BRB No. 06-0842 BLA

EDWARD MILLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STRAIGHT CREEK COAL RESOURCES, C/O ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 08/29/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order–Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order–Awarding Benefits (2003-BLA-6052) of Administrative Law Judge Larry S. Merck (the administrative law judge) on a subsequent claim for benefits 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]

[1] Claimant filed his first claim for benefits on May 18, 1993. Director's Exhibit 1. In a Decision and Order issued on May 19, 1995, Administrative Law Judge Stuart A.

The administrative law judge initially found that, by conceding the existence of pneumoconiosis in the initial claim, employer waived its right to contest that issue in a subsequent claim. The administrative law judge also found that the evidence of record supported a twenty-three year coal mine employment history. The administrative law judge concluded that the newly submitted pulmonary function study evidence and the newly submitted medical opinion evidence demonstrated the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), the element of entitlement previously adjudicated against claimant. The administrative law judge concluded, therefore, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering all of the evidence of record, the administrative law judge found that it established that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b); that it established a totally disabling respiratory impairment pursuant to 20 C.F.R. 718.204(b)(2); and that it established that pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 14-17. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the newly submitted evidence established the existence of a totally disabling respiratory impairment and, therefore, a change in an applicable condition of entitlement. Employer further contends that the administrative law judge erred in finding that the evidence of record established a totally disabling respiratory impairment on the merits. In addition, employer contends that the administrative law judge erred in finding that employer was precluded from contesting the issue of pneumoconiosis based on its concession in the prior claim. Lastly, employer contends that the administrative law judge erred in finding that claimant was totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

Levin found that substantial evidence supported employer's concession that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Judge Levin also found, however, that the evidence failed to establish the presence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(2000). Accordingly, benefits were denied. No further action was taken until the filing of the instant claim on April 17, 2002. Director's Exhibit 3.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of 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).

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); *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." 20 C.F.R. §725.309(d)(2).[3]

Employer first argues that the administrative law judge erred in finding that Dr. Baker's new opinion, along with the newly submitted pulmonary function studies, established total disability and thereby established a change in an applicable condition of entitlement. Employer asserts that the administrative law judge erred in finding that Dr. Baker's newly submitted medical opinion constituted substantial evidence of a totally disabling respiratory impairment because Dr. Baker failed to demonstrate any knowledge of the exertional requirements of claimant's last coal mine employment or identify claimant's "functional abilities" in such a way that the administrative law judge could compare them with the exertional requirements of claimant's usual coal mine employment. Employer also contends that Dr. Baker's new opinion cannot establish total disability as it is not "meaningfully different" from the opinion he submitted in the prior claim. Employer's Brief at 9.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 2.

The administrative law judge found that the newly submitted opinion of Dr. Baker supported a finding of total disability since Dr. Baker opined that claimant "suffered from a severe pulmonary impairment," was "totally disabled" and was "unable to perform his regular coal mine employment." Director's Exhibit 13; 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge noted that Dr. Baker's opinion was based on pulmonary function studies, blood gas studies, history, examination and symptoms and that his opinion was buttressed by, not only the qualifying pulmonary function study[4] that he conducted, but the other new qualifying pulmonary function studies.

Dr. Baker's stated that claimant was employed as a high wall drill operator. Director's Exhibit 13. The physician never explained the exertional requirements of that employment or identified claimant's "functional abilities," however.

The administrative law judge noted that claimant worked as a high wall drill operator and truck driver. The administrative law judge also noted claimant performed maintenance and was exposed to significant amounts of coal dust in his coal mine employment. Decision and Order at 4. The administrative law judge, however never discussed the exertional requirements of claimant's usual coal mine employment,[5] or considered Dr. Baker's opinion in light of the exertional requirements of claimant's usual coal mine employment.

We agree with employer that the administrative law judge erred in summarily accepting Dr. Baker's opinion that claimant was totally disabled because he could not perform his regular coal mine employment.[6] *See Cornett v. Benham Coal, Inc.*, 227 F.3d

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[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 tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] In the decision on the prior claim, Judge Levin found that claimant's coal mine employment entailed light to sporadic moderate labor. At the hearing, claimant testified extensively regarding the nature of his coal mine employment. Hearing Transcript at 17-21. Claimant testified that, after working as a drill operator, he worked as a mechanic and truck driver. Claimant also testified that his work included some heavy lifting. Hearing Transcript at 20.

[6] Employer's contention that Dr. Baker's new opinion cannot establish total disability as it is not "meaningfully different" from Dr. Baker's prior opinion is rejected. The administrative law judge is not required to find a "qualitative difference" between the old and new evidence. 20 C.F.R. 725.309(d).

569, 22 BLR 2-107 (6th Cir. 2000); *see also Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). We, therefore, vacate the administrative law judge's finding of total disability at Section 718.204(b)(2)(iv) based on Dr. Baker's opinion. The case is remanded for the administrative law judge to determine the exertional requirements of claimant's usual coal mine employment and to evaluate Dr. Baker's newly submitted opinion in light of those requirements. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002); *Hvidzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984).

Employer also argues that the administrative law judge erred in concluding that the newly submitted pulmonary function study evidence was supportive of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i). Employer contends that the administrative law judge, while stating that the record contained four pulmonary function studies, only discussed the results of three studies in finding that the new pulmonary function study evidence demonstrated total disability. Employer also contends that the administrative law judge did not sufficiently consider the opinions of Dr. Repsher and Dr. Powers, who attributed claimant's qualifying pulmonary function study values to his heart disease, rather than pneumoconiosis.[7] Thus, employer contends that these errors require remand of the case for the administrative law judge to consider all of the new evidence relevant to total disability.

In finding that the newly submitted pulmonary function study evidence supported a finding of a total disability pursuant to Section 718.204(b)(2)(i), the administrative law judge noted that there were four new pulmonary function studies. The administrative law judge found that Dr. Baker's conforming study of May 10, 2002, produced both pre-exercise and post-exercise qualifying values, Director's Exhibit 15, and that this study

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[7] Dr. Repsher stated that claimant's "apparent abnormal pulmonary function tests are overwhelmingly most likely due to his underlying coronary artery disease." Employer's Exhibit 1. Dr. Repsher further stated that the pulmonary function studies are "uninterpretable" and should not have been conducted under Department of Labor regulations inasmuch as the miner was suffering from left ventricular congestive heart failure. *Id.*

Dr. Powers indicated that the shortness of breath demonstrated by claimant on objective studies was due to claimant's limited heart rate with beta blockers, and that the pulmonary function improved when bronchodilators were administered. Claimant's Exhibit 1.

was validated by Dr. Burki. Director's Exhibit 16. The administrative law judge noted that Dr. Dahhan's study of August 5, 2002, produced both pre-exercise and post-exercise qualifying values, but that Dr. Powers' non-conforming study of August 18, 2004 was non-qualifying, Claimant's Exhibit 1; Decision and Order at 8. The administrative law judge rejected the consultative medical report of Dr. Repsher, who opined that claimant's pulmonary function studies could not be interpreted because claimant had congestive heart failure. The administrative law judge noted that Dr. Repsher misinterpreted Department of Labor regulations when he stated that the pulmonary function studies should not be conducted when claimant had "left ventricular congestive heart failure." Decision and Order at 12. The administrative law judge noted that the regulation actually states that pulmonary function study testing should not be conducted when claimant is suffering from an acute respiratory illness. 20 C.F.R. Part 718, Appendix B (2)(i).[8]

The administrative law judge properly concluded that Dr. Repsher's opinion, regarding the validity of the pulmonary function studies, was entitled to little weight as the qualifying pulmonary function study was found valid by Board-certified pulmonologists and Dr. Repsher never opined that claimant was suffering from an acute respiratory condition. Dr. Repsher, in fact, stated that claimant did not have a respiratory impairment.

As employer contends, however, the administrative law judge did not discuss Dr. Powers's opinion that the results of claimant's pulmonary function studies were reflective of his heart disease. Thus, because the administrative law judge did not discuss Dr. Powers's opinion regarding the validity of the pulmonary function studies and did not discuss the results of all four pulmonary function studies to which he referred,[9] we vacate the administrative law judge's finding that the new pulmonary function studies support a finding of total disability and remand the case for further consideration of all the relevant new pulmonary function study evidence at Section 718.204(b)(2)(i). *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985) (2-1 opinion with Brown, J., dissenting); *see also Director, OWCP v. Siwiec*, 894 F.2d

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[8] The pertinent part of the regulation specifically states that such "[t]ests shall not be performed during or soon after an acute respiratory illness." 20 C.F.R. Part 718, Appendix B (2)(i).

[9] As employer notes, the administrative law judge found that the record consisted of four newly submitted pulmonary function studies, but only addressed three such studies. The fourth study to which the administrative law judge refers may be the validation report of Dr. Burki. Director's Exhibit 16; Decision and Order at 8. On remand, the administrative law judge should resolve this discrepancy.

635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).[10]

The administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309 based on the qualifying pulmonary function studies and the opinion of Dr. Baker showing total disability is therefore vacated and the case is remanded for further consideration of all the new relevant evidence regarding total disability. Further, in weighing the newly submitted evidence relevant to total disability, the administrative law judge must weigh together all of the relevant evidence, 20 C.F.R. §718.204(b)(2)(i); *see 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). In weighing the evidence, the administrative law judge must comply, as employer contends, with the requirements of the Administrative Procedure Act, (the APA), 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) and 30 U.S.C. §932(a), that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record.

In addition, we vacate the administrative law judge's determination that the evidence of record supported a finding of total disability pursuant to Section 718.204(b)(2) on the merits, as that finding was based on the administrative law judge's conclusion that the newly submitted evidence was entitled to greatest weight. On remand, if reached, the administrative law judge must reconsider all the evidence of record together in determining whether total disability is established. 20 C.F.R. §725.309.

Employer next contends that while it conceded the existence of pneumoconiosis in the prior claim, the administrative law judge erred in finding the concession binding on employer in this subsequent claim. Employer contends that it is not collaterally estopped from relitigating the existence of pneumoconiosis when the record contains new evidence

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[10] Employer also contends that the opinions of Drs. Repsher and Powers concerning the validity of the pulmonary function studies are relevant because Section 718.204(a)(1) specifically indicates that the presence of a nonpulmonary or nonrespiratory condition or disease which causes a chronic respiratory or pulmonary impairment "shall be considered" by the administrative law judge in determining whether claimant was totally disabled due to pneumoconiosis. That section, however, is applicable to determining whether claimant's pneumoconiosis is a significantly contributing cause of total disability. 20 C.F.R. §718.204(a)(1).

of a technically superior nature, *i.e.*, the negative reading of a CT scan.[11] Employer's Exhibit 1.

The administrative law judge did not, however, apply the doctrine of collateral estoppel in finding that employer could not relitigate the issue of pneumoconiosis. Instead, the administrative law judge properly found that employer waived its right to contest the existence of pneumoconiosis in this subsequent claim based on its concession of the existence of pneumoconiosis in the prior claim, citing 20 C.F.R. §725.309(d)(4).[12] Decision and Order at 3; *see* 20 C.F.R. §725.309(d)(4). That finding is affirmed.

Lastly, employer contends that the administrative law judge erred in finding that pneumoconiosis was a substantially contributing cause of disability pursuant to Section 718.204(c).[13] In finding that claimant established that pneumoconiosis was a substantially contributing cause of total disability pursuant to Section 718.204(c), the administrative law judge found that since the opinions of Drs. Powers and Woolum were unreasoned as to total disability,[14] their opinions would not establish the cause of

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[11] In addition to noting that the x-ray evidence supported employer's concession of pneumoconiosis in the prior decision, Judge Levin noted that the medical opinion evidence established pneumoconiosis which also supported employer's concession.

[12] Section 725.309(d)(4) provides:

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463) shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. §725.309(d)(4).

[13] In order to establish disability causation, a claimant must establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[14] The administrative law judge noted that Dr. Powers stated that claimant was disabled for cardiopulmonary reasons, but never stated whether claimant could do his

disability. The administrative law judge gave little weight to Dr. Repsher's opinion, that claimant's ventilatory defect was due to heart disease, because the doctor did not find the existence of pneumoconiosis. Instead, the administrative law judge gave determinative weight to the opinion of Dr. Baker, that claimant's disability was due to pneumoconiosis, because it was well-reasoned and well-documented. Decision and Order at 15-16.

Because we have vacated the administrative law judge's finding that the new evidence established total disability, and therefore a change in an applicable condition of entitlement and as we have also vacated the administrative law judge's finding of total disability on the merits, we vacate the administrative law judge's finding that claimant was totally disabled due to pneumoconiosis and remand the case for further consideration of that issue. If reached on remand, the administrative law judge must, as employer contends, consider all the evidence relevant to causation, including opinions attributing claimant's total disability to heart disease.[15]

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regular coal mine employment. The administrative law judge noted that, although Dr. Woolum stated that claimant was disabled due lung disease, the doctor never stated the bases for his opinion.

[15] As noted previously in this decision, *see* fn. 9, Section 718.204(a)(1) specifically indicates that the presence of a nonpulmonary or nonrespiratory condition or disease which causes a chronic respiratory or pulmonary impairment "shall be considered" by the administrative law judge in determining whether claimant was totally disabled due to pneumoconiosis. 20. C.F.R. §718.204(a)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge