BRB No. 09-0834 BLA

JOHN O. KINNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/30/2010
	)	
PEABODY COAL COMPANY	)	
	)	
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 Remand – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky for claimant.

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

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2007-BLA-05065) of Administrative Law Judge Daniel F. Solomon, with respect to a claim filed on November 2, 2005, 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). This case is before the Board for a second time. In *J.O.K.* [*Kinney*] *v. Peabody Coal Co.*, BRB No. 08-0382 BLA (Feb. 19, 2009)(unpub.), the Board noted that the administrative law judge credited claimant with forty-three years of coal mine employment, based on the stipulation of the parties, and affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). The Board held that the administrative law judge erred in his weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) and 718.204(c) because he mischaracterized relevant evidence and did not comply with 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). The Board also determined that the administrative law judge erred in finding total disability established at 20 C.F.R. §718.204(b)(2). Therefore, the Board vacated the administrative law judge's findings that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c) and remanded the case to the administrative law judge for reconsideration.

On remand, the administrative law judge concluded that Dr. Simpao's opinion was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also determined, pursuant to 20 C.F.R. §718.204(b)(2)(i), that claimant established a totally disabling respiratory impairment. Further, the administrative law judge found that Dr. Simpao's opinion was sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that the administrative law judge repeated the error that he made in his original decision concerning whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, employer asserts that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §718.204(b)(2), (c). Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief in which it reiterates its arguments. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this appeal.

By Order dated June 8, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[1]

[1] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act,

Kinney v. Peabody Coal Co., BRB No. 09-0834 BLA (June 8, 2010)(unpub. Order). All of the parties have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the award of benefits. The Director further asserts that if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005 and the administrative law judge credited claimant with more than fifteen years of coal mine employment. Claimant responds, agreeing that Section 1556 is applicable to the current claim, based on the filing date and the length of his coal mine employment. Employer contends that if the Board vacates the administrative law judge's decision, Section 1556 would not be applicable because, although the claim was filed after January 1, 2005, the record establishes that claimant worked for less than fifteen years underground. However, employer states if the Board disagrees, then the case should be remanded to the district director to provide the parties an opportunity to respond to the changes in the law.

To determine whether this case must be remanded for consideration of invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) and 718.204(b)(2), (c).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the

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30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 7. 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 (1989)(*en banc*).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. 20 C.F.R. §§718.202(a)(4)

A. The Administrative Law Judge's Findings

In considering, on remand, whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), the administrative law judge evaluated the opinions of Drs. Simpao, Repsher, and Fino. The administrative law judge stated that he "now accept[ed]" that Drs. Repsher and Fino did not diagnose a respiratory impairment "because they determined that all testing that they discussed was invalid." Decision and Order on Remand at 2. The administrative law judge then referenced the pulmonary function study (PFS) results from May 2, 2007, which Dr. Simpao described as showing a moderate obstructive airway disease and the non-qualifying tests performed by Dr. Repsher on August 1, 2006. *Id*. The administrative law judge also noted that Dr. Fino did not address the May 2, 2007 study in his report. *Id*. The administrative law judge concluded that, because pneumoconiosis is a progressive and irreversible disease, the newest testing was the most probative in the record. *Id*. Accordingly, the administrative law judge found that the preponderance of the evidence established the presence of a respiratory impairment. *Id*.

The administrative law judge determined that Dr. Simpao's opinion, that claimant had a moderate restrictive and obstructive impairment due to coal dust exposure and cigarette smoking, was more rational because "a pulmonary deficit was established by [Claimant's Exhibit] 5." Decision and Order on Remand at 3; *see* Director's Exhibit 12; Claimant's Exhibits 3, 5. In addition, the administrative law judge found that Dr. Simpao's opinion was consistent with the Department of Labor's comments to the amended regulations because he concluded that coal dust and smoking were contributing causes of claimant's impairment and stated that there was no way to distinguish between them. Decision and Order on Remand at 2-3. Thus, the administrative law judge relied on Dr. Simpao's opinion to find that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

B. Arguments on Appeal

Employer asserts that, on remand, the administrative law judge did not follow the Board's instructions in considering the medical opinions of Drs. Simpao, Repsher, and

Fino at 20 C.F.R. §718.202(a)(4).[3] Employer argues that the administrative law judge did not explain why Dr. Simpao's opinion is more persuasive than those of Drs. Repsher and Fino or acknowledge the inconsistencies in Dr. Simpao's testimony. In addition, employer contends that the administrative law judge erred in relying on a finding of a pulmonary deficit as a reason to credit Dr. Simpao's opinion, as there is no presumption that any respiratory impairment suffered by a miner is due to coal dust exposure. Further, employer states that consistency with the regulations is not a reason to credit Dr. Simpao's opinion because, although a physician does not have to apportion the effects of pneumoconiosis and smoking on a miner's impairment, he has to credibly opine that coal dust exposure had more than a *de minimus* impact.

Contrary to employer's contention, the administrative law judge complied, in part, with the Board's remand instructions by explaining that the opinions of Drs. Repsher and Fino were not as persuasive as Dr. Simpao's opinion because they did not diagnose a respiratory or pulmonary impairment. Decision and Order on Remand at 2. However, as discussed *infra*, since the administrative law judge erred in relying on the May 2, 2007 PFS results to find that claimant had a respiratory impairment, he also erred in relying on it to resolve the conflict between Dr. Simpao's opinion and the opinions of Drs. Repsher and Fino. In addition, although a physician is not required to precisely identify the portion of impairment attributable to coal dust exposure, a medical opinion that purports to contain a diagnosis of legal pneumoconiosis must be reasoned and documented. 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In this case, the administrative law judge did not render a determination as to whether Dr. Simpao's identification of coal dust exposure as a contributing cause of claimant's alleged impairment is supported by any documentation.[4] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v.*

[3] Dr. Simpao diagnosed claimant with a moderate restrictive and obstructive impairment due to his coal mine employment and smoking history. Director's Exhibit 12; Claimant's Exhibit 3 at 9, 11-12, 14. Dr. Repsher determined that there was no evidence of a respiratory impairment caused or aggravated by coal dust exposure and that claimant was "fully fit" to perform his previous coal mine employment. Employer's Exhibit 1. Dr. Fino found there was insufficient objective evidence to diagnose coal workers' pneumoconiosis and agreed with Dr. Repsher that there was no evidence of a respiratory impairment. Employer's Exhibit 3.

[4] In his deposition on July 23, 2007, Dr. Simpao testified that claimant has chronic obstructive pulmonary disease (COPD) due to the combined impact of his coal dust exposure and significant smoking history. Claimant's Exhibit 3 at 9, 11-12, 14. On

Director, OWCP, 11 BLR 1-16 (1987); Consequently, we must vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4).

II. 20 C.F.R. §718.204(b)

A. The Administrative Law Judge's Findings

In considering whether claimant established total disability, the administrative law judge noted that there was no evidence of complicated pneumoconiosis at 20 C.F.R. §§718.204(b)(1), 718.304. Decision and Order on Remand at 4. Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge "accepted" Dr. Simpao's opinion that the PFSs in Employer's Exhibit 5 met the federal criteria for total disability and substantiated the validity of the previous testing.[5] *Id*. Finding "no contrary evidence," the administrative law judge concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

B. Arguments on Appeal

Employer contends that the administrative law judge did not make any findings regarding the PFS or blood gas study evidence but, instead, merely restated claimant's argument that the PFS evidence established total disability. In addition, employer notes that the pulmonary function test at Claimant's Exhibit 5, which the administrative law judge appeared to reference, did not produce qualifying values. Employer also argues that the administrative law judge, in his previous decision, relied on improper reasons to discredit the opinions of Drs. Fino and Repsher, and, on remand, did not make any findings regarding their opinions. Therefore, employer asserts that remand is required for the same reasons given by the Board in its previous decision.

Employer's contentions have merit, in part. Contrary to employer's assertion, the administrative law judge rendered a finding regarding the PFS evidence at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge determined that the PFS dated May 2,

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cross-examination, Dr. Simpao admitted that claimant's symptoms could be consistent with a disease other than one caused by coal dust exposure. *Id*. at 21-22.

[5] Although the administrative law judge referenced Employer's Exhibit 5, it appears that he intended to reference Claimant's Exhibit 5, which contains the May 2, 2007 pulmonary function study performed by Dr. Simpao, as there is no Employer's Exhibit 5 in the record. In addition, in his deposition, Dr. Simpao described the May 2, 2007 pulmonary function study as qualifying. Claimant's Exhibit 3 at 12.

