

BRB No. 07-0651 BLA

M.G.)
)
 Claimant-Respondent)
)
 v.)
)
 STERLING MINING COMPANY,) DATE ISSUED: 04/28/2008
 INCORPORATED)
)
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-6315) of Administrative Law Judge Alice M. Craft (the administrative law judge) awarding benefits on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ The administrative

¹ Claimant filed his first claim on June 6, 1975. Director's Exhibit 1. It was

law judge accepted employer's concession of "8.68 years of coal mine employment,"² Decision and Order at 3, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits established total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv). Employer also challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) on the merits. Further, employer argues that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) on the merits. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.³

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 into the

finally denied on June 23, 1980, because claimant failed to establish that he had pneumoconiosis arising out of coal mine employment and that he was totally disabled by the disease. *Id.* Claimant filed his second claim on September 9, 1981. Director's Exhibit 2. It was finally denied on December 22, 1994, because claimant failed to establish a material change in conditions pursuant to a prior version of 20 C.F.R. §725.309. *Id.* Claimant filed this claim on May 7, 2003. Director's Exhibit 4.

² The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Because the administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i) and (iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Act 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 is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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(d). 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 that he had pneumoconiosis arising out of coal mine employment and that he was totally disabled by the disease. *See* 20 C.F.R. §§718.202(a), 718.203; Director’s Exhibits 1, 2. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. 20 C.F.R. §725.309(d)(2), (3); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev’g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Initially, employer contends that the administrative law judge erred in finding that the new arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). We agree. The record consists of three new arterial blood gas studies dated July 18, 2003, January 20, 2004, and February 18, 2004. The July 18, 2003 study by Dr. Forehand produced non-qualifying⁴ values at rest, and qualifying values during exercise. Director’s Exhibit 16. The January 20, 2004 study by Dr. Dahhan produced non-qualifying values at rest and during exercise. Employer’s Exhibit 3. Similarly, the February 18, 2004 study by Dr. Rasmussen produced non-qualifying values at rest and during exercise. Claimant’s Exhibit 2. Based on the July 18, 2003 study, the administrative law judge concluded that “[t]he conflicting arterial blood gas studies support a finding of an impairment, if not a totally disabling impairment based on the blood gas studies alone.” Decision and Order at 17.

⁴ A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

Employer argues that the administrative law judge erred in failing to provide an explanation for finding that the July 18, 2003 arterial blood gas study produced qualifying values that supported a finding of total disability. As noted above, although the July 18, 2003 study produced qualifying values during exercise, it produced non-qualifying values at rest. The administrative law judge did not discuss the conflict in the values that were produced by the July 18, 2003 study at rest and during exercise. Rather, the administrative law judge stated that “there is one qualifying study, by Dr. Forehand; one normal study, by Dr. Dahhan; and one non-qualifying study by Dr. Rasmussen, which nonetheless shows a reduced percentage of oxygen with exercise (61%) which is close to, but does not meet the standard for disability (60%).” Decision and Order at 17. The administrative law judge then concluded that the new arterial blood gas study evidence supported a finding of total disability. *Id.* The interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). The administrative law judge did not explain how she resolved the conflict in the values that were produced by the July 18, 2003 study at rest and during exercise. *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980). Also, she did not adequately explain how the non-qualifying values that were produced by the January 20, 2004 and February 18, 2004 studies supported a finding of total disability. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge’s finding that the new arterial blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii), and remand the case for further consideration of the new evidence thereunder.

Next, employer contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). We agree. The record contains the new reports of Drs. Dahhan, Forehand, and Rasmussen. Dr. Dahhan opined that from a respiratory standpoint claimant retained the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Employer’s Exhibit 3. By contrast, Dr. Forehand opined that claimant has a totally disabling respiratory impairment. Director’s Exhibit 14. Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Claimant’s Exhibit 2.

In considering the new medical opinions, the administrative law judge gave probative weight to Dr. Forehand’s opinion, because it was supported by a qualifying arterial blood gas study. Decision and Order at 17. The administrative law judge next determined that Dr. Dahhan was a well-qualified pulmonologist, and his opinion was well-documented and well-reasoned. *Id.* However, the administrative law judge gave less weight to Dr. Dahhan’s opinion, because she found that the normal results that were achieved on tests by Dr. Dahhan were an anomaly. *Id.* The administrative law judge then determined that Dr. Rasmussen’s opinion was well-documented and well-reasoned. *Id.* After weighing together the new arterial blood gas study results and the new medical

opinions, the administrative law judge concluded that the opinions of Drs. Forehand and Rasmussen outweighed Dr. Dahhan's contrary opinion, because they were better supported by the objective evidence. *Id.*

Employer argues that the administrative law judge erred in discounting Dr. Dahhan's opinion, because she found no evidence that Dr. Dahhan was aware of the reports and test results of Drs. Forehand and Rasmussen. The administrative law judge noted that Dr. Dahhan's opinion was based on a normal physical examination and normal test results. The administrative law judge then stated:

However, there is no evidence that he was aware of the differing results achieved on examination and testing by Dr. Forehand or Dr. Rasmussen. Nothing in the record discredits, or explains the reasons for the different results. Nonetheless, as two out of three recent examinations supported the presence of an impairment, it appears that the normal results achieved by Dr. Dahhan represent an anomaly. Therefore, I give his opinion less weight.

Decision and Order at 17.

However, as employer argues, the administrative law judge did not consider whether Drs. Forehand and Rasmussen were aware of the physical examination and test results obtained by Dr. Dahhan.⁵ The administrative law judge's consideration of Dr. Dahhan's opinion was inconsistent with her consideration of the opinions of Drs. Forehand and Rasmussen with regard to the physicians' awareness of other physical examinations and objective test results in the record. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*). We, therefore, vacate the administrative law judge's finding that the new medical opinion evidence established total disability at 718.204(b)(2)(iv), and remand the case to the administrative law judge to provide a valid basis for her findings in accordance with the Administrative Procedure Act (APA).⁶ See 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); *Wojtowicz*, 12 BLR at 1-165.

⁵ Claimant was examined by Dr. Forehand on July 18, 2003, by Dr. Dahhan on January 20, 2004, and by Dr. Rasmussen on February 18, 2004.

⁶ Because the administrative law judge, on remand, must reconsider the arterial blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), it impacts the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Employer also argues that the administrative law judge’s weighing of the new medical opinion evidence was based on a “counting of heads.” The administrative law judge gave less weight to Dr. Dahhan’s opinion, because she found that the normal test results that Dr. Dahhan relied on were an anomaly. However, as noted above, the fact that two of the three new medical opinions supported the presence of a respiratory impairment was the only reason that the administrative law judge provided for that finding. Decision and Order at 17. Because the administrative law judge resolved the conflict in the medical opinions solely on the basis of the number of physicians supporting the respective parties, *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), we hold that substantial evidence does not support her finding that the disability opinions of Drs. Forehand and Rasmussen outweighed Dr. Dahhan’s contrary disability opinion. On remand, when reconsidering whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer additionally argues that substantial evidence does not support the administrative law judge’s finding that Dr. Forehand’s opinion was well-documented and well-reasoned.⁷ Specifically, employer asserts that the administrative law judge erred in failing to address the discrepancy between the length of the smoking history found by Dr. Forehand and the other physicians.⁸ The administrative law judge stated that “[t]he reports of the [c]laimant’s smoking history varied over the years, from one pack per day in earlier reports, to one-half pack per day in more recent reports.” Decision and Order at 4. The administrative law judge then found that “[t]he [c]laimant smoked one-half to one pack [of cigarettes] per day for about [thirty] years, for a total of about [twenty to twenty-five] pack years.” *Id.* However, the administrative law judge did not explain why she

⁷ We reject employer’s assertion that the administrative law judge erred in failing to consider that Dr. Forehand’s opinion was based, in part, on a discredited x-ray interpretation. Contrary to claimant’s assertion, x-rays are not diagnostic of the extent of a respiratory disability. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987).

⁸ The administrative law judge noted that Dr. Forehand noted a smoking history of one-half pack of cigarettes a day for about twenty years. Director’s Exhibit 14, while Dr. Dahhan reported a smoking history of a pack per day for thirty-five years and Dr. Rasmussen reported a history of one-half pack per day for twenty-five years. Decision and Order at 13-14; Director’s Exhibit 14; Employer’s Exhibit 3; Claimant’s Exhibit 2.

found that claimant has a twenty to twenty-five pack year smoking history, when the evidence on the issue was conflicting. Consequently, on remand, the administrative law judge must reconsider claimant's smoking history in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Employer further asserts that substantial evidence does not support the administrative law judge's finding that Dr. Forehand's opinion established total disability, because it was based, in part, on a pulmonary function study that Dr. Forehand interpreted as normal. In considering Dr. Forehand's disability opinion, the administrative law judge stated that "[Dr. Forehand's] opinion is supported by the qualifying arterial blood gas study." Decision and Order at 17. However, as noted above, the administrative law judge did not adequately explain how she resolved the inconsistent values that the July 18, 2003 study produced at rest and during exercise.⁹ *Wojtowicz*, 12 BLR at 1-165. In addition, the administrative law judge failed to address the non-qualifying pulmonary function study by Dr. Forehand in her assessment of Dr. Forehand's opinion. Thus, without additional explanation by the administrative law judge, it is unclear how the administrative law judge found that the objective tests that Dr. Forehand may have relied on supported his disability opinion. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). On remand, the administrative law judge must fully explain the basis for her weighing of the medical opinion evidence in accordance with the APA.¹⁰ *Wojtowicz*, 12 BLR at 1-165.

In addition, employer asserts that Dr. Forehand failed to disclose his knowledge of the functional demands of claimant's last coal mine job. Dr. Forehand, in a July 18, 2003 report, noted that claimant was a high-wall drill operator at his last coal mine employment. Director's Exhibit 14. In a September 29, 2003 report, Dr. Forehand noted that "[claimant] reported that he was employed in underground coal mining as a coal loader and highwall drill operator" and "[h]is latter job is associated with a higher than normal risk of developing coal workers' pneumoconiosis." Director's Exhibit 15. However, as employer argues, Dr. Forehand did not specifically note the functional demands of a highwall drill operator. On remand, the administrative law judge must

⁹ Dr. Forehand diagnosed a significant respiratory impairment, based on his finding that "insufficient residual oxygen-transfer capacity remains to continue in last coal mining job." Director's Exhibit 14.

¹⁰ We also reject employer's assertion that Dr. Forehand failed to consider the impact of claimant's back injury, obesity, anxiety, and aging on his pulmonary abilities. Contrary to employer's assertion, Dr. Forehand noted, on physical examination, that claimant was born on March 27, 1939, weighed 204 pounds, was 66 inches tall, was in a steady mood, and was hospitalized twice in 1975 for a back injury. Director's Exhibit 14.

consider whether Dr. Forehand understood the duties of claimant's usual coal mine employment. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

Employer further argues that substantial evidence does not support the administrative law judge's finding that Dr. Rasmussen's opinion established total disability, because Dr. Rasmussen relied on an inflated work history. The administrative law judge credited claimant with "8.68 years of coal mine employment." Decision and Order at 3. Dr. Rasmussen stated that "[claimant] was employed in the coal mining industry for a total of about [ten] years, between 1954 and 1965." Claimant's Exhibit 2. Because the discrepancy in the length of coal mine employment history noted by Dr. Rasmussen and that found by the administrative law judge was not significant, *McMath*, 12 BLR at 1-9, we reject employer's assertion that substantial evidence does not support the administrative law judge's finding that Dr. Rasmussen's opinion established total disability, because Dr. Rasmussen relied on an inflated work history.¹¹

In addition, employer argues that the administrative law judge erred in failing to weigh the new medical opinion evidence in light of the functional demands of claimant's usual coal mine employment. As noted above, Dr. Dahhan opined that, from a respiratory standpoint, claimant retained the physiological capacity to continue his previous coal mining work or a job of comparable physical demand. Employer's Exhibit 3. The administrative law judge noted that Dr. Dahhan found no impairment. Decision and Order at 17. Dr. Forehand opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 14. Lastly, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Claimant's Exhibit 2. Because Dr. Forehand opined that claimant has a totally disabling respiratory impairment and Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job, the administrative law judge was not required to make a comparison of their opinions with the exertional requirements of claimant's usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Thus, we reject employer's assertion that the administrative law judge erred in failing to weigh the new medical opinion evidence in light of the functional demands of claimant's usual coal mine employment.

Finally, employer argues that substantial evidence does not support the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b), because she did not weigh together all of the new evidence of total

¹¹ We also reject employer's assertion that Dr. Rasmussen failed to consider that claimant's back injury. Contrary to employer's assertion, Dr. Rasmussen noted that claimant worked for a total of about ten years in the coal mining industry from 1954 to 1965, and had a back injury in 1965. Claimant's Exhibit 2.

disability. Employer asserts that the administrative law judge ignored the objective tests that were at odds with the opinions of Drs. Forehand and Rasmussen. The administrative law judge weighed together the new arterial blood gas studies at 20 C.F.R. §718.204(b)(2)(ii) and the new medical opinions at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 17. The administrative law judge then determined that the opinions of Drs. Forehand and Rasmussen were entitled to greater weight than Dr. Dahhan's contrary opinion, because they were better supported by the objective evidence. *Id.* However, as employer argues, the administrative law judge failed to consider the new pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) when she weighed together the other new evidence at 20 C.F.R. §718.204(b). If reached, on remand, the administrative law judge must weigh together *all* of the contrary probative evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*).

Because we vacate the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and remand the case for further consideration of the new evidence. *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235. If, on remand, the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309, then she must reconsider whether the evidence establishes entitlement to benefits on the merits based on all the evidence of record in accordance with the APA.¹² *Wojtowicz*, 12 BLR at 1-165.

¹² In light of our disposition of the case at 20 C.F.R. §725.309, we decline to address employer's contentions at 20 C.F.R. §§718.202(a)(4) and 718.204(c) on the merits.

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

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge