BRB No. 09-0556 BLA

RICHARD BUNCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL FORK MINING, INCORPORATED	)	DATE ISSUED: 04/29/2010
	)	
and	)	
	)	
AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Richard A. Bunch, Wartburg, Tennessee, *pro se*.

H. Ashby Dickerson (Penn Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of legal counsel, appeals the Decision and Order – Denying Benefits (2008-BLA-05509) of Administrative Law Judge Paul C. Johnson, Jr., with respect to a 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). The administrative law judge found that this claim, filed on April 16, 2007, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with fourteen years of coal mine employment, based on the stipulation of the parties at the hearing. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found that claimant failed to establish the applicable condition of entitlement adjudicated against him in the previous claim pursuant to 20 C.F.R. §725.309.[2] The administrative law judge, therefore, denied benefits.

On appeal, claimant contends generally that the administrative law judge erred in denying benefits. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive brief unless requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

[1] The lengthy procedural history of this case is set forth in the administrative law judge's Decision and Order dated March 23, 2009.

[2] The administrative law judge also found that because claimant failed to establish pneumoconiosis, he could not establish that his disability was due to pneumoconiosis at 20 C.F.R. §718.204(c), even though he had established total disability at 20 C.F.R. §718.204(b) in his previous claim. Decision and Order at 12.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Trent*, 11 BLR at 1-27.

Subsequent to the issuance of the administrative law judge's Decision and Order – Denying Benefits, amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, were passed affecting claims filed after January 1, 2005. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of pneumoconiosis and that total disability is due to pneumoconiosis in cases where the miner has established fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

In the current case, the administrative law judge credited claimant with fourteen years of coal mine employment. Decision and Order at 3. While claimant alleged sixteen years of coal mine employment, at the hearing, the parties stipulated to fourteen years. Hearing Transcript at 5-7; Director's Exhibit 4. Specifically, employer's counsel stated that it was "willing to stipulate to what the Department of Labor found, which I believe this last time around was 14 years." Hearing Transcript at 5. In response to the administrative law judge's question as to whether claimant agreed to the stipulation, the following discussion occurred between the administrative law judge and claimant's counsel:

> MR. AGEE: We think that there is actually more, but we would stipulate to the 14 years of coal mine employment.
>
> JUDGE JOHNSON: For purposes of presumption, it doesn't make any difference.
>
> MR. AGEE: That is correct, Your Honor.

Hearing Transcript at 7.

Because claimant filed his current claim after January 1, 2005, and has established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), whether claimant has fifteen or more years of coal mine employment is relevant to the availability of the Section 411(c)(4) presumption.

Therefore, we vacate the administrative law judge's finding of fourteen years of coal mine employment based on the parties' stipulation. On remand, the administrative law judge must render a specific finding as to the length of claimant's coal mine

employment, as such a finding is necessary to determine whether claimant is entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).[4] If, on remand, the administrative law judge finds that claimant has established at least fifteen years of coal mine employment and is, thus, entitled to the presumption of pneumoconiosis and that total disability is due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability did not arise in whole, or in part, out of coal mine employment. 30 U.S.C. §921(c)(4).

In the interest of judicial efficiency, we will address the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Initially, we note that, in summarizing and weighing the newly submitted evidence, the administrative law judge did not consider the medical opinion of Dr. Burrell and the objective testing conducted by him. Dr. Burrell provided claimant with the Department of Labor sponsored pulmonary evaluation required by the Act. Dr. Burrell's opinion was admitted into the record at Director's Exhibit 9. *See* Director's Exhibits 8, 9; Hearing Transcript at 8. The pulmonary evaluation included a physical examination administered by Dr. Burrell, a positive chest x-ray administered by Dr. Ahmed, and the results of a blood gas study and pulmonary function study administered for Dr. Burrell. Director's Exhibit 9. Because the administrative law judge's findings do not reflect consideration of Dr. Burrell's opinion and the data he compiled as a result of his evaluation, we vacate the administrative law judge's findings at Section 718.202(a)(1)-(4) and remand the case for the administrative law judge to re-evaluate the relevant evidence with Dr. Burrell's opinion and the medical data compiled by him. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111 (1979).

Moreover, in considering the medical opinion evidence at Section 718.202(a)(4), the administrative law judge found that the professional credentials of Drs. Dahhan and McSharry are superior to those of Dr. Bruton, because unlike the latter doctor, the former are both Board-certified in Internal and Pulmonary Medicine. Decision and Order at 10. A review of the record, however, indicates that Dr. Bruton is also Board-certified in Internal and Pulmonary Medicine. Claimant's Exhibit 8. Therefore, on remand, the administrative law judge must reconsider the weight to be accorded the medical opinions in light of the qualifications of the physicians. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990). In addition, because the administrative law judge found the opinion of Dr. Bruton, claimant's treating physician,

[4] The administrative law judge must also determine whether claimant has established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), based on the availability of the presumption.

well-reasoned and well-documented, the administrative law judge must also apply the criteria set forth at 20 C.F.R. §718.104(d), to determine whether Dr. Bruton's opinion may be entitled to controlling weight on the issue of the existence of pneumoconiosis. 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-495, 2-512 (6th Cir. 2002).

Thus, if, on remand, the administrative law judge finds that the claimant is not entitled to the Section 411(c)(4) presumption, he must determine whether claimant has established pneumoconiosis by the newly submitted evidence at Section 718.202(a)(1)-(4) and, if reached, whether claimant has established, on consideration of all of the evidence of record, all of the elements of entitlement at Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

In sum, this case must be remanded for the administrative law judge to first determine whether claimant is entitled to the Section 411(c)(4) presumption and has, thereby, established a change in an applicable condition of entitlement at Section 725.309(d). If the administrative law judge determines that claimant is not entitled to the presumption, he must then determine whether claimant has established a change in an applicable condition of entitlement by establishing the existence of pneumoconiosis and, if so, whether claimant has established all of the elements of entitlement at Part 718.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge