BRB No. 12-0130 BLA

CECIL DANIELS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPARTAN MINING COMPANY	)	DATE ISSUED: 12/21/2012
	)	
Employer-Respondent	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5249) of Administrative Law Judge Richard A. Morgan, rendered on a claim, filed on January 7, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with at least thirty years of coal mine employment and further determined that claimant established at least fifteen years of work in underground mining. The administrative law judge initially found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but proved that he is suffering from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption

of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] However, applying his findings at 20 C.F.R. §718.202(a), the administrative law judge concluded that employer rebutted the presumption by establishing that claimant does not have pneumoconiosis. The administrative law judge similarly concluded that employer rebutted the presumption by establishing that claimant's respiratory disability did not arise out of coal mine employment. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge misstated the burden of proof in this case. Claimant also argues that the administrative law judge did not properly weigh the x-ray, CT scan, biopsy and medical opinion evidence relevant to whether he has pneumoconiosis and whether his disability arose out of, or in connection with, his coal mine employment. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.[2]

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 into the

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[1] On March 23, 2010, amendments to the Act, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established fifteen years of qualifying coal mine employment and a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Based upon these findings, and the administrative law judge's correct observation that the claim was filed after January 1, 2005 and was pending on March 23, 2010, we further affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, because claimant's most recent coal mine employment was in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

The primary issue before the Board on appeal is whether the administrative law judge properly found that employer established rebuttal of the amended Section 411(c)(4) presumption. To aid in the disposition of this issue, we will first summarize the manner in which the administrative law judge considered the present claim.

The administrative law judge indicated that he would initially determine whether claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 14-23. When addressing the existence of pneumoconiosis under 20 C.F.R. §718.202(a), however, the administrative law judge made a *dual* finding that "claimant has not met his burden of proof" and that "employer has proven the miner does not have pneumoconiosis." *Id.* at 21. The administrative law judge then determined that, because claimant did not establish that he has pneumoconiosis, he could not establish that the disease arose out of coal mine employment at 20 C.F.R. §718.203. *Id.* Nevertheless, the administrative law judge found that claimant proved that he is totally disabled at 20 C.F.R. §718.204(b)(2), thereby invoking the amended Section 411(c)(4) presumption. *Id.* at 25-26.

With respect to rebuttal, the administrative law judge stated, "[claimant] is entitled to benefits unless the employer proves that [he] does not have pneumoconiosis or that his respiratory impairment did not arise out of coal mine employment." *Id.* at 37. The administrative law judge then noted that "[t]he revised regulations, 20 C.F.R. §718.204(c)(1), require [that] a claimant establish [that] his pneumoconiosis is a 'substantially contributing cause' of his totally disabling respiratory or pulmonary disability." *Id.* (footnotes omitted). The administrative law judge summarized the circuit court law relevant to 20 C.F.R. §718.204(c) and stated:

> My analysis of the medical evidence related to legal pneumoconiosis applies to this matter of causation and need not be repeated. I do not find the miner's impairment is due to coal mine dust exposure. Dr. Rasmussen was the only physician to opine the miner's impairment was coal mine dust related; Drs. Castle and Fino ruled that out. I do not find Dr. Rasmussen's opinion sufficiently credible, in this case, to support his diagnosis. I find the opinions of Drs. Castle and Fino consistent with the evidence and credible. They have ruled out a relationship between the miner's coal mine dust exposure and his pulmonary affliction.

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> In conclusion, [claimant] has not established the existence of clinical or legal pneumoconiosis but has proven he is now totally disabled. The employer has established that the miner does not have pneumoconiosis. *It is not established his total disability is due to pneumoconiosis.* [C]laimant is therefore not entitled to benefits.

Decision and Order at 29 (footnotes omitted) (emphasis added).

Claimant argues that the administrative law judge erred in finding that employer established rebuttal of the amended Section 411(c)(4) presumption, as he improperly shifted the burden of proof to claimant and did not adequately explain the weight that he accorded to the evidence, as required by the Administrative Procedure Act (APA).[4] Claimant's contentions have merit. Specifically, we agree with claimant that the administrative law judge did not perform a proper analysis of the evidence, with the burden of proof placed on employer to disprove the existence of either clinical or legal pneumoconiosis.[5] Furthermore, contrary to the administrative law judge's finding, claimant is not required to establish that he is totally disabled due to pneumoconiosis under amended Section 411(c)(4), as satisfying the prerequisites for invocation creates a rebuttable presumption that claimant is totally disabled due to pneumoconiosis. *Id.*

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[4] The Administrative Procedure Act (APA), 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 set forth the rationale underlying his findings of fact and conclusions of law.

[5] Pursuant to 20 C.F.R. §718.201(a)(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." 20 C.F.R. §718.201(a)(1). The regulation further provides, "[t]his 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." *Id.* Under 20 C.F.R. §718.201(a)(2), 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). The regulation also provides, "[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

Because the administrative law judge discussed the evidence relevant to rebuttal in dual relation to 20 C.F.R. Part 718 and amended Section 411(c)(4), and did not consistently place the burden of proof on employer, we vacate his finding that employer rebutted the presumption and remand the case to the administrative law judge. On remand, the sole issue before the administrative law judge is whether employer has met its burden of establishing rebuttal of the amended Section 411(c)(4) presumption by affirmatively proving that claimant does not have pneumoconiosis or that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980).

II. Consideration of the Evidence on Remand

In the interest of judicial economy, we will also address claimant's arguments regarding the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis. Regarding the x-ray evidence, the administrative law judge considered five readings of two x-rays. Decision and Order at 5-6, 17. An April 29, 2009 x-ray was read as positive for pneumoconiosis by Dr. Rasmussen, a B reader, and by Dr. Miller, dually-qualified as a Board-certified radiologist and B reader. Director's Exhibit 12; Claimant's Exhibit 1. Dr. Wiot, a dually-qualified radiologist, read this film as negative. Employer's Exhibit 1. An October 22, 2009 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a dually-qualified radiologist, and as negative by Dr. Wiot. Claimant's Exhibit 2; Employer's Exhibit 6. Based on his finding that Dr. Wiot "is the far best qualified radiologist," the administrative law judge concluded that the April 29, 2009 x-ray was negative for pneumoconiosis and that the October 22, 2009 x-ray was "in equipoise at best." Decision and Order at 12.

We agree with claimant that the administrative law judge erred in omitting any explanation of why he considered Dr. Wiot's radiological qualifications to be superior to those of Drs. Miller and Alexander, as each of these radiologists is dually-qualified. Claimant's Brief at 15. Thus, we vacate the administrative law judge's findings with respect to the x-ray evidence and instruct the administrative law judge to reconsider this evidence on remand.

Regarding the biopsy evidence, the administrative law judge determined that it did not assist claimant in establishing the existence of pneumoconiosis, as Dr. Sigdel's biopsy report, dated September 29, 2009, was negative. Decision and Order at 16; Employer's Exhibit 4. Claimant is correct in alleging that, with the burden properly placed on employer to rebut the presumed fact that claimant has pneumoconiosis, the administrative law judge must assess whether Dr. Sigdel's report affirmatively rules out a

pathological diagnosis of pneumoconiosis.[6] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43.

With respect to the CT scan evidence, the administrative law judge considered two readings of a scan dated March 9, 2007 and one reading of a scan dated September 29, 2009. Decision and Order at 7; Claimant's Exhibit 6; Employer's Exhibits 4, 5. The administrative law judge determined that the March 9, 2007 CT scan was negative for pneumoconiosis, based on the reading by Dr. Meyer, a dually-qualified radiologist. Decision and Order at 17. The administrative law judge discredited Dr. Miller's positive reading for simple and complicated pneumoconiosis because it was "aberrant" and Dr. Meyer is "better qualified." *Id.* The administrative law judge found that the scan obtained on September 29, 2009 was negative, based on Dr. Sigdel's reading. *Id.* As claimant contends, because the administrative law judge did not explain the basis for his determination regarding the respective radiological qualifications of Drs. Meyer and Miller, we must vacate his finding with respect to the March 9, 2007 CT scan and instruct him to reconsider it on remand.

Regarding the administrative law judge's consideration of the medical opinion evidence, he must specifically determine whether Drs. Fino and Castle have provided reasoned and documented opinions[7] sufficient to affirmatively establish either that claimant does not have pneumoconiosis, or that his disability did not arise out of, or in connection with, his coal mine employment.[8] The administrative law judge is further

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[6] Dr. Sigdel stated that the biopsy revealed the presence of necrotizing granulomas, pigment-laden macrophages, focal ossification negative for malignancy, pleuritis, atelectasis, and evidence of emphysema. Employer's Exhibit 4.

[7] The administrative law judge indicated that he credited the opinions of Drs. Fino and Castle, that the miner does not have legal pneumoconiosis, because they are "in agreement" and because their opinions are consistent with his finding that the biopsy and CT scan evidence is negative for clinical pneumoconiosis. Decision and Order at 21, 29. As claimant maintains, the administrative law judge should be mindful that a negative biopsy for clinical pneumoconiosis does not necessarily disprove the existence of legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). He should also reassess the credibility of the medical opinions in light of his reweighing of the CT scan evidence on remand.

[8] Dr. Fino opined that claimant's severe emphysema was unrelated to his thirty years of coal mine employment, citing Dr. Leigh's 1994 study and other literature for the proposition that, in the absence of clinical pneumoconiosis on pathology, the amount of emphysema that is related to coal mine dust is minimal. Employer's Exhibit 2. Claimant correctly suggests that the administrative law judge should reconsider whether Dr. Fino's

instructed to reassess the conflicting medical opinions in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Finally, in reconsidering whether employer has rebutted the amended Section 411(c)(4) presumption on remand, the administrative law judge must identify and weigh all relevant evidence and set forth his findings in detail, including the underlying rationale, in accordance with the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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opinion is reasoned, given that the Department of Labor has specifically rejected the medical literature relied upon by Dr. Fino in rendering his findings. 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2008); *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge