BRB No. 11-0784 BLA

LOIS JEAN BELCHER (Widow of CHARLES BELCHER)	)	
Claimant-Petitioner	)	
v.	)	
PIKEVILLE COAL COMPANY	)	DATE ISSUED: 08/16/2012
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05485) of Administrative Law Judge Theresa C. Timlin, with respect to a survivor's claim filed on July 1, 2009, 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] The administrative law judge credited the miner with thirty-two years of coal mine employment, based on the parties' stipulation, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that, because claimant did not establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), the rebuttable presumption of death due to pneumoconiosis, set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), does not apply.[2] Further, the administrative law judge concluded that claimant did not establish that the miner had pneumoconiosis at 20 C.F.R. §718.202(a) and, thus, did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant did not invoke the amended Section 411(c)(4) presumption. In the alternative, claimant asserts that the evidence establishes that the miner had pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), and that his death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[3]

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[1] Claimant is the widow of a miner, Charles Belcher, who died on May 26, 2006. Director's Exhibit 10. The miner filed a claim for benefits on June 10, 1987, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. on August 2, 1991. Director's Exhibit 1 at 104, 570. The Board affirmed the denial of benefits on September 28, 1992. *Belcher v. Pikeville Coal Co.*, BRB No. 91-2062 BLA (Sept. 28, 1992)(unpub.).

[2] Amended Section 411(c)(4) of the Act applies to claims filed after January 1, 2005, that were pending on March 23, 2010. 30 U.S.C. §921(c)(4). In relevant part, this provision contains a rebuttable presumption that a miner's death was due to pneumoconiosis, if he or she had fifteen or more years of underground, or substantially similar, coal mine employment and suffered from a totally disabling respiratory or pulmonary impairment.

[3] We affirm, as unchallenged on appeal, the administrative law judge's decision to credit the miner with thirty-two years of coal mine employment and her findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), or that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[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).

I. Invocation of the Amended Section 411(c)(4) Presumption

The administrative law judge considered whether claimant proved that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 14-15. The administrative law judge initially determined that, because the record did not contain any pulmonary function or blood gas studies post-dating the miner's denied claim, and did not contain any evidence of cor pulmonale with right-sided congestive heart failure, claimant did not satisfy the requirements of 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id*. The administrative law judge also determined that the medical opinion evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 15-16. Therefore, the administrative law judge concluded that claimant did not invoke the presumption at amended Section 411(c)(4). *Id*. at 16.

Claimant argues that the administrative law judge incorrectly found that Dr. Fannin "did not give an opinion specific to total disability." Claimant's Brief at 14, *quoting* Decision and Order at 16. In addition, claimant asserts that the administrative law judge erred in discrediting Dr. Fannin's opinion because the objective tests he relied on were not admitted into evidence, as 20 C.F.R. §718.204(b)(2)(iv) does not contain such a requirement. Claimant further states that Dr. Fannin's opinion was "entitled to special consideration" and "should be given controlling weight," pursuant to 20 C.F.R. §718.104(d)(5), based on Dr. Fannin's status as the miner's treating physician. Claimant's Brief at 16. Claimant also contends that the administrative law judge incorrectly "minimized" Dr. Jarboe's opinion. *Id*.

We reject claimant's allegations of error. Dr. Fannin, one of the miner's treating physicians, testified that he reviewed pulmonary function and blood gas studies from 1987 and blood gas studies from the miner's hospitalization prior to his death in 2006. Employer's Exhibit 8 at 15. When asked whether the miner was totally disabled due to his respiratory condition, Dr. Fannin stated that the miner "had to limit what he did" and that "his impairment was significant enough to where he couldn't do normal activities."

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

Id. at 23. However, none of the studies that purportedly support Dr. Fannin's opinion was admitted into the record, nor did Dr. Fannin describe the values that they produced. Therefore, contrary to claimant's assertion, the administrative law judge acted within her discretion as fact-finder in discrediting Dr. Fannin's opinion under 20 C.F.R. §718.204(b)(2)(iv), as Dr. Fannin did not set "forth any objective evidence on the issue of total disability." Decision and Order at 16; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Employer's Exhibit 8.

Moreover, Dr. Fannin's opinion was not automatically entitled to additional weight, based on his status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit has held that an administrative law judge is not required to accord greater weight to the opinion of a treating physician based on that status alone. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003). Rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-646. Similarly, 20 C.F.R. §718.104(d)(5) provides that, "[i]In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge rationally determined that Dr. Fannin's diagnosis of total disability was entitled to little weight because it was not adequately documented. *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 2-494 (6th Cir. 2002). Accordingly, we affirm the administrative law judge's finding that Dr. Fannin's opinion was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

We also hold that there is no merit in claimant's assertion that the administrative law judge should have determined that Dr. Jarboe diagnosed a totally disabling respiratory impairment. As claimant acknowledges, Dr. Jarboe testified, based on a set of assumptions proposed by claimant's counsel, that the miner "might be disabled," but that he could not say for certain, based on the lack of objective evidence and the fact that not everyone using supplemental oxygen needs it. Employer's Exhibit 5 at 26-27. Accordingly, the administrative law judge acted within her discretion in giving less weight to Dr. Jarboe's opinion because it was equivocal. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995). Because claimant did not establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), we

affirm the administrative law judge's determination that claimant did not invoke the amended Section 411(c)(4) presumption.

II. Establishing Entitlement Without Benefit of the Presumption

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, in which the rebuttable presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not applicable, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

A. The Existence of Pneumoconiosis

1. Legal Pneumoconiosis

Claimant alleges that the administrative law judge erred in determining that Dr. Fannin's opinion, that the miner had a respiratory impairment related to coal dust exposure, was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[5] *See* Decision and Order at 12; Director's Exhibit 14; Employer's Exhibit 8. We disagree. As previously indicated, the administrative law judge rationally determined that Dr. Fannin's opinion was not entitled to additional weight, based on his status as a treating physician, as his diagnosis was not adequately documented. *See Williams*, 338 F.3d at 513, 22 BLR at 2-646; *Odom*, 342 F.3d at 492, 22 BLR at 2-622. Therefore, we affirm the administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[5] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

2. Clinical Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered three readings of an x-ray dated April 19, 2006 and three readings of an x-ray dated May 20, 2006. Decision and Order at 5. The administrative law judge noted that Dr. Jarboe, a B reader, and Dr. Abramowitz, dually-qualified as a Board-certified radiologist and B reader, read both films as negative for pneumoconiosis, while Dr. Alexander, who is also a dually-qualified radiologist, read both films as positive for the disease. *Id.*; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 6, 7. The administrative law judge found that, although the x-ray interpretations of Drs. Abramowitz and Alexander were equally probative, Dr. Jarboe's negative readings "tip[ped] the balance toward a negative finding." Decision and Order at 6. The administrative law judge concluded, therefore, that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis.[6]

Claimant argues that the administrative law judge erred in relying on Dr. Jarboe's x-ray interpretations to determine that the x-rays dated April 19, 2006 and May 20, 2006, were negative for pneumoconiosis. We agree. Claimant asserts correctly that Dr. Jarboe's readings were not admitted into the record, as employer withdrew them at the hearing. Hearing Transcript at 10. Because the administrative law judge relied, in part, upon evidence that is not in the record to determine that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, we must vacate her finding and remand the case to her for consideration of only the x-ray evidence admitted into the record. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

The administrative law judge also considered whether claimant established the existence of clinical pneumoconiosis, based on the readings of a CT scan obtained on April 16, 2006. Decision and Order at 11-12. The administrative law judge found that the readings by Drs. Abramowitz and Alexander were "suggestive of pneumoconiosis," but were outweighed by "the chest x-ray evidence and the absence of a well-documented medical opinion that [the miner had] pneumoconiosis."[7] *Id*. at 13; see Claimant's Exhibit

[6] Clinical pneumoconiosis is defined as "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).

[7] Dr. Abramowitz indicated that the CT scan showed hyper-expanded lungs with bilateral bullous and interstitial lung disease. Employer's Exhibit 7. Dr. Alexander read the scan as showing multiple reticulonodular densities consistent with simple coal

3; Employer's Exhibit 1. We agree with claimant that, because the administrative law judge relied on her improper consideration of the x-ray evidence at 20 C.F.R. §718.202(a)(1), we must vacate her determination that the CT scan evidence was insufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Tackett*, 7 BLR at 1-706; *McCune*, 6 BLR at 1-988.

In weighing the x-ray and CT scan evidence on remand, the administrative law judge must be aware that the Sixth Circuit has held that 20 C.F.R. §718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis.[8] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Thus, contrary to the administrative law judge's finding that the x-ray and medical opinion evidence outweighed the CT scan evidence, she must consider separately whether the x-ray evidence is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and whether the CT scan evidence is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §§718.107 and 718.202(a)(4).[9] *Id.*, 227 F.3d at 576-77, 22 BLR at 2-121-22. If the administrative law judge finds that claimant has established the existence of pneumoconiosis by one of these methods, she must conclude that claimant has met her burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id*.

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workers' pneumoconiosis. Claimant's Exhibit 3. Dr. Alexander further noted that CT scans are best used to determine if large opacities of complicated coal workers' pneumoconiosis are present and should not be used to classify simple pneumoconiosis. *Id*. According to Dr. Alexander, x-rays must be used for the latter purpose. *Id*.

[8] The administrative law judge must exclude Dr. Jarboe's reading of the April 16, 2006 CT scan from consideration on remand, as employer withdrew it from the record. *See* Hearing Transcript at 10. The administrative law judge acknowledged Dr. Jarboe's negative interpretation, but found that the readings by Drs. Abramowitz and Alexander were entitled to greater weight, based upon their superior qualifications. Decision and Order at 12; Employer's Exhibits 3, 5.

[9] The administrative law judge relied on *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997), to assert that she had to "consider the CT scan evidence in conjunction with all of the contrary probative evidence." Decision and Order at 5, 12. However, in *Hill*, when the Sixth Circuit stated an administrative law judge must weigh "all contrary probative evidence," the court cited to 20 C.F.R. §718.204(c) (2000), the regulation under which a claimant established total disability, not the existence of pneumoconiosis. *Hill*, 123 F.3d at 416, 21 BLR at 2-197-98.

When rendering her findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale, as required by 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), 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

B. Death Due to Pneumoconiosis

Because the administrative law judge's finding that claimant did not prove that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) was based on her determination that claimant did not establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a), we also vacate this finding. *See* Decision and Order at 16-18. If the administrative law judge finds that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a) on remand, she must then determine whether the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and must set forth her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying 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