BRB No. 10-0214 BLA

STEVEN MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	DATE ISSUED: 01/20/2011
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-06184) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on March 8, 2005, 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). After crediting claimant with eleven years of coal mine employment, based on a stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Weighing the medical evidence of record, the administrative law judge found the evidence sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or 20 C.F.R. §718.107. Further, because pneumoconiosis was not established, the administrative law judge found that claimant could not establish that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) or that he was totally disabled due to pneumoconiosis (disability causation) pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in weighing the medical opinion evidence and the CT scan evidence and, therefore, erred in finding the evidence insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4) and Section 718.107.[1] In response, employer urges affirmance of the administrative law judge's denial of benefits, arguing that the administrative law judge properly weighed the medical evidence in finding it insufficient to establish pneumoconiosis pursuant to Section 718.202(a)(4) or Section 718.107. Employer also argues that the administrative law judge erred in finding total disability established pursuant to Section 718.204(b), because claimant was employed in coal mining at the time of the hearing. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge failed to properly consider the CT scan evidence pursuant to Section 718.107.[2] In

[1] Claimant does not challenge the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] By Order dated June 29, 2010, the Board granted the motion for enlargement of time by the Director, Office of Workers' Compensation Programs (the Director), to file a response brief to claimant's appeal and, at the same time, instructed the Director that the response brief should also address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, 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). In addition, the Board granted the other parties thirty days, from the date of the Order, to file

addition, the Director, addressing the impact of the 2010 amendments to the Act, argues that the amendments are not applicable in this case, because claimant alleged only fourteen years of coal mine employment, he stipulated to only eleven years of coal mine employment, and the evidence does not support a finding of fifteen years.[3] In a supplemental brief addressing the impact of the 2010 amendments, employer also contends that the amendments are not applicable, repeating the point argued by the Director. In addition, employer contends that the retroactive application of the amendments to the Act is unconstitutional.

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'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*).

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supplemental briefs addressing the impact in this case, if any, of the amendments. *Mullins v. Pen Coal Corp.*, BRB No. 10-0214 BLA (Jun. 29, 2010)(unpub. Order).

[3] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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, in pertinent part, a rebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[4] Because claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

Claimant challenges the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Claimant contends that the administrative law judge, citing *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), erred in according little weight to Dr. Gaziano's opinion of legal pneumoconiosis because he relied on an inaccurate coal mine employment history. Claimant contends that the administrative law judge erred in mechanically applying *Worhach* to discredit Dr. Gaziano's opinion, because the facts in this case and those in *Worhach* are distinguishable. In *Worhach*, the Board held that the administrative law judge correctly found that doctors diagnosing pneumoconiosis had relied on an exaggerated length of coal mine employment history, as a basis for their diagnosis, and held that an administrative law judge may discredit a medical opinion based on an inaccurate length of coal mine employment. *Worhach*, 17 BLR at 1-110. Claimant contends, however, that *Worhach* is not controlling in this case, because in *Worhach* the administrative law judge found only half as many years of coal mine employment as the number relied upon by the doctors, *i.e.*, four versus eight years of coal mine employment, while, in this case, the administrative law judge credited the miner with eleven years of coal mine employment, as opposed to the sixteen found by Dr. Gaziano, *i.e.*, 69% of the sixteen years of coal mine employment found by Dr. Gaziano. Claimant's Brief at 12. Further, claimant contends that the administrative law judge erred in mechanically applying *Worhach*, because, the eleven years of coal mine employment credited in this case was significantly "greater than ten years of coal mine employment which is generally found to be a sufficient length of coal mine employment to contribute to a miner's pulmonary impairment" pursuant to 20 C.F.R. §718.203(b). Claimant's Brief at 12. Claimant contends, therefore, that the administrative law judge erred in summarily discounting Dr. Gaziano's opinion, diagnosing legal pneumoconiosis, because it was based on an inaccurate length of coal mine employment history.

We agree. In according little weight to the opinion of Dr. Gaziano, the administrative law judge did not fully consider Dr. Gaziano's opinion. In light of claimant's persuasive arguments, the administrative law judge did not adequately explain how the five year discrepancy between the sixteen years of coal mine employment relied upon by Dr. Gaziano and the eleven years credited by the administrative law judge, undermined the credibility of Dr. Gaziano's opinion finding legal pneumoconiosis. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984). Therefore, we vacate the administrative law judge's finding according little weight to Dr. Gaziano's opinion, and we remand the case for the administrative law judge to provide a more detailed explanation of his credibility determination regarding Dr. Gaziano's opinion on legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the medical opinion evidence was insufficient to establish legal pneumoconiosis at Section

718.202(a)(4) and we remand the case for further consideration of all the relevant evidence.[5] *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); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Pneumoconiosis – 20 C.F.R. §718.107

Claimant also contends that the administrative law judge erred in failing to credit Dr. Alexander's positive re-reading of the March 29, 2006 CT scan. Claimant contends that because Dr. Alexander's reading was a re-reading, Dr. Alexander was not required to demonstrate that CT scan evidence is a medically acceptable test for the diagnosis of pneumoconiosis under Section 718.107(b), in order to be accepted.

We agree. In weighing the original negative CT scan reading of Dr. Repsher and the positive re-reading of the CT scan by Dr. Alexander[6] the administrative law judge credited Dr. Repsher's negative CT scan reading and not Dr. Alexander's positive re-reading, because Dr. Repsher explained that the CT scan evidence is a medically acceptable method for the diagnosis of pneumoconiosis pursuant to 20 C.F.R. §718.107(d), while Dr. Alexander did not. Decision and Order at 13.

However, as claimant and the Director contend, Section 718.107(d) requires only that "the party submitting the test or procedure ... bears the burden to demonstrate that the test or procedure is medically acceptable." 20 C.F.R. §718.107(d). Therefore, once employer submitted Dr. Repsher's initial reading of the March 29, 2006 CT scan and a statement regarding the medical acceptability of CT scan evidence, as a method for the

[5] Although employer contends that the administrative law judge properly found that legal pneumoconiosis was not established by the medical opinion evidence at Section 718.202(a)(4), employer contends that the administrative law judge erred in according little probative weight to the opinions of Drs. Repsher and Dahhan, that claimant did not have legal pneumoconiosis, because they were not well-reasoned. Employer argues that their opinions should have been credited as well-reasoned and documented. Employer's Brief at 14. Because we vacate the administrative law judge's finding that legal pneumoconiosis was not established pursuant to Section 718.202(a)(4), the administrative law judge should reconsider, on remand, all of the medical opinion evidence relevant to the existence of legal pneumoconiosis.

[6] The administrative law judge found that the record contains two readings of the March 29, 2006 CT scan, an initial negative reading by Dr. Repsher, Director's Exhibit 29, and a positive re-reading by Dr. Alexander, Claimant's Exhibit 3.

diagnosis of pneumoconiosis, claimant was not required to demonstrate the medical acceptability of the CT scan evidence, in order to rebut Dr. Repsher's reading. 20 C.F.R. §718.107(d). Consequently, we agree with claimant and the Director that the administrative law judge erred in rejecting Dr. Alexander's positive re-reading of the March 29, 2006 CT scan as not complying with the requirements of Section 718.107. Accordingly, we vacate the administrative law judge's finding that claimant's CT scan evidence of pneumoconiosis was inadmissible at Section 718.107, and we remand the case for the administrative law judge to reconsider the CT scan readings of both Drs. Repsher and Alexander, including the relative professional credentials of the physicians providing the readings, to determine whether they are sufficient to establish pneumoconiosis at Section 718.107. *See Tackett v. Director, OWCP*, 10 BLR 1-703 (1985).

