BRB No. 03-0344 BLA

ROBERT PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COAL POWER CORPORATION	)	DATE ISSUED: 03/29/2004
	)	
and	)	
	)	
AMERICAN RESOURCES 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (97-BLA-0862) of Administrative Law Judge Joseph E. Kane on a claim filed pursuant to

the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case is before the Board for the third time. Claimant filed a claim for benefits on November 23, 1992. In a Decision and Order dated May 27, 1998, Administrative Law Judge Donald W. Mosser credited claimant with twenty-one years of coal mine employment based upon the stipulation of the parties, and determined that Coal Power Corporation is the responsible operator in this case. Turning to the merits of the claim, Judge Mosser found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Judge Mosser further found that while claimant established the presence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000), he failed to establish disability causation under 20 C.F.R. §718.204(b) (2000). Consequently, Judge Mosser denied benefits. Claimant appealed. Employer cross-appealed, challenging Judge Mosser's determination that it was the responsible operator.

In a Decision and Order dated October 29, 1999, the Board affirmed Judge Mosser's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1)-(3), but vacated Judge Mosser's finding that the evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). *Price v. Coal Power Co.*, BRB Nos. 98-1305 BLA and 98-1305 BLA-A (Oct. 29, 1999)(unpublished). The Board instructed Judge Mosser to consider whether Dr. Baker's opinion, that claimant has chronic bronchitis aggravated by coal dust exposure, and Dr. Myers's opinion, that claimant's pulmonary disability was caused by a combination of his coal dust exposure as well as his smoking history, are sufficient to establish legal pneumoconiosis. *Id*. The Board further affirmed Judge Mosser's finding that total disability was established pursuant to Section 718.204(c) (2000), but vacated his disability causation finding at Section 718.204(b) (2000) in light of its decision to vacate Judge Mosser's finding that pneumoconiosis was not established under Section 718.202(a)(4) (2000), and remanded the case for reconsideration of those two issues. *Id*. Finally, the Board vacated Judge Mosser's finding that employer was the properly designated responsible operator, and remanded the case for consideration of all of the evidence relevant to claimant's employment history subsequent to his employment with employer.

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

In his Decision and Order on Remand dated August 30, 2000, Judge Mosser found the medical opinion evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000) and, therefore, declined to address the issue of disability causation. In addition, Judge Mosser dismissed employer as the responsible operator. Claimant appealed, and the Director, Office of Workers' Compensation Programs (the Director), cross-appealed, challenging Judge Mosser's responsible operator finding. In a Decision and Order dated November 30, 2001, the Board vacated Judge Mosser's finding under Section 718.202(a)(4) (2000). *Price v. Coal Power Corp.*, BRB Nos. 01-0111 BLA and 01-0111 BLA-A (Nov. 30, 2001)(unpublished). Specifically, the Board held that Judge Mosser improperly discounted Dr. Baker's opinion on the basis that Dr. Baker considered an erroneous smoking history,[2] and improperly accorded greatest weight to the opinions of Drs. Jarboe, Broudy and Powell because Judge Mosser did not determine, pursuant to the decision of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000),[3] whether these physicians provided an explanation for excluding coal dust as an aggravating factor in claimant's respiratory problems. The Board thus remanded the case for reconsideration of the medical opinions under Section 718.202(a)(4). *Id*. The Board further vacated Judge Mosser's dismissal of employer as the responsible operator, and remanded the case for consideration of all relevant evidence as to whether a subsequent employer of claimant for over one year, Britestar Mining Company (Britestar), is defunct and has no assets, evidence which, if credited, could prove that Britestar cannot provide benefits.[4] *Id*.

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[2]The Board held that, contrary to Judge Mosser's finding, it was not clear that there was a material difference in the smoking history of one pack per day for thirty years, which Dr. Baker relied upon, and the "greater than thirty pack year" smoking history upon which Dr. Jarboe relied. *Price v. Coal Power Corp.*, BRB Nos. 01-0111 BLA and 01-0111 BLA-A (Nov. 30, 2001)(unpublished), slip op. at 7-8.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[4]Employer filed an appeal with the United States Court of Appeals for the Sixth Circuit, challenging the Board's holding with respect to the responsible operator issue. In an Order dated March 26, 2002, the court dismissed the appeal for lack of jurisdiction, holding that the Board's Decision and Order remanding the case to the administrative law judge for further proceedings does not end the

In a Decision and Order dated January 14, 2003, Administrative Law Judge Joseph E. Kane (the administrative law judge) found the medical opinion evidence sufficient to establish the presence of legal pneumoconiosis under Section 718.202(a)(4). The administrative law judge then determined, however, that the evidence is insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Specifically, the administrative law judge found that the opinions of Drs. Powell, Broudy and Jarboe, which indicate that claimant's pulmonary condition is due to smoking, and not coal dust exposure, outweigh the contrary opinions of Drs. Baker and Myers. Accordingly, he denied benefits. The administrative law judge also dismissed employer as the responsible operator. Claimant appeals, contending that the administrative law judge erred in finding that pneumoconiosis arising out of coal mine employment was not established pursuant to Section 718.203(b). Employer responds in support of the administrative law judge's Decision and Order. The Director has not filed a response brief in this case.[5]

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).

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish pneumoconiosis arising out of coal mine employment pursuant to Section 718.203. Initially, we will address, however, the administrative law judge's erroneous threshold finding that the medical opinion evidence of record uniformly supports a finding that claimant suffers from legal pneumoconiosis and is, therefore, sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). In finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) on the basis that all six medical opinions of record indicate that claimant suffers from legal pneumoconiosis, the administrative law judge mischaracterized four of

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agency process and is not final for purposes of review. *Coal Power Corp. v. Price*, No. 02-3122 (6th Cir. Mar. 26, 2002)(unpublished Order).

[5]We affirm, as unchallenged on appeal, the administrative law judge's dismissal of employer as the responsible operator in this case. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 13-17.

the medical opinions.[6] Decision and Order at 11. The opinions of Drs. Powell, Jarboe, Broudy and Kraman do not, in fact, indicate that claimant suffers from a chronic pulmonary disease or a respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.[7] Therefore, contrary to the administrative law judge's finding, these opinions are insufficient to establish that claimant suffers from legal pneumoconiosis pursuant to 20 C.F.R. §718.201. 20 C.F.R. §718.201(a)(2), (b). Where an administrative law judge's findings do not coincide with the evidence of record, a remand of the case is appropriate for reevaluation of the issue to which the evidence is relevant. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). We vacate, therefore, the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), and remand the case for the administrative law judge to reconsider whether the weight of the medical opinion evidence is sufficient to establish this element of entitlement.

With regard to the administrative law judge's finding that the evidence does not establish pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b), claimant contends that the administrative law judge erred in failing to determine that the opinions of Drs. Powell and Jarboe support a finding of causation. Claimant argues that the opinions of Drs. Powell and Jarboe indicate

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[6]The opinions of Drs. Baker and Myers support a finding of legal pneumoconiosis, in addition to clinical pneumoconiosis. Drs. Baker and Myers diagnosed both coal workers' pneumoconiosis and chronic obstructive pulmonary disease due to coal dust exposure and cigarette smoking. Director's Exhibits 12, 36.

[7]Dr. Powell diagnosed chronic obstructive pulmonary disease, bronchitis and emphysema due to smoking, and indicated that coal dust exposure did not contribute to claimant's conditions. Director's Exhibit 59 at 23-25. Dr. Jarboe diagnosed chronic bronchitis due to a heavy cigarette smoking history of thirty pack years, and probable pulmonary emphysema due to smoking. Director's Exhibits 35, 54. Dr. Jarboe specifically indicated that claimant does not have any condition caused by coal dust exposure. Director's Exhibit 54 at 18. Dr. Broudy diagnosed chronic obstructive airways disease due to chronic asthmatic bronchitis. Director's Exhibit 40. Dr. Broudy stated that the chronic asthmatic bronchitis is due to cigarette smoking and predisposition to asthma, and that claimant does not have any significant pulmonary disease or respiratory impairment which arose from his work as a coal miner. *Id*. Dr. Kraman stated that claimant has "chronic obstructive lung disease caused by his very heavy smoking habit." Director's Exhibit 44.

that coal dust exposure was negligible or small, but are thus sufficient to prove causation because all that is required to prove causation is that the pneumoconiosis arose "at least in part out of coal mine employment." 20 C.F.R. §718.203(a). Claimant further argues that he is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment, and that the administrative law judge erred in shifting the burden to him to prove this element of entitlement.

While we reject claimant's specific contentions on appeal, we are unable to affirm the administrative law judge's determination that the evidence does not establish that claimant has pneumoconiosis arising out of coal mine employment pursuant to Section 718.203(b). Contrary to claimant's contention that the opinions of Drs. Powell and Jarboe support a finding that claimant has pneumoconiosis arising at least in part out of coal mine employment, these physicians, as discussed above, unequivocally indicate that claimant's condition is not related, even in part, to coal dust exposure. Director's Exhibits 35, 54, 59. In addition, we disagree that the administrative law judge failed to find claimant entitled to the presumption available under Section 718.203(b). The administrative law judge duly noted that claimant was entitled to the presumption that his pneumoconiosis arose at least in part out of coal mine employment since claimant established more than ten years of coal mine employment. Decision and Order at 11. The administrative law judge then weighed the relevant evidence to determine whether the presumption was rebutted. Decision and Order at 11-13.

The administrative law judge's credibility determinations with regard to the conflicting medical opinions at Section 718.203, however, are internally inconsistent and cannot be affirmed. In discussing the conflicting medical opinions under Section 718.203, the administrative law judge found that the opinions of Drs. Powell and Jarboe, Director's Exhibits 35, 51, 54, 59, indicating that claimant's condition is not due to coal dust exposure and did not arise out of coal mine employment, are entitled to probative weight, and that the contrary opinions of Drs. Baker and Myers, Director's Exhibits 12, 36, 53, are likewise entitled to probative weight. Decision and Order at 11-12. The administrative law judge specifically discounted Dr. Broudy's opinion that claimant does not have a pulmonary condition arising out coal mine employment, finding that the opinion was poorly reasoned and entitled to less probative weight. Decision and Order at 12. The administrative law judge then inconsistently stated, however, that the probative value of the opinions of Drs. Powell, Jarboe *and* Broudy outweighs the probative value of the opinions of Drs. Baker and Myers. Decision and Order at 13. Because the administrative law judge has not provided a clear rationale which explains the relationship between his credibility determinations and his ultimate conclusion under Section 718.203, that the weight of the medical opinion evidence establishes that claimant does not suffer from pneumoconiosis arising out of coal mine employment, we vacate the administrative law judge's finding at 20 C.F.R.

§718.203(b). *See Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). If he reaches the issue on remand, the administrative law judge must reconsider the relevant evidence under Section 718.203(b), and explain his rationale for resolving the conflicts in the medical evidence. In addition, the administrative law judge must determine whether the relevant evidence is sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), if reached.[8]

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[8]Revised Section 718.204(c) 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.

20 C.F.R. §718.204(c)(1).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part, and vacated in part, and the 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