

BRB No. 10-0416 BLA

JOE M. SLONE)
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 Claimant-Respondent)
)
 v.)
)
 SWEATBEE COAL CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE GROUP) DATE ISSUED: 05/12/2011
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Jonathan Rolfe (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer and carrier ("employer") appeal the Decision and Order-Awarding Benefits (08-BLA-5812) of Administrative Law Judge Alan L. Bergstrom rendered on a

subsequent claim¹ 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). The administrative law judge credited claimant with twenty years of coal mine employment,² and found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge, however, found that claimant established the existence of legal pneumoconiosis,³ pursuant to 20 C.F.R. §718.202(a)(4), based on a new medical opinion diagnosing restrictive lung disease, chronic obstructive pulmonary disease, and chronic bronchitis, all arising out of claimant's coal mine employment. The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that, although the evidence under 20 C.F.R. §718.204(b)(2)(i)-(iii) did not establish that claimant is totally disabled by a respiratory or pulmonary impairment, the medical opinion evidence established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Conducting no separate analysis of whether the medical opinion evidence established the cause of claimant's total disability under 20 C.F.R. §718.204(c), the administrative law judge found that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant established the existence of legal pneumoconiosis and that he is totally disabled. Employer further challenges the

¹ Claimant's first claim for benefits, filed on April 25, 1996, was denied by the district director on December 4, 1996, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on September 1, 2005, was also denied by the district director on May 10, 2006, because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant filed this claim on September 26, 2007. Director's Exhibit 4.

² As claimant was last employed in the coal mining industry in Kentucky, 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 (1989) (*en banc*); Director's Exhibit 1 at 31, 61; Director's Exhibit 14.

³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

administrative law judge's determination that claimant's total disability is due to pneumoconiosis. Additionally, employer asserts that, although a recent amendment to the Act, which was enacted by Section 1556 of Public Law No. 111-148, may apply to this claim,⁴ that amendment does not affect the case, because claimant is not totally disabled by a respiratory or pulmonary impairment. Claimant has not submitted a response brief. The Director, Office of Workers' Compensation Programs, responds that if the Board does not affirm the award of benefits, it should remand the case for the administrative law judge to address whether claimant is entitled to the Section 411(c)(4) presumption that was reinstated by Section 1556.⁵

Based upon the parties' responses, and our review, we hold that Section 1556 potentially affects this case. For the reasons set forth below, we vacate the award of benefits. Because we must remand this case for the administrative law judge to reconsider whether claimant is entitled to benefits, we will also instruct the administrative law judge to consider this claim pursuant to Section 411(c)(4).

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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. If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one

⁴ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on March 23, 2010, were enacted. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that if a miner had at least fifteen years of qualifying coal mine employment, and has a totally disabling respiratory impairment, there is 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(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s last claim was denied because he failed to establish any element of entitlement. Director’s Exhibit 2. Consequently, claimant had to submit new evidence establishing any one of the elements of entitlement to obtain consideration of the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Ammisetty, Dahhan, and Fino, regarding whether claimant suffers from pneumoconiosis. Dr. Ammisetty examined and tested claimant, and diagnosed clinical pneumoconiosis, based on a positive chest x-ray reading. Director’s Exhibit 12 at 25. Additionally, Dr. Ammisetty diagnosed claimant with “restrictive lung disease/bronchial asthma/bronchitis,” all of which were “secondary to 100% coal dust exposure,” as claimant never smoked. Director’s Exhibit 12 at 13, 19. Dr. Dahhan examined and tested claimant, and read his x-ray as negative for clinical pneumoconiosis. Employer’s Exhibit 1 at 2. Based on a pulmonary function study, Dr. Dahhan diagnosed a “mild non-parenchymal restrictive ventilatory defect” resulting from claimant’s marked obesity, which the doctor explained compresses the lungs and prevents them from expanding normally. *Id.* Dr. Dahhan concluded that there was no evidence of a pulmonary impairment related to the inhalation of coal mine dust.⁶ *Id.* Dr. Fino examined and tested claimant and, although he read claimant’s chest x-ray as positive for clinical pneumoconiosis, he concluded that a pulmonary function study, blood gas study, and diffusion capacity study reflected that claimant has no respiratory impairment. Employer’s Exhibit 2.

Because the administrative law judge had already found that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he discounted Dr. Ammisetty’s and Dr. Fino’s x-ray-based diagnoses of clinical pneumoconiosis. Turning to the issue of legal pneumoconiosis, the administrative law judge noted that Dr. Ammisetty did not address what role claimant’s obesity may play in producing the restrictive ventilatory defect that Dr. Ammisetty

⁶ Dr. Dahhan noted, however, that claimant suffers from conditions of the general public, including marked obesity, congestive heart failure, and coronary artery disease. Employer’s Exhibit 1.

diagnosed, based on a pulmonary function study.⁷ Decision and Order at 10, 15. The administrative law judge, however, found that Dr. Ammisetty's diagnosis of legal pneumoconiosis was well-reasoned, because Dr. Ammisetty considered claimant's "medical history, work history, lack of smoking history, observation and test results. . . ." Decision and Order at 15. In contrast, the administrative law judge found that Dr. Dahhan's opinion was not well-reasoned, because Dr. Dahhan failed to address Dr. Ammisetty's diagnoses of COPD and chronic bronchitis due to coal mine dust exposure. Further, the administrative law judge found that Dr. Dahhan did not address claimant's medical history of taking medications that are commonly prescribed for breathing impairments, or his need for supplemental oxygen at night. Decision and Order at 15. Additionally, the administrative law judge found that Dr. Fino did not explain his opinion that claimant has no respiratory impairment. According greater weight to Dr. Ammisetty's opinion, the administrative law judge found that claimant suffers from legal pneumoconiosis.

Employer contends that the administrative law judge did not adequately explain his resolution of the conflicting medical opinion evidence as to the existence of legal pneumoconiosis. We agree. Initially, the administrative law judge did not address the validity of the reasoning of Dr. Ammisetty's diagnosis of legal pneumoconiosis, in light of the studies conducted and the objective indications upon which the opinion was based. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As the administrative law judge noted, Dr. Ammisetty relied, in part, on his finding of restrictive lung disease to diagnose legal pneumoconiosis. Dr. Dahhan, however, opined that the restriction on claimant's pulmonary function study is not a lung disease related to coal mine employment, but rather, is a compression effect of obesity. Without resolving this conflict, the administrative law judge determined that Dr. Ammisetty's diagnosis of legal pneumoconiosis was well-reasoned, because Dr. Ammisetty also considered claimant's histories, and "observation and test results." Decision and Order at 15. The other objective test results that Dr. Ammisetty referred to were resting and exercise blood gas studies revealing "no hypoxemia."⁸ Director's Exhibit 12 at 24. Dr. Ammisetty stated further that his diagnosis of legal pneumoconiosis was based on claimant's

⁷ Dr. Ammisetty interpreted a November 5, 2007 pulmonary function study as diagnostic of restrictive lung disease. Director's Exhibit 12 at 24. In diagnosing claimant with legal pneumoconiosis, Dr. Ammisetty stated that the diagnosis was "based on symptoms of restrictive lung disease/bronchial asthma/bronchitis." Director's Exhibit 12 at 13.

⁸ Later, when a Department of Labor claims examiner asked Dr. Ammisetty to clarify his opinion, Dr. Ammisetty stated that the exercise portion of claimant's blood gas study reflected "acute respiratory acidosis." Director's Exhibit 12 at 13.

reported symptoms of cough and sputum production, and on the doctor's finding of diminished breath sounds and wheezes on examination. Director's Exhibit 12 at 19, 23, 24. Because the administrative law judge did not analyze the specific bases of Dr. Ammisetty's opinion, we are unable to determine whether substantial evidence supports his determination that Dr. Ammisetty's opinion is a well-reasoned diagnosis of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer argues further that the administrative law judge erred in discounting Dr. Dahhan's opinion, because Dr. Dahhan failed to consider Dr. Ammisetty's diagnoses of COPD and chronic bronchitis due to coal mine dust exposure. As discussed above, the administrative law judge did not sufficiently address whether those diagnoses by Dr. Ammisetty were documented and reasoned. Moreover, as employer argues, the administrative law judge inconsistently analyzed the medical opinions, as he did not require Dr. Ammisetty to consider Dr. Dahhan's test results and diagnoses. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*). Further, the administrative law judge did not indicate the weight, if any, he accorded to Dr. Dahhan's opinion that claimant's restrictive pulmonary function defect is an effect of obesity and is unrelated to coal mine dust exposure. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge also found that Dr. Dahhan did not address the fact that claimant has been prescribed medications for breathing problems, and uses supplemental oxygen at night. Dr. Ammisetty did not rely on claimant's prescriptions to diagnose pneumoconiosis. Consequently, the administrative law judge did not adequately explain why Dr. Dahhan's failure to discuss them undercut his opinion that there was no objective evidence of pneumoconiosis. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Employer argues further that the administrative law judge did not set forth a valid basis for according little weight to Dr. Fino's opinion that claimant has no impairment. This argument has merit. The administrative law judge's finding, that Dr. Fino did not explain his opinion that claimant has no impairment, is not supported by the record. A review of Dr. Fino's opinion reveals the physician's explanation that claimant's "normal spirometry clearly shows no evidence of obstruction, restriction, or ventilatory impairment," that claimant's "normal diffusing capacity rules out the presence of an impairment in oxygen transfer," and that claimant's resting blood gas study was normal. Employer's Exhibit 2. Further, the administrative law judge did not adequately explain why Dr. Fino's failure to discuss claimant's prescriptions undercut Dr. Fino's opinion that there was no objective evidence of an impairment. *See Marcum*, 11 BLR at 1-24.

In light of the above errors, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis, and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §§718.202(a)(4), 725.309(d), and remand this case for further consideration. On remand,

the administrative law judge must evaluate the medical opinions of Drs. Ammisetty, Dahhan, and Fino to determine whether they are documented and reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge must then weigh the opinions together to determine whether claimant has carried his burden to establish the existence of legal pneumoconiosis. In weighing the opinions, the administrative law judge must fully explain his reasons for crediting or discrediting each opinion, in accordance with 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Total Disability

In considering the merits of the claim, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Ammisetty, Dahhan, and Fino regarding whether claimant is totally disabled.⁹ Dr. Ammisetty opined that claimant is totally disabled from performing his last job as a loader and jack setter because his exercise blood gas study “reflects that he is developing acute respiratory acidosis.” Director’s Exhibit 12 at 13. In contrast, Drs. Dahhan and Fino opined that claimant is not totally disabled. Dr. Dahhan concluded that claimant has a mild restrictive defect on his pulmonary function study that is “non-parenchymal” and results from obesity. Employer’s Exhibit 1. Dr. Fino concluded that claimant’s objective tests reveal no impairment. Employer’s Exhibit 2.

The administrative law judge found that neither Dr. Fino nor Dahhan “rebutted Dr. Ammisetty’s opinion with more persuasive well-reasoned medical opinions.” Decision and Order at 20. Specifically, the administrative law judge found that Dr. Dahhan “failed to rule out or address the other causes” of claimant’s impairment, “such as chronic obstructive pulmonary disease and chronic bronchitis.” *Id.* Further, the administrative law judge found that Dr. Fino did not consider claimant’s “prescribed breathing medications and supplemental oxygen needs. . . .” *Id.* The administrative law judge therefore found that claimant is totally disabled.

We cannot affirm the administrative law judge’s finding that total disability was established. Initially, the administrative law judge did not address whether Dr.

⁹ The administrative law judge summarized the medical evidence that was submitted with claimant’s last claim, but he accorded greater weight to the more recent evidence that was developed with the current claim. Decision and Order at 3. Employer does not challenge this aspect of the administrative law judge’s decision.

Ammisetty's opinion was reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 20; Employer's Brief at 15. Further, in discounting Dr. Dahhan's opinion that claimant is not totally disabled, because Dr. Dahhan did not address other causes of impairment, the administrative law judge improperly combined the issue of whether a disabling respiratory impairment exists under 20 C.F.R. §718.204(b)(2), with the separate issue of the causation of total disability under 20 C.F.R. §718.204(c). Further, the administrative law judge did not adequately explain why Dr. Fino's opinion, that there was no objective evidence of an impairment, was undercut by claimant's prescriptions for breathing medications, and oxygen at night. *See Marcum*, 11 BLR at 1-24. Therefore, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv).

On remand, in evaluating the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must first determine the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.*, 7 BLR 1-469 (1984). The administrative law judge must then determine whether the medical opinions are documented and reasoned, and whether they establish the existence of a totally disabling respiratory impairment, when considered in light of the exertional requirements of claimant's usual coal mine employment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Additionally, the administrative law judge, on remand, must also weigh together all of the evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether it establishes total disability at 20 C.F.R. §718.204(b)(2).¹⁰ *See Fields*, 10 BLR at 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Total Disability due to Pneumoconiosis

Employer argues further that the administrative law judge erred in finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge's decision contains no separate analysis of this issue. The administrative law judge, however, stated that he found that claimant is totally disabled due to legal pneumoconiosis. Decision and Order 20-21. Because we have vacated the administrative law judge's finding of legal pneumoconiosis, we also vacate his finding of total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge must reconsider this issue, if reached, on remand.

¹⁰ The administrative law judge found that the medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 16-20.

Application of Section 411(c)(4)

At the outset, the administrative law judge, on remand, must consider whether claimant has established invocation of the Section 411(c)(4) presumption. The administrative law judge should allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *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). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part, vacated in part, and this 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

JUDITH S. BOGGS
Administrative Appeals Judge