Additionally, we reject employer's contention that the administrative law judge's error at Section 718.107 was harmless, because the two readings, when weighed together, would be in equipoise. Contrary to employer's contention, however, the administrative law judge's error would not necessarily be harmless, as the administrative law judge, who is charged with weighing the evidence and assessing its credibility, may determine on remand that one CT scan reading is more credible than the other based on the reader's qualifications or the fact that the reading is better supported by other evidence. *See Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008).

Total Disability – 20 C.F.R. §718.204(b)

Regarding the administrative law judge's finding that the evidence was sufficient to establish a total respiratory disability pursuant to Section 718.204(b), employer contends that the administrative law judge erred in finding claimant totally disabled thereunder. Employer contends that the administrative law judge erred in finding claimant totally disabled because claimant was employed in coal mine employment at the time of the hearing.[7] Employer's Brief at 16. In finding that claimant was totally disabled, the administrative law judge acknowledged that claimant was working in coal mine employment at the time of the hearing, but found, after considering all of the medical evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), that total disability was established based on qualifying pulmonary function studies. Decision and Order at 16; Director's Exhibits 13, 29; Employer's Exhibit 1. Contrary to employer's contention, claimant's employment does not preclude the administrative law judge from finding him totally disabled as a finding of total disability must be based on medical evidence. *See* 20 C.F.R.

[7] Claimant testified at the hearing that he was running a shuttle car in the mines. Decision and Order at 16; Hearing Transcript at 18.

§718.204(b). From the final determination of eligibility for benefits, claimant has one year to terminate his coal mine employment. 20 C.F.R. §725.504. Further, because employer has not otherwise challenged the administrative law judge's weighing of the medical evidence at Section 718.204(b), we affirm his finding that the qualifying pulmonary function study evidence is sufficient to establish a totally disabling respiratory impairment. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Employer's argument that claimant's continued coal mine employment precludes a finding of total disability at Section 718.204(b) is, therefore, rejected, and we affirm the administrative law judge's total disability finding thereunder, on the basis of the medical evidence.

In conclusion, therefore, we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(b), but we vacate the administrative law judge's finding that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(4) or Section 718.107 and we remand the case for further consideration under those Sections.

Section 411(c)(4)

Further, on remand, the administrative law judge must preliminarily consider whether claimant has established invocation of the Section 411(c)(4) presumption. In this case, claimant filed his claim after January 1, 2005, he alleged fourteen years of coal mine employment, he stipulated to eleven years of coal mine employment at the hearing, and the evidence established a totally disabling respiratory impairment at Section 718.204(b). Employer and the Director assert the Section 411(c)(4) rebuttable presumption is not applicable because claimant alleged only fourteen years of coal mine employment and stipulated to only eleven years. We conclude, however, that in light of claimant's allegation regarding his years of coal mine employment, evidence in the record regarding years of coal mine employment, and claimant's continued coal mine employment at the time of the hearing, the administrative law judge must consider whether claimant has established the requisite fifteen years of *qualifying* coal mine employment to establish invocation of the Section 411(c)(4) presumption.[8] If the administrative law judge determines that the Section 411(c)(4) presumption is applicable, he must allow the parties the opportunity to submit additional evidence to address the changes in the law, consistent with the evidentiary limitations set forth at 20 C.F.R.

[8] In order to determine whether claimant has fifteen years of *qualifying* coal mine employment, the administrative law judge must determine whether at least fifteen years of the miner's coal mine employment were underground, or performed in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988).

§725.414.[9] *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).

[9] We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of the new amendments has been challenged, as employer does not indicate that any court has enjoined the application of or ruled on the validity of the recent amendments to the Act.

Because the administrative law judge has not yet considered the applicability of the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) to this claim, we decline to address, as premature, employer's argument that the retroactive application of the amendment to this claim is unconstitutional.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____
BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge:

I concur in the result only.

_____
ROY P. SMITH
Administrative Appeals Judge