BRB No. 10-0184 BLA

VICTOR BERNARDI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY[1]	)	DATE ISSUED: 10/28/2010
	)	
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 – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Hazlett Law Offices), St. Clairsville, Ohio, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

[1] The caption on the administrative law judge's Decision and Order lists "McElroy Coal Company" as the responsible operator. However, at the formal hearing in the case, employer's counsel, Ms. Ashley Harman, stated that McElroy Coal Company was a subsidiary company that was later purchased by Consolidation Coal Company. Hearing Transcript at 7-8. When the administrative law judge inquired as to whether he should change the caption to list Consolidation Coal Company instead of McElroy Coal Company as the responsible operator, Ms. Harman stated that naming either company was acceptable. *Ibid.* Since Consolidation Coal Company is referenced in most of the documents contained in the record and all the parties have named Consolidation Coal Company as the responsible operator in their pleadings and briefs, we shall do so herein to remain consistent.

Paul L. Edenfield (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (08-BLA-5557) of Administrative Law Judge Michael P. Lesniak on a claim[2] 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 adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in coal mine employment for forty years. The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), but failed to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that the medical opinion evidence was insufficient to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv) and disability causation pursuant to Section 718.204(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal.

By Order dated September 14, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Bernardi v. Consolidation Coal Co.*, BRB No. 10-0184 BLA (Sept. 14, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section

[2] Claimant, Victor Bernardi, filed his application for benefits on January 28, 2008. Director's Exhibit 2.

411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] All parties have responded. Claimant states that the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are applicable to the instant claim and that he is entitled to invocation of the presumption set forth therein. Employer avers that, while claimant filed his application for benefits after January 1, 2005 and established forty years of coal mine employment, invocation of the presumption of total disability due to pneumoconiosis is precluded based on the administrative law judge's finding that the evidence is insufficient to establish total disability. Alternatively, in the event that the Board remands the case, employer asserts that due process requires that employer be permitted to develop whatever new medical evidence it deems necessary to respond to the change in the law.[4] In his supplemental letter brief, the Director contends that, if the Board affirms the administrative law judge's finding that total disability was not established, the amended Section 411(c)(4) has no bearing on this case and a remand would not be necessary. Alternatively, the Director contends that, if the Board vacates or reverses the administrative law judge's finding that total disability was not established, the case should be remanded for the administrative law judge to consider whether claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). On remand, the Director asserts that the administrative law judge must allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if evidence exceeding those limitations is offered. As set forth *infra*, we vacate the administrative law judge's finding that total respiratory disability was not established under Section 718.204(b)(2), and remand the case to the administrative law judge for further consideration.

[3] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[4] In addition, employer challenges the constitutionality of the recent amendments to Section 411(c)(4), 30 U.S.C. §921(c)(4), arguing that retroactive application of these provisions denies employer its right to due process and constitutes an unconstitutional taking of private property. Employer recognizes that the Board recently addressed the constitutionality of the recent amendments in *Mathews v. United Pocahontas Coal Co.*, --- BLR ---, BRB No. 09-0666 BLA (Sept. 22, 2010). Nevertheless, employer has raised these issues to preserve them for the purpose of a future appeal. Employer's Supplemental Brief at 8-14.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant challenges the administrative law judge's finding that the medical opinions of Drs. Knight and Saludes were insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv),[6] notwithstanding his initial determination that Drs. Knight and Saludes each found that claimant was disabled. Claimant asserts that both physicians testified during their depositions that claimant suffered from a totally disabling respiratory impairment and, therefore, the administrative law judge mischaracterized their opinions by finding that "Dr. Knight did not indicate that claimant has a pulmonary impairment" and that "Dr. Saludes' opinion suggests that claimant is not disabled under the Regulations," Decision and Order at 10. Claimant's argument has merit with regard to the medical opinion of Dr. Knight.

In reviewing the disability assessments of the physicians, the administrative law judge found that, because "Dr. Knight did not indicate that Claimant had a pulmonary impairment,… he cannot be of the opinion that Claimant's pulmonary impairment, standing alone, caused Claimant's disability," and therefore, "Dr. Knight's opinion suggests that Claimant is not disabled." Decision and Order at 10. The administrative law judge, however, did not discuss Dr. Knight's deposition testimony, which was based on his July 31, 2008 complete pulmonary evaluation of claimant, that claimant suffers from a totally disabling respiratory impairment that prevents him from performing his

[5] The law of the United States Court of Appeals for the Fourth Circuit applies because the miner was employed in coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[6] The administrative law judge found that the evidence of record was insufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 10.

usual coal mine employment.[7] A review of Dr. Knight's May 14, 2009 deposition

[7] A review of Dr. Knight's deposition testimony reveals multiple occasions, during his exchange with employer's counsel, when Dr. Knight opined that claimant is totally disabled. Dr. Knight testified as follows:

> Q: Okay. Were you ultimately able to come to an opinion as to whether Mr. Bernardi was disabled from his last coal mine employment?
> A: Yes.
> Q: And what was your opinion in that respect?
> A: It was my opinion that he was disabled from his last coal mining job.
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> * * *
>
> Q: All right. Your opinion that Mr. Bernardi was disabled from his last coal mine employment of July 31, 2008, did his chest pain on exertion contribute to that opinion?
> A: Actually, none.
> Q: Why is that?
> A: *Because I felt already, from my examination and findings, from a respiratory standpoint that he was and should be disabled from his coal mining work. And there was no need to consider those other things as part of the decision.*
>
> * * *
>
> Q: Now, you do rely on the pulmonary function test and the blood gases to say that Mr. Bernardi was disabled from his last coal mine employment?
> A: Yes.
> Q: And that level of disability was what; totally disabled?
> A: Total, in my view.

Employer's Exhibit 8 at 16, 18-19, 49 [emphasis added].

In addition, Dr. Knight reinforced his disability assessment during the examination by claimant's counsel:

> Q: Doctor, we really didn't discuss the requirements of Mr. Bernardi's job other than that he had a long history of coal mine employment. If he had explained to you that his most recent job was as a fire boss and that involved his walking and occasionally crawling several miles a day, would that change your opinion as to whether he could do that job?
> A: That reinforces my feeling that he is totally unable to do that job.
> Q: And that opinion is based on his medical condition and not his age?
> A: Correct.

testimony reveals that Dr. Knight reviewed his findings from claimant's physical examination, chest x-ray, pulmonary function study, arterial blood gas study, electrocardiogram, and other diagnostic tests, and repeatedly ruled out non-respiratory factors as potential causes of claimant's total disability, including: age, obesity, insulin-dependent diabetes, hyperlipidemia, hemoptysis, and chest pain on exertion. Employer's Exhibit 8 at 16-18, 56. As Dr. Knight's deposition testimony would, if credited, support a finding of total respiratory disability pursuant to Section 718.204(b)(2)(iv), we vacate the administrative law judge's finding that the weight of the evidence was insufficient to establish total disability thereunder, and remand this case for a reassessment and weighing of Dr. Knight's opinion. *See* 20 C.F.R. §718.204(b)(1); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 10; Employer's Exhibit 8.

However, we reject claimant's contention that the administrative law judge improperly discredited Dr. Saludes' opinion. Dr. Saludes testified at his November 24, 2008 deposition and, on direct examination by employer's counsel, observed that claimant's pulmonary function studies did not demonstrate a significant impairment, and that claimant retained the pulmonary capacity to work in the coal mines. Employer's Exhibit 1 at 13, 16, 26. In addition, Dr. Saludes declared that from a pulmonary standpoint, claimant "does not appear to have impairment based on [a] purely oxygenation and ventilation status." Employer's Exhibit 1 at 28. Therefore, the administrative law judge rationally found that Dr. Saludes' opinion, that claimant "had normal lung capacity" and "does not have a pulmonary impairment," did not support a finding of total respiratory disability. Decision and Order at 10. Accordingly, we affirm the administrative law judge's determination that Dr. Saludes' opinion is insufficient to demonstrate total respiratory disability under Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Employer's Exhibit 1.

Claimant additionally argues that the administrative law judge summarily dismissed Dr. Cholak's opinion since Dr. Cholak, like Drs. Knight and Saludes, testified during his March 10, 2009 deposition that claimant is not able to perform his last coal mine job from a pulmonary standpoint. However, it was not unreasonable for the administrative law judge to accord less weight to the opinion of Dr. Cholak, claimant's treating physician since October 29, 1997, on the ground that Dr. Cholak admitted that he merely deferred to the pulmonologists for an assessment as to whether claimant had a pulmonary disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 10; Employer's Exhibit 7 at 14. Hence, we reject

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Employer's Exhibit 8 at 56.

claimant's assertion that the administrative law judge's discounting of Dr. Cholak's opinion on this basis was improper.

Claimant also avers that the administrative law judge erred in crediting the medical opinion of Dr. Rosenberg, that claimant can perform his previous coal mine work from a pulmonary perspective, after rejecting his opinion that claimant did not suffer from pneumoconiosis. Contrary to claimant's argument, however, an administrative law judge may credit a physician's opinion on the issue of total disability under Section 718.204(b)(2)(iv), even though that same physician's opinion was discredited on the issue of pneumoconiosis under Section 718.202(a)(4), because these sections address different elements of entitlement. *See* 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv); *see generally Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (existence of pneumoconiosis has no conclusive bearing on total disability); Decision and Order at 8, 10. As the administrative law judge found that Dr. Rosenberg based his disability assessment on pulmonary function studies, arterial blood gas studies, chest x-rays, and other physicians' reports, Decision and Order at 10, we reject claimant's argument that the administrative law judge could not rationally rely on his opinion under Section 718.204(b)(2)(iv).

In view of the foregoing, we vacate the administrative law judge's finding that total respiratory disability was not established, and remand the case for the administrative law judge to reassess the relevant medical opinion evidence at Section 718.204(b)(2)(iv), and determine whether it is sufficient to establish total respiratory disability thereunder.[8] The administrative law judge must then determine whether the weight of the relevant evidence, like and unlike, is sufficient to establish total respiratory disability under Section 718.204(b)(2), *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*), and whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

[8] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established forty years of qualifying coal mine employment and the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 8-9.

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

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge