BRB No. 11-0516 BLA

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| BOB REED | ) | |
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| Claimant | ) | |
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| v. | ) | |
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| KEN LICK COAL COMPANY, INCORPORATED | ) | DATE ISSUED: 04/20/2012 |
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| and | ) | |
| | ) | |
| AMERICAN RESOURCES INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Johanna F. Ellison (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Ann Marie Scarpino (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (2008-BLA-05925) denying benefits of Administrative Law Judge Richard K. Malamphy, with respect to a subsequent claim filed on July 24, 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] This case is before the Board for the second time.[2] The Board vacated the administrative law judge's prior Decision and Order denying benefits and remanded the case for the administrative law judge to determine whether claimant could establish the requisite fifteen years of qualifying coal mine employment necessary to invoke the presumption of total disability due to pneumoconiosis reinstated by the March 23, 2010 amendments to the Act.[3] *Reed v. Ken Lick Coal Co.*, BRB No. 09-0807 BLA (Aug. 19, 2010)(unpub.).

On remand, the administrative law judge determined that claimant did not prove that his work for two additional coal mine employers was "substantially similar" to work in an underground mine. The administrative law judge found, therefore, that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption at amended Section 411(c)(4). The administrative law judge then stated

[1] Claimant filed an initial claim on November 12, 1986, and the district director issued a proposed decision and order denying benefits on April 23, 1987, because claimant did not establish any element of entitlement. Director's Exhibit 1. There was no further action on this claim until claimant filed the present subsequent claim.

[2] In his initial Decision and Order, the administrative law judge determined that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, as the newly submitted evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 3-4. The administrative law judge denied benefits on the merits, however, because he found that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, or that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 8-15.

[3] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

that, because the Board did not vacate his previous findings on the merits, claimant is not entitled to benefits.

On appeal, the Director argues that the administrative law judge incorrectly stated that the Board did not vacate his findings that claimant failed to establish the existence of pneumoconiosis and total disability causation. In addition, the Director asserts that the administrative law judge's decision should be vacated and the case remanded, as the administrative law judge did not consider whether the opinions of Drs. Broudy and Westerfield are based on premises contrary to the regulatory definition of pneumoconiosis. The Director further maintains that "[o]n remand, the [administrative law judge] may find that Dr. Mettu's opinion, which the [administrative law judge] *did not wholly discount*, is sufficient to establish [claimant's] entitlement to benefits." Director's Brief at 10 (emphasis added).

Employer responds, stating that neither the Director, nor claimant, properly preserved their contentions regarding the opinions of Drs. Broudy and Westerfield, as they did not raise them before the administrative law judge. Employer also asserts that the opinions of Drs. Broudy and Westerfield do not conflict with the regulations and, therefore, the denial of benefits should be affirmed.

In its reply brief, the Director states that the Board need not consider employer's argument, that the Director cannot raise issues for the first time before the Board, because it failed to raise the issue when the case was initially appealed. Citing *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994), the Director argues, in the alternative, that the issues in dispute are properly before the Board, based on the exception permitting the Director to raise issues for the first time on appeal in certain circumstances. Employer responds, indicating that the Director is not entitled to the *Hodges* exception, as this case is distinguishable. Employer also asserts that if the Board finds that the Director's argument is properly before it, then employer's argument should be considered timely raised as well. Claimant has not filed a response brief in this claim.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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).

[4] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Upon review of the administrative law judge's Decision and Order on Remand and the parties' arguments on appeal, we hold that the denial of benefits is rational and supported by substantial evidence. Regarding whether claimant invoked the presumption at amended Section 411(c)(4), the administrative law judge determined that, although claimant established that he is totally disabled, he did not prove that he has fifteen years of underground, or substantially similar, coal mine employment. Decision and Order on Remand at 5. The administrative law judge considered evidence indicating that part of claimant's employment involved operating bulldozers at surface mines, which caused him to be exposed to coal dust. *Id*. at 3-4. The administrative law judge acted within his discretion as fact-finder in concluding, "[w]ith no evidence of either how often the [c]laimant operated a bulldozer in which he was exposed to coal dust or how much coal dust he was exposed to during those times, I cannot find his work to be substantially similar to underground mining conditions." *Id*. at 5; *see Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497 (1997). We affirm, therefore, the administrative law judge's finding that claimant did not establish fifteen or more years of underground, or substantially similar, coal mine employment and, therefore, did not invoke the amended Section 411(c)(4) presumption.

With respect to the administrative law judge's findings on the merits, although the Director is technically correct in maintaining that, when the Board vacated the administrative law judge's initial Decision and Order denying benefits, the findings within the Decision and Order were also vacated, the administrative law judge acted within his discretion in incorporating these determinations by reference into his Decision and Order on Remand.[5] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); Decision and Order on Remand at 5.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge rationally found that the evidence was insufficient to establish the existence of pneumoconiosis, as the x-ray readings from claimant's prior claim were uniformly read as negative and the sole positive reading of the newly submitted x-rays was outweighed by a negative reading performed by a reader with superior qualifications. *See Staton v. Norfolk &*

[5] The parties did not submit any additional medical evidence on remand.

*Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 8-9. In addition, the administrative law judge determined correctly that the presumptions set forth in 20 C.F.R. §§718.304 and 718.306, and referenced in 20 C.F.R. §718.202(a)(3), were not available in this case, as there is no evidence that claimant has complicated pneumoconiosis and this claim was filed by a living miner. Decision and Order at 9.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge discredited the opinion of Dr. Mettu, who was the only physician who provided a medical report containing a diagnosis of pneumoconiosis. Decision and Order at 15. Dr. Mettu examined claimant at the request of the Department of Labor and completed Form CM-988. Director's Exhibit 13. Dr. Mettu recorded a coal mine employment history of sixteen years and a smoking history of two packs per day for thirty-one years. *Id*. Based upon a physical examination, an x-ray, a pulmonary function study, a blood gas study and an EKG, Dr. Mettu diagnosed chronic bronchitis and a severe pulmonary impairment. *Id*. On the portion of Form CM-988 that asks the physician to identify the etiology of the cardiopulmonary diagnoses, Dr. Mettu stated, "[h]e smoked for [thirty-one] years. He quit smoking in 1991. He quit working in the coal mines in 1991." *Id*. Regarding the extent to which the cardiopulmonary diagnoses contributed to claimant's pulmonary impairment, Dr. Mettu reported, "though smoking is the common cause for chronic bronchitis, coal dust exposure significantly [aggravated the] pulmonary impairment giving [rise to] legal pneumoconiosis." *Id*.

The administrative law judge stated, "Dr. Mettu concluded that exposure to coal dust significantly aggravated [c]laimant's condition, and that he therefore suffers from legal pneumoconiosis. He provides no explanation for this conclusion[,] aside from the dates of [c]laimant's smoking and coal mine employment histories." Decision and Order at 15. The administrative law judge determined that Dr. Mettu's opinion was not well-reasoned, stating that "[t]he report of Dr. Mettu does not provide explanation or reasoning for his conclusions. . . ." *Id*.

The administrative law judge has broad discretion in assessing the credibility of the medical experts and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121 (6th Cir. 1989); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). In the present case, the administrative law judge rationally determined that Dr. Mettu's opinion was not adequately reasoned, as he did not explain his conclusion, that coal dust exposure significantly aggravated claimant's disabling impairment, or link it to the medical tests that he performed. *See Stephens*, 298

F3d. at 522, 22 BLR at 2-512; *see also Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-202, 2-221 (6th Cir. 2009); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1988). *Id*. at 15-16. Thus, contrary to the Director's statement, quoted *supra*, the administrative law judge has wholly discredited Dr. Mettu's opinion relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We therefore affirm the administrative law judge's credibility finding with regard to Dr. Mettu, as it is rational and supported by substantial evidence.[6]

Because the administrative law judge permissibly determined that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), an essential element of entitlement, we also affirm the denial of benefits. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[6] In light of our affirmance of the administrative law judge's discrediting of Dr. Mettu's opinion, that claimant has pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), we need not address the arguments of the Director, Office of Workers' Compensation Programs, regarding the administrative law judge's weighing of the contrary opinions of Drs. Broudy and Westerfield, that claimant does not have pneumoconiosis, under 20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits, is affirmed.

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