

BRB No. 10-0179 BLA

ERIC E. MORRIS)
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 Claimant-Respondent)
)
 v.)
)
 DAKOTA, LLC)
)
 and) DATE ISSUED: 11/24/2010
)
 WEST VIRGINIA CWP FUND)
 c/o BRICKSTREET MUTUAL)
 INSURANCE COMPANY)
)
 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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell, Keith P. Harmon and Jeff Shevlin (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5116) of Administrative Law Judge Richard A. Morgan with respect to a miner's claim filed on January 10, 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with over thirty years of coal mine employment. The administrative law judge found the medical opinion evidence established the existence of clinical and legal pneumoconiosis¹ arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4)² and 718.203(b). Further, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b),³ and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

¹ "Clinical pneumoconiosis" consists of 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes 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 The administrative law judge found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3).

³ Although the administrative law judge found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), he found that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Further, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response brief in this appeal.⁴

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated April 29, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Morris v. Dakota, LLC*, BRB No. 10-0179 BLA (Apr. 29 2010)(unpub. Order). Claimant, employer, and the Director respond.

Claimant urges affirmance of the administrative law judge's award of benefits, but states that, if the award is vacated, the case must be remanded because the recent amendments are applicable to his claim, inasmuch as he has more than fifteen years of coal mine employment, he has been diagnosed with pneumoconiosis, and he has a totally disabling pulmonary impairment.

The Director states that the 2010 amendments will not affect this case if the Board affirms the administrative law judge's award of benefits. However, 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), would be required, as the present claim was filed after January 1, 2005, it was pending on March 23, 2010, and

⁴ Because the administrative law judge's length of coal mine employment finding and his findings that the medical opinion evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the administrative law judge credited claimant with more than fifteen years of coal mine employment. In addition, the Director states that, if the case is remanded for consideration under Section 411(c)(4), 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, or upon a showing of good cause under 20 C.F.R. §725.456.

Employer indicates that the recent amendment at Section 411(c)(4) may affect this claim, based on the filing date of the claim and claimant's coal mine employment history. Alternatively, employer argues that the recent amendment at Section 411(c)(4) may not apply in this case because the Board could reverse or vacate the administrative law judge's finding that total respiratory disability was established. If, however, the case is remanded to the administrative law judge for consideration under Section 411(c)(4), employer maintains that due process requires that it be allowed to develop evidence, without limit, addressing the new standards created by the amendment. Lastly, employer argues that retroactive application of the amendments is unconstitutional because it denies the operator due process and constitutes an unconstitutional taking of private property.

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.⁵ 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 living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Initially, we will address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record consists of the opinions of Drs. Poling, Hippensteel, Mullins, Zaldivar, and Rosenberg. In a report dated May 11, 2009, Dr. Poling opined that claimant has coal workers' pneumoconiosis and asthma.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, Office of Workers' Compensation Programs*, 12 BLR 1-200, 1-202 (1989 (*en banc*)); Director's Exhibit 3.

Claimant's Exhibit 4. In a report dated May 9, 2005, Dr. Hippensteel stated, "it does not appear like [claimant] has clinically significant emphysema" and "it can be made as a general statement that dusty environments are not good for people with asthma and [I] think that is his main diagnosis." Claimant's Exhibit 6. In a report dated May 16, 2007, Dr. Mullins opined that claimant has coal workers' pneumoconiosis and chronic obstructive pulmonary disease related to coal workers' pneumoconiosis and asthma. Director's Exhibit 9. In a subsequent letter filed on April 13, 2009, Dr. Mullins opined that claimant's asthma was not occupational.⁶ Employer's Exhibit 18. In a report dated September 6, 2007, Dr. Zaldivar opined that claimant has coal workers' pneumoconiosis and asthma. Employer's Exhibit 1. In a report dated September 3, 2008, Dr. Rosenberg opined that claimant has coal workers' pneumoconiosis and a pulmonary impairment caused by asthma that is unrelated to coal mine dust exposure. Employer's Exhibit 14.

In addressing the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge gave less weight to the opinions of Drs. Zaldivar and Rosenberg because he found that they were based on generalities, rather than the specific facts of claimant's condition. Decision and Order at 21. The administrative law judge additionally gave less weight to the opinions of Drs. Zaldivar and Rosenberg because their conclusion that coal dust exposure is not known to cause occupational asthma conflicts with the regulations, which require merely that coal dust exacerbate or aggravate the pulmonary condition. *Id.* The administrative law judge also gave less weight to the opinion of Dr. Rosenberg because Dr. Rosenberg's assessment of pulmonary function study results was inconsistent with the doctor's assessment of claimant's response to treatment for his asthma. *Id.* Further, the administrative law judge gave special consideration to Dr. Poling's opinion because of the doctor's status as claimant's treating physician. *Id.* at 21-22. In addition, the administrative law judge indicated that Dr. Poling's opinion was supported by Dr. Hippensteel's opinion, inasmuch as the administrative law judge stated that "Dr. Hippensteel diagnosed asthma and noted that coal mine dust exposure can aggravate the claimant's asthma." *Id.* at 22. Hence, based on his determination that Dr. Poling concluded that claimant's coal mine dust exposure and pneumoconiosis aggravated his asthma, the administrative law judge found that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Employer asserts that the administrative law judge erred in relying on Dr. Poling's opinion to establish the existence of legal pneumoconiosis. As noted above, Dr. Poling opined that claimant has clinical pneumoconiosis and asthma. Claimant's Exhibit 4. The administrative law judge found that "[Dr. Poling] concluded that the [c]laimant's

⁶ The administrative law judge did not address Dr. Mullins's report with regard to the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

exposure to coal mine dust and pneumoconiosis are aggravating his asthma.” Decision and Order at 22. Hence, based on Dr. Poling’s opinion, the administrative law judge found that claimant met his burden of establishing the existence of legal pneumoconiosis. *Id.* Contrary to the administrative law judge’s finding, however, Dr. Poling did not opine that claimant’s asthma was aggravated by his coal dust exposure. Claimant’s Exhibit 4. Rather, after opining that claimant has coal workers’ pneumoconiosis, Dr. Poling stated:

[Claimant] worked in the coal mines for approximately 30 years. He was exposed to dust all during this time. [Claimant] does not smoke. He does have bad asthma which contributes to his breathing problems. He is on aggressive treatment for his asthma but still does not improve to the point he should if this was asthma alone causing his breathing problems.

Id.

As discussed *supra*, Section 718.201(a)(2) provides that “legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Here, Dr. Poling did not opine that claimant’s asthma was related to coal dust exposure. Claimant’s Exhibit 4. Thus, the administrative law judge mischaracterized Dr. Poling’s opinion by finding that Dr. Poling concluded that claimant’s coal mine dust exposure and pneumoconiosis aggravated his asthma. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Consequently, we vacate the administrative law judge’s finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the evidence.

Next, we address employer’s contention that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer asserts that Dr. Poling relied on a pulmonary function study that was not in the record. Employer also asserts that Dr. Poling did not have a complete picture of claimant’s condition. Further, employer asserts that Dr. Poling did not indicate that he had knowledge of the duties of claimant’s usual coal mine employment.

The administrative law judge considered the opinions of Drs. Poling, Mullins, Zaldivar, and Rosenberg.⁷ In a report dated May 11, 2009, Dr. Poling opined that

⁷ The administrative law judge did not consider Dr. Hippensteel’s opinion at 20 C.F.R. §718.204(b)(2)(iv). In a report dated May 9, 2005, Dr. Hippensteel opined that “[claimant’s] diagnosis of simple [coal workers’ pneumoconiosis] is not associated with permanent impairment enough that it is significant enough to keep him from working in the mines but the dilemma of how to keep his function steady remains before him.”

claimant was totally disabled from his pulmonary status. Claimant's Exhibit 4. In a report dated May 16, 2007, Dr. Mullins opined that claimant has a mild to moderate impairment that would have prevented him from performing his last coal mine job. Director's Exhibit 9. In a subsequent letter filed on April 13, 2009, Dr. Mullins opined that claimant was "fairly impaired" due to his asthma. Employer's Exhibit 18. In a report dated September 6, 2007, Dr. Zaldivar opined that claimant was not disabled from a pulmonary standpoint. Employer's Exhibit 1. Dr. Zaldivar opined that, strictly from a pulmonary standpoint, claimant could perform very heavy manual labor. *Id.* In a report dated September 3, 2008, Dr. Rosenberg opined that "with optimal treatment of his asthmatic condition, [claimant] would not be considered disabled from performing his previous coal mining job or other similarly arduous types of labor." Employer's Exhibit 14.

In finding that the medical opinion evidence established that claimant's impairment prevented him from performing his usual coal mine work, the administrative law judge stated, "[a]ll four physicians that conducted examinations and diagnostic tests concluded that the claimant is currently too impaired to consistently perform his usual coal mine duties." Decision and Order at 25. The administrative law judge therefore concluded that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Contrary to the administrative law judge's finding, Drs. Zaldivar and Rosenberg did not opine that claimant has a totally disabling respiratory impairment. As noted above, Dr. Zaldivar opined that claimant was not disabled from a pulmonary standpoint. Employer's Exhibit 1. Additionally, while Dr. Rosenberg opined that claimant has a respiratory impairment caused by hyperactive airways or asthma that was disabling *at times*, the doctor did not opine that claimant's respiratory impairment was totally disabling. Employer's Exhibit 14. Rather, as noted above, Dr. Rosenberg opined that "with optimal treatment of his asthmatic condition, [claimant] would not be considered disabled from performing his previous coal mining job or other similarly arduous types of labor." *Id.* Thus, the administrative law judge mischaracterized the medical opinion evidence by indicating that all of the physicians opined that claimant has a totally disabling respiratory impairment. *Tackett*, 7 BLR at 1-706. Consequently, we vacate the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration of the evidence.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the

Claimant's Exhibit 6.

explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Further, if reached on remand, the administrative law judge must weigh together all of the evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Finally, employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the opinions of Drs. Poling, Hippensteel, Mullins, Zaldivar, and Rosenberg. In a report dated May 11, 2009, Dr. Poling opined that claimant's asthma contributed to his breathing problems, that claimant is totally disabled "from his pulmonary status," and that claimant's black lung/coal workers' pneumoconiosis is a contributing factor. Claimant's Exhibit 4. In a report dated May 9, 2005, Dr. Hippensteel opined that "dusty environments are not good for people with asthma and [I] think that is his main diagnosis." Claimant's Exhibit 6. In a report dated May 16, 2007, Dr. Mullins opined that claimant's coal workers' pneumoconiosis and other conditions contributed to his mild to moderate impairment. Director's Exhibit 9. In a subsequent letter filed on April 13, 2009, Dr. Mullins opined that claimant was "fairly impaired" due to his asthma. Employer's Exhibit 18. In a report dated September 6, 2007, Dr. Zaldivar opined that claimant's pulmonary impairment was caused by his asthma, and not coal workers' pneumoconiosis. Employer's Exhibit 1. In a report dated September 3, 2008, Dr. Rosenberg opined that claimant's pulmonary/respiratory impairment was caused by his asthma, which was unrelated to coal mine dust exposure, and not coal workers' pneumoconiosis. Employer's Exhibit 14.

The administrative law judge gave greater weight to Dr. Poling's opinion than to the contrary opinions of Drs. Zaldivar and Rosenberg because of Dr. Poling's status as claimant's treating physician. Decision and Order at 26-27. In addition, the administrative law judge indicated that Dr. Poling's opinion was supported by the opinions of Drs. Hippensteel and Mullins. *Id.* at 27. The administrative law judge therefore found that claimant established that pneumoconiosis caused his total respiratory disability. *Id.*

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R.

§718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all the evidence in accordance with the Administrative Procedure Act,⁸ if reached. On remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).⁹ *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

At the outset, however, the administrative law judge must consider whether claimant has established invocation of the Section 411(c)(4) presumption. As discussed *supra*, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment,¹⁰ there

⁸ 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 his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁹ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

¹⁰ In this case, as discussed *supra*, the administrative law judge found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). In addition, we herein vacate the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

is a rebuttable presumption that claimant was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, *see* Director's Exhibit 2, and the administrative law judge credited him with over thirty years of coal mine employment, Decision and Order at 5.

On remand, the administrative law judge must determine whether at least fifteen of the thirty years of coal mine employment that the administrative law judge found established in this case occurred 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). The administrative law judge must then determine whether claimant has established invocation of the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

If the administrative law judge finds that claimant is entitled to the presumption at Section 411(c)(4), then the administrative law judge must determine whether the medical evidence rebuts the presumption by showing that claimant did not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Further, 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, 1047-50, 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). As the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Moreover, because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of the amendment to this claim is unconstitutional.

Thus, before the administrative law judge can apply the Section 411(c)(4) presumption in this case, he must reconsider whether the evidence establishes a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings 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