

BRB No. 10-0299 BLA

JAMES D. BROCK)
)
 Claimant-Respondent)
)
 v.)
)
 CAMPBRANCH COAL COMPANY,)
 INCORPORATED)
) DATE ISSUED: 01/11/2011
 and)
)
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2004-BLA-6558) of Administrative Law Judge Alice M. Craft issued on a claim filed on May

23, 2003,¹ 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 the second time. The Board previously affirmed the administrative law judge's findings that the claim was timely filed pursuant to 20 C.F.R. §725.308, that claimant worked fifteen years in coal mine employment, and that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *J.B. [Brock] v. Campbranch Coal Co.*, BRB No. 07-0484 BLA, slip op. at 5, 9 (Mar. 31, 2008) (unpub.)² The Board, however, vacated the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), based on the medical opinions of Drs. Rasmussen and Cadle, because she failed to render a specific finding as to the exertional requirements of claimant's usual coal mine work. *Id.* The Board also vacated her finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Thus, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration.

On remand, the administrative law judge determined, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that claimant's usual coal mine work involved heavy manual labor and that the medical opinion evidence was sufficient to establish that claimant has a totally disabling respiratory impairment. Based on her consideration of all of the record evidence, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence was sufficient to establish that claimant is totally disabled due pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant's usual coal mine employment required heavy manual labor, and her determination that claimant is totally disabled. Employer also contends that the administrative law judge erred in her consideration of the evidence relevant to the issue of disability causation. Claimant responds to employer's appeal, urging affirmance of the

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

² The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *J.B. [Brock] v. Campbranch Coal Co.*, BRB No. 07-0484 BLA, slip op. at 5 n.3 (Mar. 31, 2008) (unpub.).

award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Employer has also filed a reply brief.

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.³ 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 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*).

Employer asserts that the administrative law judge erred in finding that claimant is totally disabled. In addressing the issue of total disability on remand, the administrative law judge first considered the exertional requirements of claimant's usual coal mine work. She stated:

Claimant testified that he worked in several different mines. He ran power equipment to cut and scoop coal, and drilled and shot coal "from the solid" at the face of the coal. He was also a foreman and a superintendent. [Hearing Transcript] at 16. He had to lift and carry heavy equipment and rock dust weighing as much as 40, 80, or 100 pounds. [Hearing Transcript] at 17 18. He had to crawl as much as 2000 feet. He said he no longer had the wind to do that kind of work. [Hearing Transcript] at 18. His last job for the Employer was as superintendent, supervising 5 to 15 people. He was responsible for the entire operation of the mine. [Hearing Transcript] at 27.

Decision and Order on Remand at 3. The administrative law judge noted that claimant told his treating physician, Dr. Caudill, that when he worked underground, he ran a roof bolter and a cutter, and performed heavy manual labor, which required lifting and carrying of up to 100 pounds. *Id.*; see Claimant's Exhibit 5. The administrative law

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

judge further noted that claimant's job as a foreman was described by Dr. Rasmussen as requiring claimant to work underground daily, operate equipment, unload supplies, set timbers, rock dust and shovel. Director's Exhibit 12. Additionally, the administrative law judge noted that claimant completed a Department of Labor (DOL) Form CM-913 "Description of Coal Mine Employment," indicating that he last worked as a mine foreman or supervisor and was required to "Buy all supplies for mine. Give orders on which job had to be done. Make sure that the mines [were] run right." *Id.* She also noted that claimant reported that he sat for two hours, stood for three hours, crawled one mile for three hours a day, and that he was required to lift and to carry fifty pounds, ten times a day, and twenty or twenty-five pounds, twenty to thirty times a day. *Id.* Following her summary of the evidence, the administrative law judge concluded:

Claimant contends that his job required him to perform heavy manual labor. The Employer disagrees, citing to portions of the record indicating that less exertion was required. But considering all of the evidence in the record on this issue, I find that the Claimant's job as a foreman or superintendent required him to perform heavy manual labor.

Decision and Order on Remand at 3.

On appeal, employer asserts that the administrative law judge "failed to properly consider the relevant evidence relating solely to claimant's most recent employment" and that she failed to explain her finding, that claimant's job as a foreman or a superintendent required heavy manual labor, in accordance with the Administrative Procedure Act (APA).⁴ Employer's arguments have merit.

Employer asserts correctly that, while the administrative law judge acknowledged the conflict in the record regarding whether claimant's work for employer required heavy manual labor, she did not explain how she resolved that conflict, as required by the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Instead, she summarily stated that the record as a whole supported her finding that claimant's work required heavy manual labor. The administrative law judge has made no distinction in this case between claimant's description of the exertional requirements of his earlier coal mine employment and his work for employer. We agree with employer that the administrative law judge erred in failing to consider that the exertional requirements described by claimant on

⁴ The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Form CM -913 pertain to the job he held from January 6, 1987 to January 6, 1989, and not his most recent coal mine job as a superintendent for employer from September 1990 to September 1991. *See* Director's Exhibit 4. The administrative law judge has also not addressed the fact that the work descriptions claimant provided to Drs. Caudill and Rasmussen included duties he performed in prior jobs.

The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). Because claimant bears the burden of establishing the exertional requirements of his usual coal mine work, and the administrative law judge has not rendered a specific finding as to the exertional requirements of claimant's job with employer, as a superintendent, from September 1990 to September 1991, we vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and her finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*).

On remand, the administrative law judge is instructed to render a specific finding as to the exertional requirements of claimant's usual coal mine work with employer, and consider whether the physicians had an accurate understanding of this work, prior to finding that claimant has satisfied his burden of proving total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). As necessary, the administrative law judge must also determine whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 214 (2002) (*en banc*). In reaching all of her credibility determinations on remand, the administrative law judge must comply with the APA and explain the bases for all of her findings of fact and conclusions of law.

Accordingly, the Decision and Order Awarding Benefits on Remand of the administrative law judge is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge