

BRB No. 10-0605 BLA

JAMES ADAMS)
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 Claimant-Petitioner)
)
 v.)
)
 MILLER BROTHERS COAL COMPANY)
)
 and)
)
 AMERICAN INTERNATIONAL SOUTH) DATE ISSUED: 07/20/2011
 INSURANCE COMPANY)
)
 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 Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5998) of Administrative Law Judge Pamela Lakes Wood rendered on 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). This case involves a miner's claim filed on October

26, 2006. Director's Exhibit 2. After crediting claimant with thirty-seven years of coal mine employment,¹ as stipulated, the administrative law judge first considered whether claimant could establish his entitlement to benefits by proving directly all of the necessary elements of entitlement under 20 C.F.R. Part 718. The administrative law judge found that claimant could not do so, because he did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).² The administrative law judge next considered whether claimant could establish his entitlement with the aid of a rebuttable presumption of total disability due to pneumoconiosis that was reinstated by a recent amendment to the Act.³ See 30 U.S.C. §921(c)(4). The administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis under 30 U.S.C. §921(c)(4), because he established that his thirty-seven years of surface coal mine employment were substantially similar to the conditions of an underground mine, and that he is totally disabled by a respiratory or pulmonary impairment. However, the administrative law

¹ The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

² A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "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). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

³ Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled 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)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

judge further found that employer rebutted the presumption, by establishing that claimant does not have clinical or legal pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4),⁴ and that employer established rebuttal of the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits, and claimant has filed a reply brief reiterating his contentions. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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. 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 under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Mettu and Westerfield⁵ in determining whether claimant

⁴ The administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) are unchallenged. Additionally, the administrative law judge's finding that the existence of clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4) is unchallenged. Thus, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The administrative law judge also considered the opinions of Drs. Belhasen and Broudy. Dr. Belhasen diagnosed COPD, but did not address its etiology. Claimant's Exhibit 1. The administrative law judge discounted Dr. Broudy's opinion that claimant does not have legal pneumoconiosis, because she found that Dr. Broudy did not adequately explain why he eliminated coal mine dust exposure as a possible cause of claimant's respiratory impairment. Decision and Order at 14; Director's Exhibit 12; Employer's Exhibit 2.

established the existence of legal pneumoconiosis. In reports dated November 28, 2006, and March 18, 2008, Dr. Mettu diagnosed claimant with chronic bronchitis due primarily to coal mine dust exposure, and secondarily to smoking. Director's Exhibits 10 at 17; 35 at 3. Dr. Westerfield opined that claimant does not have legal pneumoconiosis, but has asthma unrelated to coal mine dust exposure, and COPD that is due solely to smoking. Employer's Exhibit 3. The administrative law judge found that Dr. Mettu did not adequately explain the basis for his diagnosis of legal pneumoconiosis. In contrast, she found that Dr. Westerfield's opinion was reasoned, documented, and persuasive.

Claimant contends that the administrative law judge erred in discrediting Dr. Mettu's opinion, when it is well-documented and well-reasoned, and sufficient to establish legal pneumoconiosis. We disagree. While Dr. Mettu's opinion, attributing claimant's chronic bronchitis in part to his coal mine dust exposure, is sufficient, if credited, to establish legal pneumoconiosis, the issue of whether a physician's opinion is adequately reasoned is a credibility determination for the administrative law judge. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-482 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In this case, the administrative law judge permissibly discredited Dr. Mettu's opinion, that claimant has legal pneumoconiosis, because the doctor did not explain why he related claimant's chronic bronchitis to his coal mine dust exposure.⁶ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 11, 14; Director's Exhibits 10 at 17; 35 at 3. As the administrative law judge provided a valid reason for discrediting Dr. Mettu's opinion, we reject claimant's allegation of error, and affirm the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and thus, did not establish directly the pneumoconiosis element of his claim under Section 718.202(a).

Section 411(c)(4) Presumption

The administrative law judge invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, finding that claimant established that his surface coal mine employment was substantially similar to underground coal mine employment, and that he has a totally disabling respiratory impairment. However, the administrative law

⁶ Dr. Mettu explained that claimant has chronic bronchitis because he has symptoms of cough expectoration for the last fifteen years, and he has an abnormal pulmonary function study indicating a severe obstructive disease. As the administrative law judge found, however, Dr. Mettu did not explain why he attributed claimant's chronic bronchitis to his coal mine dust exposure. Director's Exhibit 35 at 3.

judge found that employer rebutted the Section 411(c)(4) presumption by establishing, by a preponderance of the evidence, that claimant does not have clinical or legal pneumoconiosis.⁷ Decision and Order at 18. The administrative law judge found Dr. Westerfield's opinion, that claimant does not have legal pneumoconiosis, to be well-reasoned, well-documented, and persuasive. In so finding, the administrative law judge referred to her earlier "discuss[ion] in detail above" of Dr. Westerfield's opinion. *Id.* In that discussion, the administrative law judge summarized Dr. Westerfield's opinion that it was more likely than not for claimant's smoking, and not his work as a surface miner, to have caused his respiratory problems. Decision and Order at 13. Further, the administrative law judge summarized Dr. Westerfield's opinion that he diagnosed asthma, a condition that is not caused or aggravated by coal mine dust, because he saw reversibility on claimant's pulmonary function study, and because claimant was being treated for asthma. Decision and Order at 12.

Claimant contends that the administrative law judge erred in relying on Dr. Westerfield's opinion to find that employer rebutted the Section 411(c)(4) presumption. Specifically, claimant argues that the administrative law judge did not examine whether there was a credible basis for Dr. Westerfield's "statistical rationale" that it was more likely than not that claimant's COPD was caused by smoking and not coal mine dust exposure. Claimant's Brief at 10.

The determination of whether a medical opinion is reasoned and documented is for the administrative law judge as factfinder to decide. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. That determination "requires the factfinder to examine the validity of the reasoning of a medical opinion," and to explain her credibility determinations. *Id.* In this case, after summarizing Dr. Westerfield's opinion, the administrative law judge found that:

Dr. Westerfield has done the best job of explaining the basis for his opinion and discussing the likelihood that the Claimant suffers from legal pneumoconiosis, and his opinion is both reasoned and documented. When considered along with his report, which addresses issues he was not questioned about (such as the Claimant's coronary artery disease), his deposition testimony is persuasive.

⁷ The administrative law judge's findings that invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis was established, and that employer established that claimant does not have clinical pneumoconiosis, are unchallenged. Additionally, the administrative law judge's finding, that Dr. Broudy's opinion was not sufficiently explained to establish rebuttal of the Section 411(c)(4) presumption, is unchallenged. Therefore, these findings are affirmed. *See Skrack*, 6 BLR at 1-711.

Decision and Order at 13-14. As claimant contends, the administrative law judge did not set forth the basis for her determination in a manner indicating her analysis of the reasoning underlying Dr. Westerfield's conclusions. As a result, the Board is unable to determine whether substantial evidence supports her credibility determination. Therefore, we must vacate the administrative law judge's finding with respect to Dr. Westerfield's opinion, and remand this case to the administrative law judge for her to reconsider whether it supports employer's burden to establish rebuttal of the Section 411(c)(4) presumption. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In this regard, the administrative law judge should, on remand, indicate how she assesses the quality of Dr. Westerfield's reasoning in concluding that it is more likely than not that claimant's COPD is due to smoking.⁸ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

Claimant also contends that the administrative law judge erred in accepting Dr. Westerfield's opinion that the miner has asthma unrelated to coal mine employment because his pulmonary function study demonstrates reversibility. Claimant argues that the administrative law judge did not address whether Dr. Westerfield adequately explained why impairment reversibility eliminates a condition caused or aggravated by coal mine dust exposure. Claimant's Brief at 11, *citing Barrett*, 478 F.3d at 358, 23 BLR at 2-482 (upholding administrative law judge's finding that a physician did not adequately explain why a miner's response to bronchodilator treatment necessarily eliminated legal pneumoconiosis). Employer responds that Dr. Westerfield adequately explained his opinion in this respect. Employer's Brief at 13-14.

While the administrative law judge summarized Dr. Westerfield's report, and his deposition testimony regarding the significance of reversibility in claimant's pulmonary function study, she did not set forth her basis for finding this aspect of Dr. Westerfield's opinion well-reasoned and persuasive. Decision and Order at 12-14, 18-19. On remand, the administrative law judge should consider the issue raised by claimant, and employer's

⁸ A review of the record reflects Dr. Westerfield's testimony that claimant's COPD is "more likely than not" due to smoking, and not coal mine dust exposure, in part because "[m]ost coal miners do not develop COPD" from coal mine dust exposure, "[a]nd that's particularly true with surface miners," such as claimant. Employer's Exhibit 3 (Dr. Westerfield's deposition at 19). On remand, the administrative law judge should address this aspect of Dr. Westerfield's opinion in light of her own finding that, in his thirty-seven years of coal mine employment, claimant worked in "extremely dusty conditions . . .," which were "substantially similar to the conditions at an underground coal mine." Decision and Order at 16.

response, in assessing the validity of the reasoning of Dr. Westerfield's opinion. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Therefore, we vacate the administrative law judge's finding that employer established rebuttal of the Section 411(c)(4) presumption, and we remand this case to the administrative law judge for reconsideration of Dr. Westerfield's opinion. On remand, the administrative law judge must consider whether Dr. Westerfield's opinion establishes that claimant does not have legal pneumoconiosis, or that claimant's respiratory or pulmonary impairment did not arise out of, of in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge