BRB No. 11-0831 BLA

ARNOLD PRATER (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 09/20/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-05807) of Administrative Law Judge Richard K. Malamphy, awarding benefits, with respect to a

subsequent claim[1] filed on September 11, 2007, 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 is before the Board for a second time. In its previous decision, the Board affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). *Prater v. Nat'l Mines Corp.*, BRB No. 09-0792 BLA, slip op. at 3 n.5 (Sept. 10, 2010)(unpub.). However, the Board held that the administrative law judge did not adequately explain his determination that legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) or consider specifically whether a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). *Id*. at 6-7. As a result, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 725.309(d), and the award of benefits. *Id*. at 10. The Board remanded the case to the administrative law judge for reconsideration and also directed the administrative law judge to consider the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] *Id*. at 11.

On remand, the administrative law judge initially determined that amended Section 411(c)(4) did not apply to this claim, as claimant did not establish at least fifteen years of qualifying coal mine employment. The administrative law judge found that claimant established the existence of legal pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4),

[1] Claimant filed his initial claim for benefits on January 11, 1982. Director's Exhibit 1. In his Decision and Order, issued on December 4, 1986, Administrative Law Judge Jeffrey Tureck denied benefits because he determined that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id*. Claimant took no further action until he filed the present subsequent claim. Claimant died on April 2, 2010, while employer's prior appeal was pending before the Board. Claimant's counsel notified the Board that claimant's widow will continue to pursue his claim.

[2] In relevant part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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).

based on the newly submitted evidence, and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge then reaffirmed his previous determination that claimant established total disability at 20 C.F.R. §718.204(b) and found that claimant established that his disabling impairment was due to coal dust exposure at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, erred in finding that there was a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). In addition, employer asserts that the administrative law judge erred in determining that claimant established disability causation at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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.[5] 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 miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When 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

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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).

judge finds that "one 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., Inc*., 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 prior claim was denied because he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis in order to obtain review of the merits of his claim. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge stated that, although all of the physicians agreed that claimant had chronic obstructive pulmonary disease (COPD), Drs. Ammisetty and Baker attributed it, in part, to coal dust exposure, while Drs. Dahhan and Broudy opined that coal dust did not contribute to claimant's impairment. Decision and Order on Remand at 8; Director's Exhibits 15, 20-22, 33; Claimant's Exhibit 1; Employer's Exhibits 3-5, 7, 8, 10. The administrative law judge found that Drs. Ammisetty, Baker, and Dahhan relied on smoking histories that were approximately fifteen pack years shorter than his determination of thirty-six pack years and that Dr. Dahhan was unaware that claimant had reduced his smoking prior to quitting. Decision and Order on Remand at 8-9. However, the administrative law judge stated that all four physicians were aware of claimant's significant smoking history and based their opinions on this knowledge. *Id*. at 9. Weighing the newly submitted medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Ammisetty and Baker over the opinions of Drs. Dahhan and Broudy and determined that claimant established the existence of legal pneumoconiosis and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *Id*. at 9-11.

Employer asserts that the administrative law judge's crediting of Dr. Ammisetty's diagnosis of legal pneumoconiosis violates the Administrative Procedure Act (APA), as the administrative law judge did not specify the weight that he attributed to Dr. Ammisetty's opinion or determine whether it is documented and reasoned.[6] Employer also argues that the administrative law judge's crediting of Dr. Baker's opinion violates the APA, as the administrative law judge did not explain why he found Dr. Baker's opinion to be reasoned and documented, especially when Dr. Baker relied on an inaccurate smoking history. Employer further contends that the administrative law judge

[6] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record."

mischaracterized Dr. Dahhan's opinion, substituted his own opinion for that of the physician, and did not consider the totality of Dr. Dahhan's opinion. Employer also argues that the administrative law judge again did not specify the weight he gave to Dr. Broudy's opinion and erroneously discredited the opinions of Drs. Broudy and Dahhan, for failing to rule out coal dust exposure as a cause of claimant's COPD. Finally, employer contends that the administrative law judge did not consider the evidence as a whole, old and new, in determining whether claimant was entitled to benefits on the merits.

Upon reviewing the administrative law judge's Decision and Order on Remand and the parties' arguments on appeal, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), as it is rational and supported by substantial evidence. Concerning Dr. Baker's opinion, the administrative law judge acted within his discretion in finding that his diagnosis of legal pneumoconiosis was well reasoned and documented, based on the results of claimant's physical examination and the medical literature that Dr. Baker cited in support of his diagnoses. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). In addition, the administrative law judge did not, as employer alleges, ignore Dr. Baker's reliance on an inaccurate smoking history. Rather, the administrative law judge acknowledged that, while all of the physicians relied on inaccurate smoking histories, they were aware that "[c]laimant's smoking history was significant and based their opinions on that knowledge." Decision and Order on Remand at 9.

We also reject employer's argument that the administrative law judge was required to discredit Dr. Baker's opinion because he could not identify the precise extent to which coal dust exposure contributed to claimant's obstructive impairment.[7] The Sixth Circuit has held that an administrative law judge may credit a physician's opinion even though the physician is unable to determine, with precision, the percentage of the miner's impairment due to coal mine dust exposure and the percentage due to cigarette smoking. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).

[7] In support of this argument, employer cites: 1) Dr. Baker's statement that, because claimant's smoking and coal dust exposure histories were about the same, the two causes were nearly equal in their effects on claimant's lungs; and 2) his subsequent statement that, assuming a forty pack year history of smoking, "perhaps" one could apportion twenty-five percent of claimant's impairment to coal dust exposure and seventy-five percent to cigarette smoking, but "there's no way to really do that." Claimant's Exhibit 3 at 26.

The administrative law judge also provided a valid reason for discrediting Dr. Dahhan's opinion, that claimant did not have legal pneumoconiosis, since he found that Dr. Dahhan's conclusion, based on the reversibility of claimant's impairment after the administration of bronchodilators, is not supported by the record. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002); Decision and Order on Remand at 9-10; Employer's Exhibits 4, 7 at 10. As the administrative law judge stated:

> Dr. Dahhan testified that during the pulmonary function study he performed, the Claimant did not show a significant response to bronchodilators. He testified that a significant response to a bronchodilator will show a ten percent improvement over the non-bronchodilator results. Of the other three pulmonary function studies in the record, one was invalidated and one did not include bronchodilator results. For the remaining study, Dr. Broudy noted that his study indicated a "slight improvement after bronchodilation (a 9% improvement)." Dr. Broudy also testified, "[bronchodilators] are used for [COPD], such as this gentleman suffered from . . . unfortunately [he] was not very responsive to medications." Therefore, it is unclear what study Dr. Dahhan is relying on to indicate that the Claimant has had a significant response to bronchodilation.

Decision and Order on Remand at 10, *quoting* Employer's Exhibit 10 at 8-9 (internal citations omitted). Accordingly, the administrative law judge rationally found that the results of the valid, qualifying pulmonary function studies did not show a significant improvement after the administration of bronchodilators, and that Dr. Dahhan did not adequately explain why coal dust could not have at least contributed to claimant's residual impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 10; Director's Exhibit 33; Employer's Exhibit 3.

The administrative law judge also acted within his discretion as fact-finder in discrediting Dr. Broudy's opinion. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge rationally found that, like Dr. Dahhan, Dr. Broudy did not sufficiently explain why coal dust could not have contributed to claimant's impairment, particularly in light of Dr. Broudy's testimony that claimant's response to bronchodilators was not significant and that "it's not impossible that some [of claimant's obstructive impairment] is due to coal dust exposure." Employer's Exhibit 10 at 8-9, 19; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order on Remand at 11.

Because the administrative law judge acted within his discretion in crediting Dr. Baker's diagnosis of legal pneumoconiosis, and in discrediting the contrary opinions of Drs. Dahhan and Broudy, the administrative law judge's determination that claimant established the existence of legal pneumoconiosis is rational and supported by substantial evidence. Thus, the absence of an explanation regarding the weight the administrative law judge gave to Dr. Ammisetty's opinion does not constitute error requiring remand. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also reject employer's contention that remand is required, based on the administrative law judge's failure to consider all of the evidence of record before determining that claimant is entitled to benefits, as employer has not explained how consideration of the evidence submitted in the 1982 claim would alter the administrative law judge's findings. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Based on our affirmance of the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). We further reject employer's arguments concerning disability causation at 20 C.F.R. §718.204(c), as they are essentially identical to its arguments at 20 C.F.R. §718.202(a)(4). Consequently, we affirm the award of benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge