

BRB No. 10-0235 BLA

JAMES BLANKENSHIP)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY/ PITTSTON COMPANY)	DATE ISSUED: 02/15/2011
)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Michelle S. Gerdano (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 Granting Benefits (2008-BLA-5065) of Administrative Law Judge Pamela Lakes Wood rendered on a subsequent claim¹ filed

¹ Claimant's initial claim was filed on May 10, 2002, and was denied by the district director because the evidence was insufficient to establish any element of

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 credited claimant with at least thirty-six years of qualifying coal mine employment, and adjudicated this claim, filed on November 8, 2006, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was sufficient to establish a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and sufficient, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined, after considering all the evidence of record, that claimant established clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a), and disability causation at Section 718.204(c). Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that nothing in the preamble to the amended regulations affirmatively discloses an intent by the Department of Labor to exclude any particular type of emphysema from the broad definition of pneumoconiosis found in 20 C.F.R. §718.201.²

By Order dated May 5, 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. *Blankenship v. Clinchfield Coal Co.*, BRB No. 10-0235 BLA (May 5, 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 on March 23, 2010, the effective date of the amendments. Employer and the Director have responded. By supplemental brief, employer argues that there is no impact, as the present case was fully litigated and decided prior to March 23, 2010. The Director contends that, if the

entitlement. Director's Exhibit 1. Claimant's second claim was filed on December 1, 2004, and was also denied by the district director because 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 with regard to the length of claimant's coal mine employment, and her findings that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to consider entitlement under Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4). As set forth *infra*, because we are unable to affirm the administrative law judge's findings of pneumoconiosis and disability causation, and because the finding of total respiratory disability has not been challenged on appeal, we must remand this case to the administrative law judge to determine whether claimant is entitled to invocation of the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4).

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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*).

Employer first challenges the administrative law judge's finding that the weight of all of the relevant evidence of record established clinical pneumoconiosis as defined at 20 C.F.R. §718.201(a)(1).⁵ Specifically, employer asserts that the administrative law judge

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 codified at 30 U.S.C. §921(c)(4)).

⁴ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

⁵ Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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).

erred in failing to address the equivocal nature of Dr. Knapp's CT scan interpretation and Dr. Ramakrishnan's PET/CT scan interpretation; in failing to provide a valid reason for discounting Dr. Castle's negative CT scan interpretation; and in failing to determine whether the PET/CT scan interpretation was "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits" under 20 C.F.R. §718.107(b).⁶ Employer's arguments have merit.

The administrative law judge initially found that the earlier x-ray evidence and the newly submitted x-ray evidence were in equipoise at Section 718.202(a)(1); that the unclassified x-rays contained in claimant's treatment records were of limited probative value; that equally qualified readers provided conflicting interpretations of a May 7, 2008 digital x-ray; and that the medical opinion evidence of record at Section 718.202(a)(4) was also in equipoise. The administrative law judge then considered the following evidence at Section 718.107: Dr. Knapp's interpretation of a CT scan dated August 16, 2007, diagnosing severe centrilobular emphysema and subpleural nodules most likely due to coal worker's pneumoconiosis, with differential diagnoses of sarcoidosis, lymphangitic carcinoma, and silicosis, Claimant's Exhibit 3; Dr. Castle's interpretation of the August 16, 2007 CT scan, diagnosing significant bullous emphysema and usual interstitial pneumonitis (UIP), with a differential diagnosis of sarcoidosis made on deposition, but no findings consistent with pneumoconiosis, Employer's Exhibits 3, 8;⁷ and Dr. Ramakrishnan's interpretation of a PET/CT scan taken on August 29, 2007, diagnosing active nodes and diffuse uptake in the mid and lower lung fields, consistent with an interstitial pattern noted on an April 3, 2007 x-ray and an August 16, 2007 CT scan. Dr. Ramakrishnan indicated that, "considering the stable appearance of the chest x-ray going back to 2005, the pattern of changes are [sic] quite nonspecific and may very well represent chronic interstitial lung disease such as coal workers' pneumoconiosis." Claimant's Exhibit 3. Dr. Ramakrishnan also noted that there was no particular pattern to suggest a high probability of neoplastic activity. *Id.* The administrative law judge determined that the weight of this evidence supported a finding of clinical pneumoconiosis as the "most likely diagnosis," stating that:

The radiologists interpreting the CT scan and the PET scan found them to most likely show coal workers' pneumoconiosis, and I do not find their

⁶ Dr. Ramakrishnan recorded the following technique: "After intravenous administration of 15.3 mCi of F-18 FDG, whole body PET scan was performed followed by whole body CT without contrast. Images were reviewed on work station including PET/CT fusion." Claimant's Exhibit 3.

⁷ Dr. Castle further testified that no conclusive diagnosis could be made without a biopsy. Employer's Exhibit 8 at 24-25; Decision and Order at 11.

opinions to be outweighed by a single pulmonologist, even though (as Dr. Castle testified at his deposition) pulmonologists are frequently called upon to review CT scans.

Decision and Order at 23. The administrative law judge concluded, after reviewing all of the evidence on the issue, that claimant had established clinical pneumoconiosis by a slight preponderance of the evidence, in view of the positive CT scan evidence. *Id.* However, it is not clear whether the administrative law judge credited the two radiologists' interpretations over that of Dr. Castle based on a numerical preponderance or on the basis of their qualifications.⁸ Moreover, as the administrative law judge did not take into account the equivocal nature of the interpretations by Drs. Knapp and Ramakrishnan, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), and did not determine whether the PET/CT scan was sufficiently reliable for diagnostic purposes under Section 718.107(b),⁹ we must vacate her finding that clinical pneumoconiosis was established, and remand this case for a reassessment of the evidence.

We also find merit in employer's argument that the administrative law judge provided invalid reasons for her credibility determinations and failed to subject the conflicting medical opinions to the same scrutiny on the issue of legal pneumoconiosis¹⁰

⁸ The record reflects that Dr. Knapp is "ABR Boarded," Claimant's Exhibit 3, while Dr. Castle is a B reader, Employer's Exhibits 3, 8, and Dr. Ramakrishnan is a Board-certified radiologist and B reader, Claimant's Exhibit 3. Additionally, Dr. Castle testified at deposition that he has had training and experience in reading chest CT scans, and he reads them on a daily basis in his practice as a pulmonologist. Employer's Exhibit 8 at 22.

⁹ While Dr. Castle testified at deposition that CT scans are accepted by the medical community as a reasonable method of diagnosing lung diseases, Employer's Exhibit 8 at 22, employer correctly notes that the record does not contain evidence demonstrating that PET scans are medically acceptable, as required under 20 C.F.R. §718.107(b). Employer's Brief at 6.

¹⁰ Dr. Ranavaya performed the Department of Labor examination in claimant's first claim on August 20, 2002, and diagnosed pneumoconiosis based on a positive (1/1) x-ray and 38 years of coal mine employment. He determined that claimant has a moderate impairment that was contributed to by pneumoconiosis "to a major extent." Director's Exhibit 1. The administrative law judge determined that this opinion did not address the issue of legal pneumoconiosis. Decision and Order at 22.

at Section 718.202(a)(4).¹¹ The administrative law judge accurately summarized the medical opinions of Drs. Baker,¹² Rasmussen,¹³ Hippensteel,¹⁴ and Castle,¹⁵ all diagnosing emphysema, and noted that Dr. Baker's credentials were not of record, but that Drs. Rasmussen, Hippensteel, and Castle were "highly qualified to render opinions on pulmonary diseases."¹⁶ Decision and Order at 18. The administrative law judge found that, because Dr. Baker did not explain the basis for his conclusion that both coal dust and smoking contributed to claimant's respiratory condition, his opinion was not sufficiently reasoned, and was not entitled to significant weight. Decision and Order at 22. The administrative law judge determined that Dr. Rasmussen attributed claimant's

¹¹ Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

¹² Dr. Baker diagnosed clinical pneumoconiosis based on a positive x-ray and coal dust exposure, and legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking, based on the objective test results. Claimant's Exhibit 1.

¹³ Dr. Rasmussen performed examinations of claimant at the request of the Department of Labor on February 23, 2005 and on January 29, 2007, and diagnosed clinical pneumoconiosis due to coal dust exposure based on a positive x-ray, and COPD due to coal dust exposure and smoking, based on the objective test results. Dr. Rasmussen opined that smoking and coal dust exposure cause all types of emphysema, including panacinar, centriacinar, and bullous emphysema, and explained that "smoke particles and dust particles are engulfed by lung scavenger cells, which in susceptible individuals . . . unleash cellular and enzymatic processes, which destroy lung tissue leading to emphysema." Director's Exhibits 2, 14.

¹⁴ Dr. Hippensteel examined claimant in 2003 and 2007, and also provided testimony. He diagnosed bullous emphysema unrelated to coal dust exposure, which he determined was congenital and possibly aggravated by smoking. Director's Exhibits 1, 17; Employer's Exhibit 7.

¹⁵ Dr. Castle examined claimant in 2005 and in 2008, and provided deposition testimony. He diagnosed an obstructive airway disease due to smoking, bullous emphysema due to smoking, and possible coronary artery disease. Director's Exhibit 2; Employer's Exhibits 3, 8.

¹⁶ Drs. Hippensteel and Castle are Board-certified in internal medicine and pulmonary disease, and Dr. Rasmussen is Board-certified in internal medicine. Employer's Exhibits 3, 7.

emphysema to both smoking and coal dust exposure, while Drs. Hippensteel and Castle diagnosed bullous emphysema that was either congenital or caused by smoking, and that was unrelated to coal dust exposure. The administrative law judge found Dr. Rasmussen's opinion, that claimant's coal dust exposure is a major contributing cause of his disabling lung disease, to be "the most persuasive, and the best reasoned and documented on the issue of legal pneumoconiosis," noting that the doctor "stated that all forms of emphysema, including bullous emphysema, are caused by both coal mine dust exposure and cigarette smoking." Decision and Order at 22. The administrative law judge determined that the opinions of Drs. Hippensteel and Castle were entitled to less probative weight, as "neither . . . [doctor] explained the basis for their [sic] conclusion that bullous emphysema cannot be caused by coal mine dust exposure, and that such a conclusion is contrary to the discussion of the epidemiological evidence in the preamble to the revised regulations." *Id.* The administrative law judge noted that while Dr. Hippensteel testified regarding why bullous emphysema is not associated with coal dust, she found his explanation to be "garbled at best." Decision and Order at 20. The administrative law judge also noted that, although Dr. Castle's deposition reflected careful analysis, the doctor did not "provide a basis for his conclusion that the bullous emphysema was not caused in part by coal dust, which he appears to accept as a given." Decision and Order at 21. The administrative law judge further indicated that "the radiologist who reviewed the CT scan, upon which Dr. Castle relied, diagnosed severe centrilobular emphysema, and Drs. Hippensteel and Castle did not argue that centrilobular emphysema is not associated with coal dust exposure." Decision and Order at 22. The administrative law judge concluded that the evidence "preponderates in favor of a finding of legal pneumoconiosis in the form of emphysema caused by the combined effects of coal mine dust exposure and cigarette smoking," based on the better reasoned medical opinion evidence, considered in context with the other evidence of record, including the CT scan evidence. Decision and Order at 22, 23. As we have vacated the administrative law judge's findings with regard to the CT scan evidence, however, the administrative law judge must reevaluate the evidence on remand and resolve the conflict in the varying diagnoses of either centrilobular emphysema or bullous emphysema. Further, we agree with employer's argument that the opinions of Drs. Hippensteel and Castle are not necessarily "contrary to the discussion of the epidemiological evidence in the preamble to the revised regulations," Decision and Order at 22, as the preamble does not specifically reference bullous emphysema. While the administrative law judge noted that "the Department of Labor found both simple and complicated pneumoconiosis to cause emphysema and found that coal mine dust could cause emphysema in the absence of fibrosis," 65 Fed. Reg. 79941-42 (Dec. 20, 2000); Decision and Order at 21. n.15, and the Director correctly notes that there is no evidence that the Department of Labor intended to limit the definition of emphysema to any particular types, *see* 20 C.F.R. §718.201(a)(2); 30 U.S.C. §902 (2000); 65 Fed. Reg. at 79920, 79939, 79941-43; *Cadle v. Director, OWCP*, 19 BLR 1-56, 1-62-63 (1994), the preamble explicitly references only centrilobular, centriacinar and focal emphysema, and a physician must still attribute

the form of emphysema diagnosed to coal dust exposure in order for the disease to constitute legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79937-44. As we cannot affirm the administrative law judge's rationale for discounting the opinions of Drs. Hippensteel and Castle, and the administrative law judge did not explain why she found Dr. Rasmussen's opinion to be "the best reasoned and documented," Decision and Order at 22, we must vacate the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4). On remand, the administrative law judge is instructed to reassess the conflicting medical opinions in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and fully explain the reasons for her credibility determinations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because the administrative law judge's weighing of the evidence on the issue of disability causation was based on her finding of clinical and legal pneumoconiosis at Section 718.202(a), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c).

On remand, as a preliminary matter, the administrative law judge must determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, she must allow all parties the opportunity to submit evidence in compliance 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 Granting Benefits is affirmed in part, and vacated in part, and this 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