

BRB No. 10-0220 BLA

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| DONALD HALL |) | |
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| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| U.S. STEEL MINING CORPORATION |) | |
| |) | DATE ISSUED: 01/27/2011 |
| 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 – Awarding Benefits of Michael Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

Maia S. Fisher (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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (2008-BLA-5439) of Administrative Law Judge Michael Lesniak rendered on a subsequent claim filed 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). Upon stipulation of the parties, the administrative law judge credited claimant with twenty-two years of qualifying coal mine

employment, and adjudicated this subsequent claim,¹ filed on June 13, 2007, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found the newly submitted evidence sufficient to establish the existence of legal pneumoconiosis and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), respectively, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence on the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant has not responded to employer's brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in this case.²

By Order dated April 15, 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. *Hall v. U.S. Steel Mining Corporation*, BRB No. 10-0220 BLA (April 15, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).³ Employer and the Director have

¹ Claimant's initial claim was filed on May 29, 1990, and was denied by the district director on October 26, 1990, because he found that the evidence was insufficient to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim was filed on May 30, 2001, and was denied by the district director on January 4, 2002, because he found that the evidence was insufficient to establish any element of entitlement. Director's Exhibit 2.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), and thus, a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be

responded. Employer contends that the recent amendments are not applicable, arguing that the Patient Protection and Affordable Care Act, P.L. No. 111-148, is unconstitutional and its validity is currently being challenged in the courts; retroactive application of the amendments is unconstitutional; the amendments conflict with other provisions of the Act; implementing regulations have not yet been promulgated; and the amendments violate 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).⁴ Employer further asserts that, even if the amendments are constitutional, they do not apply to the instant claim, as claimant failed to establish that he was engaged in underground coal mine employment for fifteen years, and his original claim was filed prior to January 1, 2005.⁵ The Director maintains that, in the event the Board vacates the administrative law judge's findings, it must remand this case for consideration of the impact of the recent amendments to the Act. If the rebuttable presumption is applicable, the Director asserts that the administrative law judge should allow the parties to proffer additional evidence, consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414,⁶ as application of the amended Section 411(c)(4) will alter the parties' burdens of proof and impose on employer the obligation of showing either that the miner did not suffer from pneumoconiosis or that his disability was unrelated to pneumoconiosis, in order to defeat entitlement.

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,

codified at 30 U.S.C. §921(c)(4)).

⁴ For the reasons set forth in the Board's Decision and Order in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(recon. pending), we reject employer's arguments concerning the constitutionality and applicability of the recent amendments.

⁵ While employer asserts that claimant cannot rely on the date he requested modification, rather than the date he filed his claim, to trigger eligibility for consideration under the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge properly found that the instant claim is a subsequent claim filed on June 13, 2007. *See* 20 C.F.R. §725.309(d); *Stacy v. Olga Coal Co.*, ___ BLR 1-___, BRB No. 10-0113 BLA (Dec. 22, 2010); Decision and Order at 2.

⁶ A showing of "good cause" is necessary in the event that a party seeks to convince the administrative law judge that the submission of additional medical evidence, either in the form of a documentary report or testimony, is justified. *See* 65 Fed. Reg. 79,993 (Dec 20, 2000); 20 C.F.R. §725.456(b)(1).

and in accordance with applicable law.⁷ 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).

Employer challenges the administrative law judge’s reliance on the opinions of Drs. Begley and Schaaf, over the contrary opinions of Drs. Kaplan and Fino, to support his finding that the medical opinion evidence of record was sufficient to establish the existence of legal pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c), respectively. Employer’s Brief at 15-23. Employer asserts that the opinion of Dr. Begley is insufficient to meet claimant’s burden of proof, as the opinion is internally inconsistent and not supported by Dr. Begley’s medical findings; that the opinion of Dr. Schaaf is not well-reasoned, as it is based on an inaccurate history of claimant’s symptoms; that the administrative law judge mischaracterized the opinions of Drs. Fino and Kaplan; and that the administrative law judge failed to weigh all relevant evidence together in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Some of employer’s arguments have merit.

In evaluating the conflicting medical opinions of record, the administrative law judge summarized the opinions of Drs. Begley,⁸ Schaaf, Kaplan, and Fino, and initially determined that the evidence established that claimant has chronic obstructive pulmonary disease (COPD), based on the well-reasoned and documented opinions of all four physicians. The administrative law judge then credited the opinions of Drs. Begley and Schaaf,⁹ that claimant’s COPD is related to coal dust exposure and smoking, over the

⁷ The law of the United States Court of Appeals for the Third Circuit is applicable, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibit 2.

⁸ Dr. Begley examined claimant on August 31, 2007, and diagnosed ischemic heart disease, as well as a severe obstructive impairment consistent with coal workers’ pneumoconiosis and COPD due to smoking and coal dust. He opined that claimant cannot perform the work of a coal miner due to his 40% impairment, of which smoking accounts for 90% of the impairment and coal dust accounts for 10%. Dr. Begley opined that the CT scan findings in the treatment records, which reflected “pulmonary emphysema, some fibrosis, and multiple pulmonary nodules,” are “consistent with coal dust related lung disease.” Claimant’s Exhibit 10; Director’s Exhibit 12.

⁹ Dr. Schaaf examined claimant on August 21, 2008, and diagnosed coal workers’ pneumoconiosis based on a positive x-ray, and COPD that was substantially contributed to by claimant’s coal dust exposure and his pneumoconiosis. He stated that coal dust exposure and chronic industrial bronchitis are significant contributing factors to

contrary opinions of Drs. Fino and Kaplan, that claimant's COPD is due solely to smoking. Decision and Order at 10. The administrative law judge gave less weight to the opinions of Drs. Fino¹⁰ and Kaplan, that claimant does not have legal pneumoconiosis and that his disabling COPD, chronic bronchitis, and emphysema are due entirely to smoking, as he found that the literature cited by Dr. Fino was not helpful in eliminating either smoking or coal dust as a contributing factor; that Dr. Fino failed to discuss the relevance of the literature in relation to claimant's particular condition; and that Dr. Fino appeared to rely heavily on claimant's negative x-rays in finding that coal dust was not a contributing factor to claimant's emphysema. Decision and Order at 11-12. With respect to Dr. Kaplan,¹¹ the administrative law judge determined that he appeared to base his opinion on the fact that the doctor had never personally seen a case in which a miner was radiographically negative for pneumoconiosis and disabled due to coal dust exposure, absent an underlying condition such as asthma, a rationale that the administrative law judge found to be unsupported by the studies relied upon by the Department of Labor in amending the regulations. Decision and Order at 11. The administrative law judge determined that Dr. Kaplan's opinion was not well-reasoned or documented, as the doctor

claimant's totally disabling obstructive airway disease. Dr. Schaaf opined that claimant's symptoms of chronic industrial bronchitis began at the time claimant was working in the coal mines. Dr. Schaaf provided an independent reading of the CT scans in claimant's treatment records, and noted the presence of a small nodule at the right base and additional small nodules at the left base, emphysema in the upper lung zones, and a small nodular density about 5mm in diameter near the right apex. Claimant's Exhibits 2, 9.

¹⁰ Dr. Fino examined claimant on April 17, 2008, and diagnosed COPD with chronic obstructive bronchitis and emphysema related to smoking. Dr. Fino opined that it is possible to determine whether smoking alone, coal dust alone, or a combination are significant contributing factors in a respiratory impairment, based on whether or not there is an above-average amount of coal dust in the lung tissue. After reviewing the medical literature with respect to these issues, he opined that claimant's disabling respiratory impairment arose from cigarette smoking, and that coal mine dust had "no more than an average effect on his lungs, which is a clinically insignificant amount of FEV1 loss based on calculations from the above-cited literature." Employer's Exhibit 2.

¹¹ Dr. Kaplan examined claimant on April 23, 2008, and diagnosed COPD with features of chronic bronchitis, emphysema, and chronic airflow obstruction attributable to smoking. Dr. Kaplan independently reviewed the CT scans from claimant's treatment records, and determined that there was no interstitial disease to suggest coal workers' pneumoconiosis, as there were "just a few" sub-centimeter nodules present, rather than a myriad of nodules as seen with coal workers' pneumoconiosis. Employer's Exhibit 3 at 10-11.

did not “indicate that there was something particular to claimant’s physical condition that would cause him to rule out coal dust exposure as a contributing factor to claimant’s COPD.” *Id.*

Without explaining the basis for his finding, the administrative law judge found that Dr. Begley’s opinion was well-reasoned and documented, noting that the doctor was aware of claimant’s employment and smoking histories and that he reviewed the CT scan reports contained in claimant’s treatment records. Decision and Order at 12; Director’s Exhibit 12; Claimant’s Exhibit 10. The administrative law judge also credited the opinion of Dr. Schaaf, that claimant had chronic industrial bronchitis due to cigarette smoking and coal dust exposure, noting that the record was “unclear” as to the onset of claimant’s cough;¹² that the doctor testified only that a chronic cough typically begins while a person is still exposed to dust rather than always beginning at that time; and that the studies relied on by the Department of Labor found that a miner can be asymptomatic, and without significant impairment at the time of retirement. Decision and Order at 12, *citing* 65 Fed. Reg. 79,971 (Dec. 20, 2000); Claimant’s Exhibits 2, 9. Additionally, the administrative law judge determined that Dr. Schaaf based his opinion on claimant’s overall exposure to coal dust, claimant’s symptoms, and claimant’s smoking, employment and medical histories. Decision and Order at 12-13; Claimant’s Exhibits 2, 9.

Based on the administrative law judge’s weighing of the evidence, we are unable to affirm the award of benefits, as the administrative law judge applied an inconsistent standard when assessing the credibility of the medical opinions. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*). The APA requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge failed to subject all of the conflicting medical opinions to the same scrutiny, as he discounted the opinions of Drs. Kaplan and Fino for failing to adequately explain why coal dust was not a contributing or aggravating factor in claimant’s COPD, while crediting the opinions of Drs. Begley and Schaaf, that claimant’s impairment was due to coal dust and smoking, without requiring a similarly detailed explanation as to why coal dust exposure was a contributing factor. *See Wojtowicz*, 12 BLR at 1-165; *see also Clark v. Karst-Robbins*

¹² Dr. Begley testified that claimant’s cough began in 1997. Claimant’s Exhibit 10 at 27. Dr. Kaplan noted in 2008 that “for years, [claimant] has had a daily cough.” Employer’s Exhibit 1. Dr. Fino related a medical history of chronic bronchitis since 1980. In 2006, claimant reported to Dr. Schaaf that his cough began in 1989. In 2008, he told Dr. Schaaf that his cough began in 1987, but that his symptoms had been going on for sometime prior to that. Claimant’s Exhibit 9 at 8.

Coal Co., 12 BLR 1-149, 1-155 (1989)(*en banc*). We find merit in employer's argument that the administrative law judge failed to provide an adequate explanation for finding Dr. Begley's opinion to be well-reasoned, well-documented, and sufficient to establish the existence of legal pneumoconiosis and disability causation. Employer's Brief at 15. While Dr. Begley opined that coal dust exposure was a substantially contributing factor in claimant's COPD, the physician indicated that claimant's pneumoconiosis comprised only 10% of claimant's 40% disability, based generally on claimant's twenty years of smoking and twenty-one years of coal dust exposure, and the administrative law judge did not explain how Dr. Begley's conclusions were supported by his medical findings. The administrative law judge also failed to explain why he credited Dr. Begley's testimony, that the nodules present on claimant's CT scans supported his conclusion that coal dust exposure substantially contributed to claimant's impairment, and that there was no evidence that smoking caused those nodules, over Dr. Kaplan's testimony that the nodules were caused by smoking and not occupational exposure because they were few in number and they remained stable in size and appearance over time. *See Wojtowicz*, 12 BLR at 1-165; *Clark*, 12 BLR at 1-155; *see generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985); Decision and Order at 12; Claimant's Exhibit 10; Director's Exhibit 12; Employer's Exhibit 3. Further, the administrative law judge did not explain how Dr. Schaaf, who based his opinion on claimant's symptoms and his smoking, employment and medical histories, was better able to link his general medical determinations with claimant's individual circumstances, than were Drs. Fino and Kaplan, who also examined claimant and relied on claimant's symptoms and his smoking, employment and medical histories, in opining that claimant's COPD was due solely to smoking. Employer's Exhibits 1-3; Claimant's Exhibits 2, 9. Additionally, we agree with employer's argument that the administrative law judge mischaracterized Dr. Kaplan's opinion. The administrative law judge inferred that Dr. Kaplan ruled out coal dust exposure as a cause of claimant's COPD, based largely on the physician's testimony that he personally had never seen a case in which a coal miner was radiographically negative for pneumoconiosis and disabled due to coal dust exposure, absent an underlying condition. Decision and Order at 11. While the administrative law judge noted that the Department of Labor had reviewed the medical literature and found that there was a consensus among scientists that coal dust causes clinically significant COPD, Dr. Kaplan also testified that it was possible for a miner to be radiographically negative for pneumoconiosis and be disabled due to coal dust exposure, and that coal dust exposure can cause industrial bronchitis resulting in impairment. Employer's Exhibit 3 at 15-18. Thus, the administrative law judge's finding that the opinions of Drs. Begley and Schaaf outweighed the contrary opinions of Drs. Kaplan and Fino cannot be affirmed. *See Hughes*, 21 BLR at 1-139-40.

In view of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section

718.202(a)(4), and remand this case for a reevaluation of the medical opinions thereunder. On remand, the administrative law judge must weigh all relevant medical evidence together in accordance with *Williams*, 114 F.3d at 25, 21 BLR at 2-111, and resolve the conflict in the testimony of the various physicians regarding the nodules seen on x-ray and CT scan, as it relates to legal pneumoconiosis. The administrative law judge must also address and weigh the evidence submitted in connection with claimant's prior claims, when adjudicating the merits of his present claim. See 20 C.F.R. §725.309(d). Because we vacate the administrative law judge's findings at Section 718.202(a)(4), we also vacate the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c).

On remand, the administrative law judge must initially determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). As invocation of the presumption requires a determination that claimant worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine, see *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988), and claimant's coal mine work as an electrician involved cleaning and repairing equipment both underground and on the surface, the administrative law judge must determine whether claimant's twenty-two years of coal mine employment were equivalent to at least fifteen years of underground employment. If the administrative law judge determines that the presumption is invoked, he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must 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, 11047-50, 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, any additional evidence submitted must be consistent 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 pursuant to 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c). The administrative law judge has fully discussed the evidence of record, rationally resolved the conflicts therein, and provided multiple valid reasons for his credibility determinations. Therefore, I would affirm the administrative law judge's findings in all respects, and affirm his award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge