BRB No. 08-0442 BLA

R.D.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED: 03/26/2009
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (04-BLA-6422) of Administrative Law Judge Daniel A. Sarno, Jr. (the administrative law judge) denying benefits on a subsequent 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). Claimant filed his first claim for benefits on October 12, 1993. Director's Exhibit 1. It was denied by the district director on August 22, 1994, because claimant failed to establish pneumoconiosis or total disability. *Id*. Claimant filed a subsequent claim, now before us, on July 7, 2003. Director's Exhibit 3. In his first decision on the subsequent claim, the administrative law judge accepted the parties' stipulation to twenty years of coal mine employment, and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical opinion

evidence submitted since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against claimant.[1] 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. Turning to the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309,[2] and that the evidence established total disability on the merits at 20 C.F.R. §718.204(b). *R.D. v. Perry County Coal Corp*., BRB No. 07-0154 BLA, slip op. at 2 n.3, 5-6 n.7 (Aug. 30, 2007)(unpub.). The Board, however, vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis on the merits at 20 C.F.R. §718.202(a)(4), and remanded the case to the administrative law judge for further consideration of the medical opinion evidence thereunder.[3] *R.D.*, slip op. at 5. Specifically, the Board held that the

[1] The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). Decision and Order at 8.

[2] Although the Board held that the administrative law judge erred in finding the existence of pneumoconiosis established based on the new evidence, it held that it need not vacate his determination that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d), because substantial evidence supported his finding that total disability was established based on the new evidence, an element previously adjudicated against claimant. *R.D. v. Perry County Coal Corp.*, BRB No. 07-0154 BLA, slip op. at 5-6, n.7 (Aug. 30, 2007) (unpub.).

[3] The relevant medical opinion evidence of record consists of the opinions of Drs. Chaney, Rosenberg, Baker, and Broudy. Based on a physical examination, coal dust exposure history, and laboratory studies, Dr. Chaney, in a report dated October 29, 2005, diagnosed both clinical and legal pneumoconiosis, *i.e.*, an occupational lung disease related to coal mine dust exposure. Claimant's Exhibit 2. Dr. Chaney also indicated that he had treated claimant from 1982 to the present. In a report dated December 28, 2005, based on a review of reports by Drs. Chaney, Baker, and Broudy, and Dr. Chaney's treatment records. Dr. Rosenberg concluded that claimant does not have clinical or legal pneumoconiosis, but has obstructive lung disease due to smoking. Employer's Exhibit 3.

administrative law judge erred in his application of the treating physician rule at 20 C.F.R. §718.104(d) to Dr. Chaney's opinion. The Board noted that while the administrative law judge properly addressed the factors found at Section 718.104(d),[4] he did not explain how those factors or Dr. Chaney's examination of claimant actually gave Dr. Chaney an understanding of claimant's pulmonary condition that was superior to that gained by Dr. Rosenberg from his review of the medical evidence, or by Dr. Broudy from his examination and testing of claimant. The Board also held that the administrative law judge did not assess the validity of the reasoning in Dr. Chaney's opinion, in light of its underlying documentation. Additionally, the Board held that the administrative law judge did not address the fact that Drs. Rosenberg and Broudy are Board-certified in Internal Medicine and Pulmonary Disease, while Dr. Chaney is Board-certified only in Family Medicine. Consequently, the Board held that the administrative law judge must address these factors on remand and reconsider the relevant evidence consistent with Section 718.104(d) and the holding of the United States Court of Appeals for the Sixth Circuit in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir.

In a report dated August 1, 2003, based on a physical examination, work and smoking histories, and objective tests, Dr. Baker diagnosed "Coal Workers' Pneumoconiosis 1/0," as well as chronic bronchitis, chronic obstructive pulmonary disease (COPD), and hypoxemia due to coal dust exposure and smoking. Director's Exhibit 11.

In a report dated October 14, 2005, based on physical examination, coal mine employment history, smoking history, and objective tests, Dr. Broudy diagnosed COPD due to smoking, and reported that there was no evidence of any chronic lung disease arising from claimant's coal mine employment. Employer's Exhibit 1.

[4] Section 718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

1) Nature of relationship.
2) Duration of relationship.
3) Frequency of treatment.
4) Extent of treatment.

The regulation also requires the administrative law judge to weigh the treating physician's opinion "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

2003).[5] The Board also instructed the administrative law judge to reconsider the evidence at 20 C.F.R. §718.204(c), if reached. *Id*.

Noting the Board's instructions, on remand the administrative law judge found that the medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge found that Dr. Chaney's opinion was not entitled to as much weight as the opinions of Drs. Rosenberg and Broudy, because Dr. Chaney was Board-certified only in Family Medicine while Drs. Rosenberg and Broudy were Board-certified in Internal Medicine and Pulmonary Disease. Additionally, the administrative law judge noted that although he found that Dr. Chaney's opinion was well-documented, "given the breadth of the background he has had with Claimant," he no longer found it to be well-reasoned given that it was a "one-page fill in the blank medical opinion…." Decision and Order on Remand at 6 n.7. Further, the administrative law judge noted that he no longer accorded diminished weight to Dr. Rosenberg's opinion on the ground that he had not examined claimant, since Dr. Broudy, an examining physician, corroborated Dr. Rosenberg's opinion. In conclusion, therefore, the administrative law judge determined that the opinions of Drs. Rosenberg and Broudy were entitled to greater weight based on their superior qualifications and because they were better reasoned, while the opinions of Drs. Baker and Chaney were insufficient to carry claimant's burden. Accordingly, the administrative law judge found that the existence of pneumoconiosis, an essential element of entitlement, was not established at Section 718.202(a) and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) on remand. Claimant also contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) in his first decision. Claimant further contends that the administrative law judge erred in failing to consider whether the evidence established that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Lastly, claimant contends that the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

[5] The record shows that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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. 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 living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is 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).

Claimant argues that the administrative law judge erred in his weighing of the opinions of Drs. Rosenberg and Chaney on remand, "as he failed to explain his reasoning for giving [Dr.] Rosenberg controlling weight over [Dr.] Chaney, other than to say he 'out qualified' him." Claimant's Brief at 17. Contrary to claimant's argument, however, the administrative law judge may accord greater weight to the opinion of a physician based on his superior qualifications. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Accordingly, the administrative law judge acted properly in finding that the opinions of Drs. Rosenberg and Broudy were entitled to greater weight than that of Dr. Chaney, based on their superior qualifications. As claimant contends, however, the administrative law judge failed to address the qualifications of Dr. Baker,[6] who is also Board-certified in Internal Medicine and Pulmonary Diseases and who found that claimant had both clinical and legal pneumoconiosis. Because the administrative law judge failed to consider Dr. Baker's qualifications on remand, and Dr. Baker's opinion supports Dr. Chaney's opinion, we vacate the administrative law judge's finding at Section 718.202(a)(4), and remand the case for the administrative law judge to consider the qualifications of Dr. Baker, along with those of the other physicians in weighing the credibility of the medical opinion evidence. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-67 (2004)(*en banc*).

Claimant also argues that the administrative law judge erred in finding pneumoconiosis established at Section 718.202(a)(4) because he found the opinions of Drs. Rosenberg and Broudy better reasoned than the opinion of Dr. Chaney. Specifically, the administrative law judge found that Dr. Chaney's opinion was not well-reasoned because it consisted of a "one-page fill in the blank medical opinion…in light of, the well

[6] The Board did not specifically require the administrative law judge to address Dr. Baker's qualifications in its decision remanding the case. We agree with claimant, however, that Dr. Baker's qualifications are relevant to an evaluation of the medical opinion evidence as a whole at 20 C.F.R. §718.202(a)(4).

reasoned…opinions provided by both Drs. Rosenberg and Broudy." Decision and Order on Remand at 6.

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 for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, however, the administrative law judge failed to explain why he found that the opinions of Drs. Rosenberg and Broudy well-reasoned.[7] *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. In addition to stating that the opinions were "well reasoned," the administrative law judge merely noted that the opinion of Dr. Broudy, an examining physician, corroborated the opinion of Dr. Rosenberg, a non-examining physician. Decision and Order on Remand at 6. The administrative law judge did not, however, discuss his reasons for finding the opinions of Drs. Rosenberg and Broudy well-reasoned. The administrative law judge erred in summarily concluding that the opinions of Drs. Rosenberg and Broudy were well-reasoned without explaining the basis for that finding. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, because the administrative law judge's evaluation of the credibility of Dr. Chaney's opinion was based, in part, on the fact that the opinions of Drs. Rosenberg and Broudy were better reasoned, he has failed to provide a sufficient rationale for his weighing of the medical opinion evidence. Consequently, the case must be remanded for him to do so.

Claimant next argues that the administrative law judge erred in discounting Dr. Chaney's opinion as unreasoned. When the case was previously before the Board, the Board held that while the administrative law judge properly addressed the factors at Section 718.104(d)(1)-(4) for the consideration of the opinions of treating doctors, he did not explain how those factors or Dr. Chaney's examination of claimant gave him, as a treating physician, a better understanding of claimant's pulmonary condition than Drs. Rosenberg and Broudy. Accordingly, the Board vacated the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and remanded the case for the administrative law judge to explain how the factors set forth at Section 718.104(d)(1)-(4) enhanced Dr. Chaney's understanding of claimant's respiratory condition. The Board also instructed the administrative law judge to assess the validity of Dr. Chaney's opinion in light of its underlying documentation.

[7] The administrative law judge found that all of the opinions were well-documented. Decision and Order on Remand at 6.

On remand, the administrative law judge found that Dr. Chaney's opinion was not well-reasoned because it consisted of a "one-page fill in the blank medical opinion…." Decision and Order on Remand at 6. The administrative law judge failed, however, to discuss the opinion in light of Dr. Chaney's treatment records, which showed that he had treated claimant regularly between April 2002 and June 2005, prescribing medication and performing objective studies to monitor claimant's condition. The administrative law judge failed, therefore, to follow the Board's remand instructions, which required the administrative law judge to explain how the factors set forth at Section 718.104(d) gave Dr. Chaney a better understanding of claimant's respiratory condition. Likewise, while the administrative law judge noted that Dr. Chaney's opinion consisted of only one page, he did not assess the credibility of the opinion in light of the documentation provided in Dr. Chaney's treatment records, as required at Section 718.104(d)(1)-(4). Accordingly, the case must be remanded so that the administrative law judge can comply with the Board's remand instructions.

Further, claimant contends that while the administrative law judge referred to the diagnosis of clinical pneumoconiosis made by Dr. Baker, he did not discuss the diagnosis of legal pneumoconiosis made by Dr. Baker that supports Dr. Chaney's diagnosis. On remand, the administrative law judge must fully discuss the opinion of Dr. Baker at Section 718.202(a)(4).

In view of the foregoing, we vacate the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the medical opinion evidence thereunder, in accordance with the APA. On remand, the administrative law judge must consider whether the medical opinion evidence establishes clinical pneumoconiosis and/or legal pneumoconiosis at Section 718.202(a)(4).

Claimant also asserts that the administrative law judge erred in finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1) on the basis of x-ray evidence. In his first decision, the administrative law judge found that pneumoconiosis was not established at Section 718.202(a)(1) because the x-ray evidence was in equipoise. *R.D.*, slip op. at 8. Because Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and we have vacated the administrative law judge's finding that pneumoconiosis was established at Section 718.202(a)(4), we will consider claimant's arguments at Section 718.202(a)(1).

Claimant contends that the administrative law judge erred in finding the new x-ray evidence to be in equipoise and failed to adequately consider both old and new evidence. We agree. The administrative law judge found that the x-ray of August 2003 was interpreted as positive for pneumoconiosis by Dr. Baker, a B reader and Dr. Poulos, a B

reader and Board-certified radiologist, and as negative by Dr. Alexander, a B reader and Board-certified radiologist. The administrative law judge found the October 2005 x-ray was interpreted as positive by Dr. Alexander, a B reader and Board-certified radiologist and as negative by Dr. Broudy, a B reader. The administrative law judge also indicated that there was earlier positive evidence. Because the administrative law judge has not adequately discussed all of the x-ray evidence of record and has not explained why he found the x-ray evidence to be in equipoise, we vacate the administrative law judge's finding that the x-ray evidence has not established the existence of pneumoconiosis at Section 718.202(a)(1) and remand the case for reconsideration of the evidence thereunder. On remand, the administrative law judge must resolve any conflicts in the x-ray evidence. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Further, if reached on remand, the administrative law judge must consider whether the evidence establishes that clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.[8] In addition, if reached on remand, the administrative law judge must consider whether the evidence establishes that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). *See 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).

[8] If the administrative law judge finds legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), he need not determine whether it arose out of coal mine employment at 20 C.F.R. §718.203, as a finding of causality would be subsumed in the finding of legal pneumoconiosis. 20 C.F.R. §718.201; *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

Accordingly, the administrative law judge's Decision and Order on Remand 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.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge