**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0113 BLA

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| PAUL H. BAILEY | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| BAILEY MINING COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| ROCKWOOD CASUALTY INSURANCE COMPANY | ) | DATE ISSUED: 02/28/2019 |
| | ) | |
| 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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.[1]

[1] Ms. Klaus correctly asserts that the administrative law judge erred in captioning the case, as Old Republic Insurance Company, not Rockwood Casualty Insurance

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05252) of Administrative Law Judge Larry W. Price, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 27, 2014.[2]

The administrative law judge determined that claimant established fourteen years of coal mine employment and therefore did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He further found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Lastly, he found that because the new evidence does not establish the existence of simple clinical or legal

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Company, is the carrier for employer that was identified by the district director. Employer's Response Brief at 1 n.1; Director's Exhibit 60.

[2] Claimant's previous claim, filed on May 16, 1988, was finally denied by Administrative Law Judge Charles W. Campbell on June 3, 1992, for failure to establish the existence of pneumoconiosis. Director's Exhibit 1.

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

pneumoconiosis,[4] claimant is not entitled to benefits. 20 C.F.R. §§718.202(a); 725.309. He therefore denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that he established less than fifteen years of coal mine employment and could not invoke the Section 411(c)(4) presumption. He also contends that the administrative law judge erred in finding that he does not have pneumoconiosis and, to the extent the administrative law judge discredited Dr. Forehand's opinion, he was not provided with a complete pulmonary evaluation as required under the Act. Employer/carrier (employer) responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that she met her obligation to provide claimant with a complete pulmonary evaluation.

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).

**Length of Coal Mine Employment**

Claimant bears the burden of proof to establish the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's finding if it is based on a reasonable method of computation and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

[4] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

[5] Claimant's coal mine employment was in Kentucky. Claimant's Exhibit 1. 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, 1-202 (1989) (en banc).

We initially affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established fourteen years of coal mine employment with employer, Bailey Mining Company (Bailey), from 1969 to 1983.[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26. Claimant alleges, however, that the administrative law judge erred in not crediting him with two additional years of coal mine employment with Bailey prior to 1969. Claimant's Brief at 18. He asserts that his "unrebutted testimony indicates that he had worked from 1967 to 1968 and wasn't paid because they were getting the coal mines set up." *Id*. He contends that his hearing testimony must be credited because there is no contradictory evidence. *Id*. Claimant's argument is without merit.

The administrative law judge correctly noted that "up until the hearing in connection with this claim [c]laimant has consistently reported that he worked for [employer/Bailey], beginning in 1969."[7] Decision and Order at 9. In calculating the length of coal mine employment, the administrative law judge considered claimant's testimony at the April 4, 2017 hearing that he "first started working in the coal mines in 1967 and 1968, getting the [Bailey] mine up and running, before he went on the payroll in 1969." Decision and Order at 9; *see* 2017 Hearing Transcript at 15. The administrative law judge found this testimony unpersuasive because "[t]here is nothing in the record in this claim, or the previous claim, to corroborate [claimant's] testimony that he worked in the mines before 1969, and it contradicts [claimant's] own consistent testimony and statements." Decision and Order at

[6] Employer in this case is Bailey Mining Company (Bailey). Claimant testified that he and his brother were the owner/operators of Bailey. 2017 Hearing Transcript at 16-17.

[7] Claimant stated on his application that he worked as a coal miner for fourteen years, ending on February 15, 1983. Decision and Order at 8; Director's Exhibit 1 at 1024. On his Employment History form, he reported that he worked for Bailey from 1969 to 1983. Decision and Order at 8; Director's Exhibit 1-1022. Claimant also testified that he first began work in the coal industry in June or July of 1969, when he contracted a mine from Island Creek Coal Company and formed Bailey. Decision and Order at 8; Director's Exhibit 1-33. In the current claim, claimant alleged fourteen years of coal mining employment with Bailey from 1969 to 1983, on his application for benefits and Employment History form. Decision and Order at 8; Director's Exhibits 3-5. During a June 30, 2015 deposition, claimant further testified that he worked for Bailey from 1969 to 1983 or 1985. Decision and Order at 8; Director's Exhibit 24 at 11-12. The record also contains a letter from Mr. Hamilton, claimant's accountant for Bailey, indicating that claimant worked for Bailey from June 1969 to February 1983. Decision and Order at 8; Director's Exhibit 28.

9. He concluded that "the most accurate" evidence of claimant's length of coal mine employment is claimant's testimony from his prior claim, since "the first claim was filed in 1988, only five years after he left the mines." *Id*. Relying on claimant's earlier statements and the Social Security Administration earnings record, the administrative law judge found that claimant established fourteen years of coal mine employment from 1969 to 1983. *Id.*

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Assessing the credibility of witness testimony is committed to the administrative law judge's discretion in his role as fact-finder, and the Board will not disturb his findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Because the administrative law judge permissibly assigned little weight to claimant's April 4, 2017 hearing testimony, we reject claimant's contention that the administrative law judge erred in not crediting him with coal mine employment prior to 1969. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. Thus, we affirm the administrative law judge's finding that claimant established less than fifteen years of coal mine employment and did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

**Existence of Pneumoconiosis**

Where 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 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(c); *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."[8] 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish pneumoconiosis. Director's Exhibit 1. Thus, in order to obtain a review of the merits of

[8] To be entitled to benefits under the Act, claimant must establish that he has pneumoconiosis, his pneumoconiosis arose out of coal mine employment, he has a totally disabling respiratory or pulmonary impairment, and his totally disabling impairment is due to his pneumoconiosis. 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 an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

his current claim, he was required to establish through new evidence that he has pneumoconiosis.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eleven readings of four new x-rays.[9] Decision and Order at 11, 25. Giving greater weight to the readings by the physicians who are dually-qualified as B readers and Board-certified radiologists, the administrative law judge determined that the February 5, 2015 and July 28, 2015 x-rays are in equipoise for the existence of simple pneumoconiosis and the May 27, 2015 and July 28, 2015 x-rays are negative for the disease. *Id*. at 25-26. He therefore found that claimant did not establish clinical pneumoconiosis based on the new x-ray evidence. *Id*. at 26.

Claimant argues that the administrative law judge erred in finding the February 5, 2015 x-ray in equipoise and in not giving weight to Dr. Forehand's negative reading of that film. We disagree. The administrative law judge permissibly assigned controlling weight to the interpretations of the February 5, 2015 x-ray by Drs. Alexander and Meyers because of their superior radiological qualifications as dually-qualified physicians. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Because Dr. Alexander read the x-ray as positive and Dr. Meyer read it as negative, we see no error in the administrative law judge's conclusion that the x-ray is in equipoise. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); Decision and Order at 26. As claimant raises no other error with regard to the weighing of the x-ray evidence, *see Skrack*, 6 BLR at 1-711, we affirm the administrative law judge's finding that claimant did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).[10] Decision and Order at 26.

[9] As summarized by the administrative law judge, Dr. Forehand, a B reader, and Dr. Alexander, dually-qualified as a B reader and Board-certified radiologist, read the February 5, 2015 x-ray as positive for pneumoconiosis; Dr. Meyers, also dually-qualified, read it as negative. Decision and Order at 11; Director's Exhibits 10, 20; Claimant's Exhibit 5. Dr. Baker, a B reader, read the May 27, 2015 x-ray as positive for pneumoconiosis; Dr. Adcock, dually-qualified, read it as negative. Decision and Order at 11; Director's Exhibit 21; Employer's Exhibit 6. Drs. Alexander and Crum, each dually-qualified, read the June 17, 2015 x-ray as positive for pneumoconiosis; Drs. Meyer and Seaman, also dually-qualified, read it as negative. Decision and Order at 11; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 3. Dr. Baker read the July 28, 2015 x-ray as positive for pneumoconiosis; Dr. Seaman read it as negative. Decision and Order at 11; Director's Exhibit 17; Employer's Exhibit 2.

[10] We affirm, as unchallenged on appeal, the administrative law judge's determination that the x-ray readings in claimant's treatment records do not support a

Pursuant to 20 C.F.R. §718.202(a)(4),[11] the administrative law judge considered five medical opinions. Decision and Order at 25-29. Drs. Forehand and Baker opined that claimant suffers from clinical pneumoconiosis and legal pneumoconiosis, in the form of an obstructive pulmonary impairment due to cigarette smoking and coal dust exposure. Director's Exhibits 10, 17. Dr. Hall, claimant's treating physician, wrote a letter stating that he has "clinical and [x]-ray findings of coalworkers pneumoconiosis." Claimant's Exhibit 6; Director's Exhibit 13. Drs. Fino and Vuskovich opined that claimant has neither clinical nor legal pneumoconiosis. Director's Exhibits 15, 18.

The administrative law judge rejected the diagnoses of clinical pneumoconiosis by Drs. Forehand and Baker because they relied on positive x-ray readings, contrary to the administrative law judge's finding that the x-ray evidence does not establish the disease. Decision and Order at 26. He also found that Dr. Hall "did not provide any support for her summary claim that [claimant] has x-ray findings of coal workers' pneumoconiosis, nor do the x-rays from [claimant's] treatment record support this finding." *Id*.

Claimant generally states that the administrative law judge "erred in finding that he has not established clinical pneumoconiosis by the medical opinion evidence" and summarizes the evidence that supports his position. Claimant's Brief at 22. The Board must limit its review, however, to contentions of error specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301*; Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because claimant does not identify any error in the administrative law judge's rejection of the opinions of Drs. Forehand, Baker, and Hall, we affirm the finding that claimant did not establish clinical pneumoconiosis pursuant 20 C.F.R. §718.202(a)(4). *See Sarf*, 10 BLR at 1-120-21; Decision and Order at 26.

In considering the issue of legal pneumoconiosis, the administrative law judge summarily stated that the opinions of Drs. Forehand and Baker were not well reasoned because they "spoke in generalities and failed to discuss how coal dust exposure related

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finding of clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

[11] The administrative law judge correctly noted that there is no biopsy evidence for consideration at 20 C.F.R. §718.202(a)(2). Decision and Order at 26. He also correctly noted that claimant is unable to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3), because there is no evidence of complicated pneumoconiosis and the Section 411(c)(4) presumption was not invoked. *Id*. at 26.

specifically to the development or aggravation of [c]laimant's [chronic obstructive pulmonary disease]." Decision and Order at 27. He also found that Dr. Fino expressed views that were contrary to the preamble to the revised 2001 regulations and that Dr. Vuskovich's opinion was not sufficiently reasoned. *Id*. at 28-29. Although the opinions of Drs. Fino and Vuskovich "are problematic," the administrative law judge determined that the opinions of Drs. Forehand and Baker "cannot carry [c]laimant's burden of proving that his lung disease is due, at least in part, to his exposure to coal mine dust." *Id*. at 29.

We agree with claimant that the administrative law judge's one-sentence analysis of the opinions of Drs. Forehand and Baker does not satisfy the Administrative Procedure Act (APA).[12] Although the administrative law judge summarized their reports, he did not identify the specific aspects of their opinions he found to be generalized and insufficient to satisfy claimant's burden of proof.[13] Moreover, contrary to the administrative law judge's characterization, while Dr. Forehand cited medical literature to support his opinion, he also explained his diagnosis of legal pneumoconiosis in relation to claimant's specific history of exposure to coal mine dust. Director's Exhibit 10 at 18-19.

