BRB No. 11-0465 BLA

DAVID P. ZIMMERMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/23/2012
	)	
ZIMMERMAN COAL COMPANY	)	
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Daniel A. Miscavige (Gillespie, Miscavige, Ferdinand & Baranko), Hazleton, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (10-BLA-5447) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed on June 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). The district director initially denied

benefits. Director's Exhibit 23. Claimant timely requested modification pursuant to 20 C.F.R. §725.310, and submitted additional medical evidence. Director's Exhibits 32, 33. The district director granted modification and awarded benefits, and employer requested a hearing, which was held on August 12, 2010.

In her decision, the administrative law judge credited claimant with thirty-two years of coal mine employment, twenty-two years of which took place in an underground coal mine.[1] The administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant failed to establish invocation of the amended Section 411(c)(4) presumption, and failed to establish a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in her analysis of the pulmonary function study and medical opinion evidence when she found that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) and, therefore, erred in finding that claimant did not invoke the amended Section 411(c)(4) presumption. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.[2]

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[1] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[2] The administrative law judge's findings of thirty-two years of coal mine employment, with twenty-two years underground, and that total disability was not

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. *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).

Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the four pulmonary function studies of record. The pulmonary function study of September 12, 2007 was nonqualifying,[3] while the pulmonary function studies dated July 27, 2009, March 3, 2010, and July 11, 2010, were qualifying. The record also contained evidence regarding the validity of the pulmonary function studies.

Dr. Talati, who administered the September 12, 2007 pulmonary function study, reported that claimant's cooperation on the study was "fair," and noted that "poor test performance is indicated by notching in flow" on the study tracings. Director's Exhibit 15. Concluding that the September 12, 2007 pulmonary function study was "sub-optimal," Dr. Talati indicated that claimant's "pulmonary impairment [was] undetermined."[4] *Id*. Dr. Kraynak, who administered the July 27, 2009 pulmonary function study, opined that the study was properly performed and was valid, Claimant's Exhibit 6 at 9-11, while Dr. Levinson reviewed the July 27, 2009 pulmonary function study tracings and concluded that the study was improperly performed and was,

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established pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "nonqualifying" study exceeds those values.

[4] The record reflects that Dr. Talati is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 15.

therefore, invalid.[5] Employer's Exhibit 4 at 3. Further, Dr. Levinson, who administered the March 3, 2010 pulmonary function study, reported that, because claimant "gave very poor effort . . . it is clear that these studies do not represent the patient's full and complete pulmonary function capacities." *Id*. Dr. Kraynak reviewed the tracings of Dr. Levinson's March 3, 2010 pulmonary function study, and testified that the pre-bronchodilator portion of the study was valid. Claimant's Exhibit 6 at 14. Finally, Dr. Kraynak, who administered the July 11, 2010 pulmonary function study, testified that claimant's effort and cooperation were good, and that the study was valid. *Id*. at 11-12. The record contains no opinion from Dr. Levinson on the validity of the July 11, 2010 pulmonary function study.

The administrative law judge determined that the September 12, 2007 pulmonary function study was valid, finding that "[n]o physicians of record have opined on the validity of this test."[6] Decision and Order at 6 n.4. Further, the administrative law judge determined that the July 27, 2009, March 3, 2010, and July 11, 2010 pulmonary function studies were invalid, because she found that Dr. Levinson invalidated all three studies. Based on Dr. Levinson's qualifications in Pulmonary Medicine, the administrative law judge credited Dr. Levinson's opinion over that of Dr. Kraynak. Since the only valid pulmonary function study was non-qualifying, the administrative law judge found that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i).

Claimant contends that substantial evidence does not support the administrative law judge's determination because, contrary to the administrative law judge's finding, Dr. Levinson did not invalidate the July 11, 2010, qualifying pulmonary function study. Claimant's Brief at 11-12. Claimant's contention has merit. In his March 7, 2010 medical report, Dr. Levinson addressed the validity of both the July 27, 2009 pulmonary function study performed by Dr. Kraynak, and of the March 3, 2010 pulmonary function study that he administered when he examined claimant. Employer's Exhibit 4 at 3. The record contains no other reports from Dr. Levinson. Because there is no evidence that Dr. Levinson reviewed the July 11, 2010, qualifying pulmonary function study, substantial evidence does not support the administrative law judge's finding that he invalidated it. Thus, we must vacate the administrative law judge's finding that the July

[5] The record reflects that Dr. Kraynak is Board-eligible in Family Practice, while Dr. Levinson is Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 6 at 4; Employer's Exhibit 2.

[6] Noting that "the records of the test administered by Dr. Talati . . . are sufficient for me to make a determination regarding regulatory standards," the administrative law judge determined that "this test comported with the requirements regarding variability, and the requisite number of trials." Decision and Order at 6 n.4.

11, 2010 qualifying pulmonary function study was invalid, and her attendant finding that the pulmonary function study evidence did not establish total disability under 20 C.F.R. §718.204(b)(2)(i).

There is no merit, however, to claimant's contention that the administrative law judge erred in finding that the July 27, 2009 and March 3, 2010 pulmonary function studies were invalid. Claimant's Brief at 7-11, 12-15. Contrary to claimant's contention, the administrative law judge permissibly credited Dr. Levinson's opinion that those two pulmonary function studies were invalid, over Dr. Kraynak's contrary opinion, based on Dr. Levinson's superior qualifications. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

Claimant further contends that the administrative law judge erred in relying on the September 12, 2007, nonqualifying pulmonary function study without adequately considering whether it was valid. Claimant's Brief at 3-4, 15-16. In finding the September 12, 2007 pulmonary function study to be valid, the administrative law judge did not address the statements by the administering physician, Dr. Talati, that the September 12, 2007 study was "sub-optimal" because of "poor test performance," or address Dr. Talati's conclusion that claimant's impairment could not be determined based on the study. Director's Exhibit 15. Therefore, we must vacate the administrative law judge's finding that the September 12, 2007 pulmonary function study was valid, and instruct her to reconsider that issue, on remand, in light of all the relevant evidence.[7] *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987). If the administrative law judge, on remand, determines that the September 12, 2007 pulmonary function study is valid, she must consider it, along with the July 11, 2010 study, and determine whether total disability is established under 20 C.F.R. §718.204(b)(2)(i).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Talati, Levinson, and Kraynak. As noted above, Dr. Talati did not assess claimant's pulmonary impairment, because claimant's pulmonary function study was "sub-optimal." Director's Exhibit 15 at 4. Dr. Levinson opined that there is

[7] The regulations provide that no pulmonary function study "shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported" in substantial compliance with the applicable quality standards. 20 C.F.R. §718.103(c). In considering this issue on remand, the administrative law judge must bear in mind that the interpretation of medical data is for the medical experts. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993).

no evidence that claimant has any "industrial pulmonary disease," and he noted that the pulmonary function study that he administered did not represent claimant's respiratory capacity. Employer's Exhibit 4 at 3. In a deposition dated August 13, 2010, Dr. Kraynak, claimant's treating physician, testified that claimant lacks the respiratory capacity to perform the physically demanding labor required by his usual coal mine employment, based on his July 27, 2009 and July 11, 2010 pulmonary function study values, and his March 3, 2010 blood gas study values. Claimant's Exhibit 6 at 7, 9-13, 15. Dr. Kraynak further opined that, even without reference to the pulmonary function studies, claimant is totally disabled based on the values of the March 3, 2010 blood gas study, which Dr. Kraynak interpreted as revealing moderate hypoxemia.[8] Claimant's Exhibit 6 at 17-18.

The administrative law judge accorded greater weight to the opinions of Drs. Talati and Levinson, based on their qualifications, finding that they generally agreed that "there is not enough medical evidence to support a diagnosis of a disabling respiratory impairment." Decision and Order at 10. Further, the administrative law judge discredited Dr. Kraynak's opinion, finding that it was not well-reasoned because Dr. Kraynak's analysis that claimant is totally disabled, based on the results of the March 3, 2010 blood gas study, "is contrary to the governing regulations." *Id*.

Claimant contends that the administrative law judge erred in discrediting Dr. Kraynak's opinion as "contrary to the governing regulations," because the doctor relied on a nonqualifying blood gas study to opine that claimant is totally disabled. Claimant's Brief at 3, 20-23. Contrary to the administrative law judge's analysis, a physician may formulate a reasoned medical judgment of total disability based on nonqualifying objective studies. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Smith v. Director, OWCP*, 8 BLR 1-258, 1-261 (1985). Further, to the extent the administrative law judge determined that the lack of valid, qualifying pulmonary function studies undercut Dr. Kraynak's opinion and bolstered those of Drs. Talati and Levinson, as discussed above, the administrative law

[8] Dr. Kraynak testified that the March 3, 2010 blood gas study results obtained by Dr. Levinson are "just slightly higher than the regulatory standards for disability," and reflect moderate hypoxemia. Claimant's Exhibit 6 at 13, 17-18. Dr. Levinson interpreted this blood gas study as revealing "a minor degree of hypoxemia." *Id*. The record reflects that the PO2 value on the March 3, 2010 blood gas study exceeds the listed qualifying value by one point. 20 C.F.R. Part 718, App. C; Employer's Exhibit 4.

judge must reconsider whether the pulmonary function study evidence supports total disability.[9]

Therefore, we vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability, and remand this case for her to reconsider that issue. In reconsidering the medical opinions, on remand, the administrative law judge must take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, the sophistication and bases of their diagnoses, and must explain her findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *see also* 20 C.F.R. §718.104(d); *Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004).

In sum, we remand this case to the administrative law judge for reconsideration of whether the pulmonary function study and medical opinion evidence establishes claimant's total disability under 20 C.F.R. §718.204(b)(2)(i),(iv). If the administrative law judge finds, on remand, that either type of evidence is sufficient to establish total disability, she must weigh all of the relevant probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. 20 C.F.R. §718.204(b); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). If the administrative law judge finds that claimant has established total disability and, therefore, invoked the Section 411(c)(4) presumption, she must consider whether employer has rebutted the presumption, by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[9] Because the administrative law judge's flawed analysis of the pulmonary function studies and of Dr. Kraynak's reasoning for diagnosing total disability affects her weighing of the medical opinions, we decline to affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) based solely on her determination that Drs. Talati and Levinson possess superior qualifications.

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.

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ROY P. SMITH
Administrative Appeals Judge

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REGINIA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge