions in light of the comments to the regulations. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

Further, it was within the administrative law judge's discretion to accord greater weight to the opinions of Drs. Rasmussen and Cohen, based on their overall expertise. Contrary to employer's contention, the administrative law judge did not rely on Board-certifications alone to credit the opinions of Drs. Rasmussen and Cohen over those of Drs. Crisalli and Zaldivar. Rather, he noted, in addition to their Board-certifications, the totality of their credentials, including professorships, work on government committees,

and published articles. Although employer contends that Drs. Crisalli and Zaldivar also have professorships, work on government committees, and published articles, employer does not, apart from its reference to the professorships that Drs. Crisalli and Zaldivar hold, discuss how their work on government committees and their published articles are of equal or greater merit than those of Drs. Rasmussen and Cohen. We therefore conclude that the administrative law judge acted properly in according greater weight, in part, to the opinions of Drs. Rasmussen and Cohen based on their "impressive background in the study and treatment of coal dust induced lung diseases."[7] Decision and Order at 10; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Although employer challenges the weight accorded the conflicting medical opinions as to legal pneumoconiosis, employer's assertions of error, as claimant contends, amount to no more than a request that the Board reweigh the evidence, which it is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We conclude that the administrative law judge acted within his discretion in reaching his credibility determinations in this case. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). Thus, we affirm the administrative law judge's finding that the medical opinion evidence established legal pneumoconiosis at Section 718.202(a)(4).

Nonetheless, we vacate the administrative law judge's finding of pneumoconiosis at Section 718.202(a). Although the administrative law judge stated that all relevant evidence must be weighed together before finding pneumoconiosis at Section 718.202(a), and cited to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the Decision and Order overall does not clearly indicate that the administrative law judge weighed all of the relevant evidence together, before finding pneumoconiosis established at Section 718.202(a). On remand, the administrative law judge must clearly weigh the relevant evidence at Section 718.202(a) together, before determining whether pneumoconiosis has been established.

[7] Because we affirm the administrative law judge's decision to accord greater weight to the opinions of Drs. Rasmussen and Cohen, as their opinions were more consistent with the medical authority accepted by the Department of Labor concerning the cause of emphysema, and because of their superior expertise in the "area of occupational pneumoconiosis," we need not consider employer's contention that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen because they were "well-reasoned and well-documented," when the administrative law judge found that the opinions of Drs. Crisalli and Zaldivar were also "well-reasoned and well-documented." *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer next argues that the administrative law judge failed to adequately address the evidence on the issue of disability causation at Section 718.204(c). In finding disability causation established, the administrative law judge stated:

> 20 C.F.R. §718.204(c)(1) of the regulations provides that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Since the evidence demonstrates that Claimant's pulmonary condition is totally disabling, and that the condition is caused by his coal dust exposure, Claimant is found to be entitled to black lung disability benefits.

Decision and Order at 13.

As employer contends, however, this summary disposition of the disability causation issue, which does not include any analysis of the evidence, is insufficient to meet the requirements of the Administrative Procedure Act (APA), 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), which requires a discussion of the evidence and the relevant law, and that the administrative law judge set forth the basis for his findings and conclusions. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge has not sufficiently discussed his findings and conclusions with regard to the relevant evidence and applicable law, the administrative law judge's finding at Section 718.204(c) must be vacated, and the case remanded for reconsideration of the disability causation issue, pursuant to the requirements of the APA. Because we cannot affirm the administrative law judge's findings on the issues of pneumoconiosis and disability causation at Sections 718.202(a) and 718.204(c), necessary elements of entitlement, we vacate the administrative law judge's Decision and Order Awarding Benefits.

Additionally, based upon the parties responses to our April 8, 2010 Order, and our review of the case, we conclude that this case is potentially affected by Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. As previously noted, if a claimant establishes at least fifteen years of qualifying coal mine employment and 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). In this case, claimant filed his claim after January 1, 2005, and it was pending on March 23, 2010. He was credited with twenty-eight years of coal mine employment, although employer now asserts that claimant does not have fifteen years of underground or substantially similar coal mine employment. The administrative law judge also found that claimant established a totally disabling respiratory or pulmonary impairment, which employer has not challenged. *See* 20 C.F.R. §718.204(b).

Accordingly, because we cannot affirm the award of benefits in this case, we initially remand the case for the administrative law judge to consider it under Section 411(c)(4). If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the administrative law judge must then determine whether employer has met its burden of rebutting the presumption, by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Because invocation of the presumption will alter the parties' burden of proof, the administrative law judge must allow the parties the opportunity to open the record, submit evidence, or substitute evidence to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 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). Further, as the Director states, any additional evidence must be submitted in accordance 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). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.[8]

[8] Employer notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests, "[p]otentially affected federal black lung claims should be held in abeyance until resolution of [this] legal challenge . . . ." Employer's Supplemental Brief at 6. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. Employer's request to hold this case in abeyance, therefore, is denied.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, 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