BRB No. 09-0745 BLA

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<tr><td>DORIS MAY
o/b/o ESTATE of DONNIE A. MAY

Claimant-Respondent

v.

LEECO, INCORPORATED

and

JAMES RIVER COAL COMPANY

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James M. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5660) of Administrative Law Judge Donald W. Mosser (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public 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 the miner with at least 17 years of coal mine employment based on employer's concession, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). Further, the administrative law judge found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge ordered benefits to commence as of June 1, 2005, the beginning of the month that the subsequent claim was filed.

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 evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant[2] 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 brief in response to employer's brief.[3]

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[1] The miner filed his first claim on November 12, 1993. Director's Exhibit 1. It was finally denied by a claims examiner on November 8, 1996 because the miner failed to establish any of the elements of entitlement. *Id.* The miner filed his second claim on January 29, 1998. Director's Exhibit 2. It was finally denied by a claims examiner on May 29, 1998 because the miner failed to establish any of the elements of entitlement. *Id*. The miner filed this claim on June 27, 2005. Director's Exhibit 4.

[2] Claimant is the widow of the miner, who died on October 4, 2007, while his claim was pending before the Office of Administrative Law Judges. Hearing Transcript at 10. She is pursuing this claim on behalf of the miner.

[3] Because the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R.

Subsequent to the issuance of the administrative law judge's Decision and Order, amendments to the Act, which became effective on March 23, 2010, were enacted, 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 total disability due to pneumoconiosis or, relevant to survivor's claims, death due to pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which holds that an eligible survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement. 30 U.S.C. §932(*l*). The parties responded to the Board's May 4, 2010 Order, which permitted the parties to submit supplemental briefing in this claim to address the impact, if any, of the 2010 amendments in this case.[4]

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§725.309, that the evidence established clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) on the merits, and that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) on the merits are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Claimant asserts that, while the presumption in the amended statute should be applicable, the Board need not remand the case because "[t]he new changes in the law only enhance the [administrative law judge's] prior findings." Claimant's Supplemental Brief at 2. Claimant further asserts that she should receive derivative survivor's benefits pursuant to the recent amendments to the Act. Employer asserts that the recent amendment to the Act does not apply to the miner's subsequent claim dated June 27, 2005 because, it argues, "[t]here is no statutory language in the recent amendment that applies this amendment to 'subsequent' claims or to 'modification' requests." Employer's Supplemental Brief at 2. Alternatively, employer asserts that the case should be remanded to the district director to reopen the record and allow for a proper development of the issues, if the administrative law judge decides to apply the presumption in the amended statute. The Director asserts that the Section 411(c)(4) presumption applies in this case. However, the Director states that there is no need to address the impact of the 2010 amendments on this case if the Board affirms the administrative law judge's award of benefits. On the other hand, the Director states that if the Board does not affirm the administrative law judge's award of benefits and the case is remanded to the administrative law judge to consider the Section 411(c)(4) presumption, the administrative law judge should allow for the submission of additional evidence. Lastly, the Director states that Section 422(*l*) will not affect the outcome of this appeal because it does not involve a survivor's claim. Director's Supplemental Letter Brief at 1, n.1.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer initially contends 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 administrative law judge considered the reports of Drs. Baker, Broudy, and Jarboe. In reports dated August 6, 1993, December 13, 1993, February 12, 1998, and September 8, 2005, as well as a deposition dated October 9, 2008, Dr. Baker opined that the miner had chronic obstructive pulmonary disease (COPD) and chronic bronchitis related to coal dust exposure and cigarette smoking. Director's Exhibits 1, 2, 13; Claimant's Exhibit 1. By contrast, in a report dated October 17, 2005 and a deposition dated March 7, 2006, Dr. Broudy opined that the miner had COPD related to cigarette smoking, but not coal dust exposure. Director's Exhibit 16; Employer's Exhibit 1. In a report dated November 22, 2008 and a deposition dated December 4, 2008, Dr. Jarboe opined that the miner had a moderate ventilatory and respiratory impairment characteristic of emphysema induced by cigarette smoking. Employer's Exhibits 2, 3. Based on the administrative law judge's finding that Dr. Baker's opinion was better reasoned than the contrary opinions of Drs. Broudy and Jarboe, the administrative law judge found that the miner had legal pneumoconiosis within the meaning of Section 718.201.

Employer argues that the administrative law judge erroneously weighed the opinions of Drs. Baker, Broudy, and Jarboe. Specifically, employer asserts that "[the administrative law judge] never provides a clear and permissible rationale for rejecting the opinions of Drs. Broudy and Jarboe." Employer's Brief at 15. 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 independently evaluate the evidence and provide an explanation

[5] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 2. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, as noted above, the administrative law judge found that Dr. Baker's opinion was documented and reasoned. The administrative law judge also found that "[t]he medical opinions offered by the employer are not sufficient to rule out coal dust exposure as a cause or exacerbation of the miner's respiratory impairment." Decision and Order at 11, n.5. However, contrary to the administrative law judge's finding, employer is not required to rule out coal dust exposure as a cause of the miner's respiratory condition at Section 718.202(a)(4). Further, the administrative law judge did not explain why he found that Dr. Baker's opinion was better reasoned than the contrary opinions of Drs. Broudy and Jarboe. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Thus, the administrative law judge erred in failing to provide a valid basis for giving dispositive weight to Dr. Baker's opinion that the miner had legal pneumoconiosis. 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 medical opinion evidence in accordance with the APA.[6] *Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally 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).

Employer next 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 record consists of the reports of Drs. Baker, Broudy, and Jarboe. Dr. Baker opined that coal dust exposure and cigarette smoking contributed to the miner's respiratory impairment. Director's Exhibits 1, 2, 13; Claimant's Exhibit 1. Dr. Broudy opined that the miner's respiratory impairment was due to cigarette smoking, and not coal dust exposure. Director's Exhibit 16; Employer's Exhibit 1. Similarly, Dr. Jarboe opined that the miner's pulmonary impairment was due to cigarette smoking, and not coal dust exposure or coal workers' pneumoconiosis. Employer's Exhibits 2, 3.

[6] On remand, if the administrative law judge finds that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then he need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as his findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159, n.18 (2006).

The administrative law judge found that Dr. Baker's disability causation opinion was documented and reasoned. In so finding, the administrative law judge concluded that Dr. Baker's opinion was sufficient to meet claimant's burden of proof on the disability causation issue. However, with regard to opinions of Drs. Broudy and Jarboe, the administrative law judge found that the doctors failed to unequivocally rule out coal dust exposure as a partial cause of the miner's respiratory impairment or to satisfactorily explain how the miner's coal dust exposure would not exacerbate his respiratory impairment. Consequently, the administrative law judge found that the opinions of Drs. Broudy and Jarboe were interesting, but not convincing for purposes of this case. The administrative law judge therefore concluded that the medical evidence established total disability due to pneumoconiosis at Section 718.204(c).

Because 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), 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 APA.[7] Nevertheless, for the sake of judicial economy, we will address employer's assertions regarding the administrative law judge's disability causation findings.

Employer argues that the administrative law judge erred in relying on Dr. Baker's disability causation opinion. Specifically, employer asserts that Dr. Baker's opinion is not documented, reasoned, or supportive of a finding that the miner's respiratory impairment was significantly related to, or substantially aggravated by, coal dust exposure. Employer maintains that "Dr. Baker's 'guesswork' did not focus upon the [miner's] specific condition and medical science." Employer's Brief at 16. Contrary to employer's assertion, the administrative law judge reasonably found that "[a]lthough Dr. Baker's opinion on causation of the miner's respiratory impairment is not as articulate as a trier-of-fact would like,…his opinion is both documented and reasoned." Decision and Order at 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Dr. Baker based his opinion on a physical examination, a coal mine employment history, a smoking history, a chest x-ray, a pulmonary function study, an arterial blood gas study, and medical literature. Director's Exhibits 1, 2, 13; Claimant's Exhibit 1. Further, Dr. Baker explained why he opined that both coal dust exposure and cigarette smoking contributed to the miner's respiratory impairment based on the underlying documentation. *Id*. Dr. Baker additionally explained that he was referring to an opinion within a reasonable

[7] While the administrative law judge found that the evidence established that the miner had clinical pneumoconiosis, he did not make a finding on the issue of whether the miner's totally disabling respiratory impairment was due to clinical pneumoconiosis.

degree of medical certainty when he stated that he can only make an educated guess regarding the extent to which the miner's cigarette smoking or his coal dust exposure contributed to his pulmonary problems. Claimant's Exhibit 1 (Dr. Baker's Deposition at 25-26). Thus, because the administrative law judge reasonably found that Dr. Baker's opinion was documented and reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294, we reject employer's assertion that the administrative law judge erred in relying on Dr. Baker's disability causation opinion.

Employer also argues that the administrative law judge erred in discounting the disability causation opinions of Drs. Broudy and Jarboe. Specifically, employer asserts that the administrative law judge erred in shifting the burden of proof to discount the opinions of Drs. Broudy and Jarboe. In considering the disability causation opinions of Drs. Broudy and Jarboe, the administrative law judge stated that "neither [Dr. Jarboe] nor Dr. Broudy unequivocally *ruled out* coal dust exposure as a partial cause of the miner's impairment." Decision and Order at 14 (emphasis added). Contrary to the administrative law judge's finding, the "rule out" standard does not apply to Section 718.204(c). *Hutson v. Freeman United Coal Mining*, 12 BLR 1-72 (1988) (*en banc*). Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if claimant's evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Thus, to the extent that the administrative law judge required employer's medical experts to rule out legal pneumoconiosis as a contributing factor to the miner's totally disabling respiratory impairment, we hold that the administrative law judge erroneously shifted the burden of proof to employer.

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).[8]

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[8] 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.

Peabody Coal Co. v. Smith, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether clinical or legal pneumoconiosis contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

At the outset, however, the administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, as the miner's most recent claim (a subsequent claim) was filed after January 1, 2005, employer conceded at least 17 years of coal mine employment, and the administrative law judge found that the evidence established that the miner had a totally disabling respiratory impairment.[9] 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption by establishing that the miner did not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 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). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, the proponent of this evidence must establish good cause for its admission. 20 C.F.R. §725.456(b)(1).

Finally, employer contends that substantial evidence does not support the administrative law judge's finding that benefits commence as of June 1, 2005, given that the earliest medical evidence of total disability due to pneumoconiosis was dated September 8, 2005. Contrary to employer's contention, if the medical evidence does not establish the date that the miner became totally disabled due to pneumoconiosis, an administrative law judge may determine that the miner is entitled to benefits as of the filing date of his claim, unless credible medical evidence indicates that the miner was not totally disabled at some point subsequent to the filing date of his claim.[10] *See* 20 C.F.R.

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20 C.F.R. §718.204(c)(1)(i), (ii).

[9] Because the miner was not in payment status pursuant to a final award of benefits at the time of his death, inasmuch as the miner's claim is still pending, claimant is not entitled to derivative benefits. 30 U.S.C. §932(*l*).

[10] Section 725.503 provides that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

§725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In this case, the administrative law judge stated that he could not determine the date of the onset of total disability, based on his review of the record. Decision and Order at 15. Consequently, pursuant to 20 C.F.R. §725.503, the administrative law judge found that benefits commenced as of June 1, 2005, the beginning of month that the subsequent claim was filed, and continued until September 30, 2007, "which is the end of the month before the month in which the miner died." *Id*. Nevertheless, because we vacate the administrative law judge's award of benefits, we also vacate the administrative law judge's finding that benefits commence as of June 1, 2005 and remand the case for further consideration of the evidence thereunder, if reached.

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 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