2007, which the administrative law judge characterized as meeting the federal criteria, based on Dr. Simpao's statement to that effect, was sufficient to establish total disability.[6] Decision and Order on Remand at 4. However, as employer alleges, this PFS was not qualifying. The regulations provide that, in addition to a qualifying FEV1 value, claimant must establish either a qualifying FVC or MVV value or an FEV1/FVC percentage equal to or less than fifty-five. 20 C.F.R. §718.204(b)(2)(i)(A)-(C). In this case, the May 2, 2007 test produced a qualifying FEV1, but there was no MVV and the FVC and FEV1/FVC were not qualifying. Claimant's Exhibit 5. In addition, the administrative law judge did not resolve the conflict in the evidence regarding the validity of the PFSs of record. Both Drs. Repsher and Fino determined that all of claimant's PFS results were invalid. Dr. Repsher explained that, although claimant's morbid obesity invalidated the results, the normal residual lung volume and normal diffusing capacity eliminated clinically significant chronic obstructive pulmonary disease or an interstitial lung disease, like coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Fino found that claimant did not give maximum effort on any of the pulmonary function studies he reviewed. Employer's Exhibit 3. In contrast, Dr. Simpao indicated that the May 2, 2007 PFS was valid and that it confirmed the validity of the other studies of record. Claimant's Exhibit 5.

Further, employer is correct in arguing that the administrative law judge did not render findings under the other subsections of 20 C.F.R. §718.204(b)(2) and did not weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Therefore, we must vacate the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2).

III. 20 C.F.R. §718.204(c)

Relying on his determination at 20 C.F.R. §718.202(a)(4), the administrative law judge concluded that claimant established total disability causation at 20 C.F.R. §718.204(c). Decision and Order on Remand at 4. The administrative law judge stated that he "accept[ed]" Dr. Simpao's conclusions, that both coal dust exposure and cigarette smoking contributed to claimant's impairment and that there was no way to distinguish between the two causes. *Id*. The administrative law judge gave little weight to the

[6] The record contains three pulmonary function studies. Dr. Simpao obtained studies dated February 13, 2006 and May 2, 2007. Director's Exhibit 12; Claimant's Exhibit 5. The study dated February 13, 2006, produced qualifying values, while the May 2, 2007 study did not. *Id*. Dr. Repsher obtained a study on August 1, 2006, which produced nonqualifying values. Employer's Exhibit 1.

opinions of Drs. Repsher and Fino at 20 C.F.R. §718.204(c), because they did not diagnose pneumoconiosis or a respiratory impairment. *Id.* Employer argues that the administrative law judge erred in finding that Dr. Simpao's opinion was sufficient to establish total disability due to pneumoconiosis and in discrediting the opinions of Drs. Repsher and Fino.

We vacate the administrative law judge's findings at 20 C.F.R. §718.204(c), as they are based on findings we have vacated at 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2).

IV. Conclusion

In summary, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.204(b), (c) and the award of benefits. Based on our decision to vacate the award of benefits, we agree with the Director that this case must be remanded to the administrative law judge for consideration of whether claimant has established invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow the parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. The administrative law judge must also address employer's argument that claimant cannot invoke the presumption, as he worked underground for less than fifteen years.

In reconsidering whether claimant has established total disability under 20 C.F.R. §718.204(b)(2), the administrative law judge is required to render a finding under each subsection. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge must resolve the conflict among the physicians as to the validity of the PFS evidence and must address all of the PFSs of record. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), cert. denied, 537 U.S. 1147 (2003). If the administrative law judge determines that total disability has been demonstrated under any of the subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Fields*, 10 BLR at 1-20-21; *Shedlock*, 9 BLR at 1-198.

If the administrative law judge finds that claimant has established total disability, but has not invoked the rebuttable presumption of total disability due to pneumoconiosis, he must reconsider his finding that Dr. Simpao's medical opinion was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge

must address the medical opinions of Drs. Simpao, Repsher and Fino, determine whether they are adequately reasoned and documented, and explain his rationale for crediting or discrediting the physicians' opinions. *See Crockett*, 478 F.3d at 356, 23 BLR at 2-483-484; *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

In rendering his findings on remand, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the APA.[7] *See Wojtowicz*, 12 BLR at 1-165.

[7] The Administrative Procedure Act 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 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is vacated 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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REGINA C. McGRANERY
Administrative Appeals Judge