**U.S. Department of Labor**

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

BRB No. 19-0325 BLA

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| JOHN BERRY JACKSON, SR.<br><br>Claimant-Petitioner<br><br>v.<br><br>JIM WALTER RESOURCES, INCORPORATED<br><br>and<br><br>WALTER ENERGY, INCORPORATED<br><br>Employer/Carrier-Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Respondent | ) | DATE ISSUED: 07/23/2020<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Cecilia B. Freeman (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Aaron D. Ashcraft and John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2018-BLA-05004) of Administrative Law Judge Lee J. Romero, Jr., 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 claim involves a subsequent claim filed on July 25, 2016.[1]

After crediting Claimant with at least sixteen and one-half years of underground coal mine employment,[2] the administrative law judge found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). He therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Because Claimant did not establish total disability, the administrative law judge also found he did not establish a change in the applicable condition of entitlement and denied benefits. 20 C.F.R. §725.309.[4]

[1] Claimant filed three prior claims. Director's Exhibits 1-3. The district director denied Claimant's most recent prior claim filed in 2012 because the evidence did not establish total disability. Director's Exhibit 3.

[2] Because Claimant's last coal mine employment was in Alabama, Director's Exhibit 7, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim also must 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

On appeal, Claimant argues the administrative law judge erred in finding the pulmonary function studies and medical opinions did not establish a totally disabling respiratory or pulmonary impairment. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's finding that the medical opinions did not establish total disability and remand the case for further consideration.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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, 361-62 (1965).

Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

**Total Disability**

In order to invoke the Section 411(c)(4) presumption, Claimant must establish a totally disabling respiratory or pulmonary impairment. A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

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entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's most recent prior claim was denied because he did not establish total disability or total disability causation. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing one of those elements. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3.

**Pulmonary Function Studies**

Claimant argues the administrative law judge erred in finding the pulmonary function studies did not establish total disability. Claimant's Brief at 6-8. The record contains three new pulmonary function studies conducted on November 29, 2016, May 25, 2017, and February 18, 2018. The November 29, 2016 and May 25, 2017 pulmonary function studies produced non-qualifying values[5] both before and after the administration of a bronchodilator. Director's Exhibit 20; Claimant's Exhibit 3. The February 18, 2018 pulmonary function study produced qualifying values before administering a bronchodilator and non-qualifying values after administering a bronchodilator. Claimant's Exhibit 4.

The administrative law judge noted the pre-bronchodilator portion of the 2018 pulmonary function study was the only test to produce qualifying values. Decision and Order at 13. Because this was the most recent study, the administrative law judge acknowledged it could be accorded greater weight. *Id.* He further noted Claimant's previous 2016 and 2017 pulmonary function studies produced non-qualifying values both before and after administering bronchodilators. *Id.* He also noted the post-bronchodilator portion of the 2018 pulmonary function study was non-qualifying. *Id.* He therefore found the pulmonary function studies "do not preponderantly establish the existence of a totally disabling pulmonary disability." *Id.*

The weighing of the evidence is a matter consigned to the discretion of the administrative law judge. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004). Contrary to Claimant's argument, the administrative law judge was not compelled to give greatest weight to the 2018 study conducted less than nine months after the 2017 study. *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-460 (1983). Because the administrative law judge properly determined that the preponderance of the pulmonary function study evidence did not support a finding of total disability, we affirm his finding that the pulmonary function studies did not establish total disability. 20 C.F.R. §718.204(b)(2)(i); *see Jones*, 386 F.2d at 984.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

**Medical Opinions**

Claimant and the Director contend the administrative law judge erred in finding the medical opinions did not establish total disability.[6] Claimant's Brief at 9-11; Director's Brief at 1-3. The administrative law judge considered Dr. O'Reilly's medical opinion. Dr. O'Reilly conducted Claimant's Department of Labor-sponsored pulmonary examination. Although Dr. O'Reilly diagnosed an obstructive pulmonary impairment, he opined Claimant was not totally impaired from performing his last coal mine job. Director's Exhibit 20. The administrative law judge therefore found Dr. O'Reilly's opinion did not assist Claimant in establishing a totally disabling respiratory or pulmonary impairment. Decision and Order at 24. Consequently, he found the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

Claimant and the Director, however, argue the administrative law judge erred in not considering all the relevant evidence, namely Dr. Hawkins's May 25, 2017 medical assessment. Dr. Hawkins examined Claimant several times between March 2014 and December 2017.[7] In his May 25, 2017 treatment notes, Dr. Hawkins recorded decreased breath sounds with prolonged expiration. Claimant's Exhibit 5 at 2. Dr. Hawkins also opined that Claimant's pulmonary function study revealed moderate airflow obstruction with a reduction in diffusing capacity. *Id.* at 1. He opined that Claimant was "limited with exertional shortness of breath." *Id.* at 3. He indicated Claimant was limited to walking less than one half block on level ground at an easy pace, becoming more limited with moderate exertion or when climbing stairs. *Id.* He also opined that Claimant "would be unable to work his last coal mine job or any manual labor." *Id.*

The administrative law judge noted Claimant submitted Dr. Hawkins's opinions as "treatment record" evidence, and not as one of his affirmative medical opinions. Decision and Order at 15 n.11. The administrative law judge also found Dr. Hawkins's records did not conform to the requirements for an admissible medical report. *Id.* The administrative law judge therefore declined to consider Dr. Hawkins's opinions when weighing the medical opinion evidence. *Id.* at 23 n.14.

[6] Because no party challenges the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] Dr. Hawkins is Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 5.

Initially, we agree with Claimant and the Director that the administrative law judge erred in failing to consider Dr. Hawkins' opinion. Dr. Hawkins's May 25, 2017 medical assessment was admitted into the record and does not exceed the evidentiary limitations.[8] The parties also indicated Dr. Hawkins's medical assessment constituted relevant medical opinion evidence. Claimant's Post-Hearing Brief at 7-8; Employer's Post-Hearing Brief at 8. The administrative law judge therefore erred in not weighing it along with the other evidence of record. *Tackett v. Director, OWCP*, 7 B.L.R. 1-703, 1-704 (1985); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate his finding that the medical opinions did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish total disability, we vacate his finding that Claimant did not establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309. If, on remand, the administrative law judge finds the new medical opinions establish total disability, he must weigh all the relevant new evidence together to determine whether Claimant has established total disability. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 198; 20 C.F.R. §718.204(b)(2). Should the administrative law judge find the new evidence establishes total disability, Claimant will have established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge would then be required to consider Claimant's 2016 claim on the merits, based on a weighing of all of the evidence of record, including the evidence submitted in connection with Claimant's prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). If the administrative law judge finds the evidence does not establish total disability, he must deny benefits. *See Trent*, 11 BLR at 1-27.

However, if the administrative law judge finds the evidence establishes total disability, Claimant will have invoked the Section 411(c)(4) presumption that he is totally

[8] Notwithstanding the limitations on specific types of medical evidence, "any record of a miner's hospitalization . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). It appears Dr. Hawkins' notations were prepared in the course of Claimant's treatment. Additionally, because Claimant did not designate any medical reports as his affirmative medical evidence, Claimant could have designated Dr. Hawkins's May 25, 2017 medical report as one of his two affirmative medical reports. 20 C.F.R. §725.414(a)(2)(i). (However, the administrative law judge, in ordering the proceedings, may require the parties to designate the evidence that is to be considered their medical reports. 20 C.F.R. §725.414(a).)

disabled due to pneumoconiosis.[9] In that case, the administrative law judge must consider whether Employer has established rebuttal of the presumption. 20 C.F.R. §718.305(d)(1)(i),(ii).

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

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[9] Because employer does not challenge the administrative law judge's finding of sixteen and one-half years of underground coal mine employment, this finding is affirmed. *Skrack*, 6 BLR at 1-711 (1983).