Dr. Forehand examined claimant on behalf of the Department of Labor on February 5, 2015. Director's Exhibit 10. He noted that claimant smoked from 1947 to 2014, and worked in underground coal mine employment as a roof bolter, cutting machine operator, scoop operator and belt man. *Id*. He diagnosed chronic obstructive pulmonary disease (COPD) based on claimant's shortness of breath and the results of a pulmonary function study showing an obstructive respiratory impairment. *Id*. at 18. He noted that "because of the severity of claimant's obstructive disease, the precise extent to which cigarette smoking and the occupational exposure to coal mine dust contributed to claimant's respiratory impairment cannot be determined." *Id*. at 19. He explained, however, that there was a substantial contribution made by claimant's "overexposure to hazardous silica" as a roof

[12] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[13] Dr. Baker indicated that he diagnosed legal pneumoconiosis based on "signs or symptoms that can be due to coal dust exposure." Director's Exhibit 17. He described that claimant has a symptom complex consistent with chronic bronchitis and that coal dust exposure could be an aggravating factor for that condition. *Id*. Dr. Baker opined that "claimant's smoking history could be the primary cause but coal dust exposure contributed to some extent as well." *Id*.

bolter, cutting machine operator, scoop operator, and belt man. *Id*. at 18. He further explained that claimant's "exposure to silica and coal dust put him at extremely high probability of developing obstructive lung disease and coal workers' pneumoconiosis." *Id*. Additionally, he noted that the effects of smoking and coal dust exposure are additive because "cigarette smoke interferes with the clearance of dust particles from the terminal airways." Director's Exhibit 10. Thus Dr. Forehand concluded:

> Claimant's workplace exposure to coal mine dust and silica interacted with cigarette smoke to cause claimant's obstructive lung disease. The contributions of coal mine dust exposure and cigarette smoking were substantial. Claimant's occupational exposure to silica and coal mine dust during his employment in coal mining also contribute to and materially aggravated that part of his obstructive lung disease caused by cigarette smoke by worsening airways inflammation.

*Id*.[14]

Because the administrative law judge did not set forth the bases for his credibility findings with respect to Drs. Forehand and Baker, they do not satisfy the APA. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore vacate his finding that claimant did not establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[15] *Wojtowicz,* 12 BLR at 1-165. We further vacate his determination

[14] We reject claimant's contention that the claim must be remanded for a new complete pulmonary evaluation because the administrative law judge discredited Dr. Forehand's opinion. Claimant's Brief at 32-33. Dr. Forehand conducted all medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and specifically linked his conclusions to those tests. Director's Exhibit 10. The Department of Labor therefore met its statutory obligation to provide claimant with a complete pulmonary evaluation under 30 U.S.C. §923(b). *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42 (6th Cir. 2009).

[15] Contrary to claimant's contention, although Dr. Hall noted claimant's symptoms she did not diagnose a chronic respiratory or pulmonary disease significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. §718.201. Thus, we reject claimant's assertion that the administrative law judge erred in not relying on Dr. Hall's opinion to find legal pneumoconiosis established.

that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and vacate the denial of benefits.[16]

**Remand Instructions**

On remand, the administrative law judge must reweigh the medical opinion evidence and determine whether claimant has established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[17] He is instructed to fully explain the reasons for his credibility determinations in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255.

If claimant does not establish legal pneumoconiosis on remand, the administrative law judge may reinstate the denial of benefits. Alternatively, if claimant establishes legal pneumoconiosis, he will have satisfied his burden to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Thereafter, the administrative law judge must render findings on the remaining elements of entitlement. 20 C.F.R. §718.204(b)(2), (c). In rendering all of his credibility determinations and findings of fact on remand, the administrative law judge must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[16] Because the administrative law judge did not find pneumoconiosis established, we reject claimant's argument that he erred in failing to render findings on the other elements of entitlement. *See* 20 C.F.R. §§718.203(b), 718/204(b), (c); *Anderson*, 12 BLR at 1-111.

[17] We note that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoking versus coal dust exposure in order to establish the existence of legal pneumoconiosis, provided that the physician has credibly diagnosed a chronic respiratory or pulmonary impairment that is "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77 (6th Cir. 2000) (because coal dust need not be the sole cause of the miner's respiratory or pulmonary impairment, legal pneumoconiosis can be proven based on a physician's opinion that coal dust and smoking were both causal factors and that it was impossible to allocate between them).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge