BRB No. 09-0776 BLA

JIMMIE D. RAGLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREEN COAL COMPANY	)	
	)	DATE ISSUED: 08/26/2010
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order–Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order–Denial of Benefits (07-BLA-6091) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed 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). Claimant's claim was filed on November 20, 2006. Director's Exhibit 2. After crediting claimant with at least thirty years of coal mine employment,[1] as stipulated, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[2] Claimant also contends that the administrative law judge erred by failing to address the issue of whether claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer, and the Director have responded. They agree that, if the Board does not affirm the administrative law judge's finding that claimant did not establish that he is totally disabled, Section 1556 affects this case. Specifically, a remand would be required for the administrative law judge to consider claimant's entitlement to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4); Director's Supplemental Brief at 2.

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[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

[2] The administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii) are unchallenged on appeal. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Relevant to this living 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), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Supplemental Brief at 1-2. Under 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, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)).

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.[4] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Total Disability

Relevant to total disability pursuant to Section 718.204(b)(2)(i), the administrative law judge considered four valid pulmonary function studies. The pulmonary function study dated December 15, 2006 was administered by Dr. Simpao. This study, which consisted of a pre-bronchodilator test only, was qualifying.[5] Director's Exhibit 11 at 3, 4. The January 3, 2007 pulmonary function study, administered by Dr. Powell, yielded qualifying values before a bronchodilator was given, but was non-qualifying, post-bronchodilator. Director's Exhibit 14 at 6. Similarly, the April 3, 2008 pulmonary function study, administered by Dr. Selby, was qualifying pre-bronchodilator, but was non-qualifying, post-bronchodilator. Finally, the April 30, 2008 pulmonary function study, administered by Dr. Baker and consisting of a pre-bronchodilator test only, was non-qualifying. Claimant's Exhibit 1.

In weighing the conflicting pulmonary function study results, the administrative law judge noted Dr. Baker's testimony "that the AMA Guidelines require that if bronchodilation is administered, the higher value should be used" to assess the level of impairment. Decision and Order at 6. The administrative law judge further considered Dr. Baker's assessment that, "after administration of . . . bronchodilation by Dr. Selby, the [c]laimant had a mild impairment." *Id.* Additionally, the administrative law judge

[4] Because the failure to establish a necessary element of entitlement precludes a finding of entitlement, we reject claimant's allegation that the administrative law judge erred by declining to address whether pneumoconiosis was established, once he determined that claimant did not establish total disability. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

took into account Dr. Selby's opinion that the pulmonary function study results reveal that, if claimant were properly treated with a bronchodilator, there would likely be no impairment in his pulmonary function.[6] Employer's Exhibit 4 at 3. Weighing the pulmonary function studies together, the administrative law judge found that "the more recent pulmonary function studies undermine the effect of Dr. Simpao's results," and he determined that the pulmonary function studies did not establish total disability. Decision and Order at 6-7.

Claimant argues that the administrative law judge failed to consider that the pulmonary function study administered by Dr. Simpao was both qualifying and valid. Claimant's Brief at 4. We disagree. The administrative law judge accepted that "Dr. Simpao's testing is qualifying," and he treated the study as valid.[7] Decision and Order at 6.

Claimant argues further that the administrative law judge erred by crediting Dr. Selby's "unfounded" statement that, with proper medication, claimant can achieve near normal results on his pulmonary function studies. Claimant's Brief at 4. Contrary to claimant's argument, substantial evidence supports the administrative law judge's determination that both Drs. Selby and Baker explained the significance of claimant's non-qualifying post-bronchodilator results that were obtained in both studies where claimant received a bronchodilator. Since the administrative law judge had to weigh both the pre-bronchodilator and post-bronchodilator tests and explain which results he found more probative, he reasonably relied on the doctors' shared assessment that the post-bronchodilator results were more representative of claimant's pulmonary function. *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983).

Claimant also contends that the administrative law judge erred in stating that "it may be appropriate to accord greater weight to the more recent" pulmonary function studies. Decision and Order at 6; Claimant's Brief at 4-5. Because the issue for the

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[6] The record reflects that Dr. Rosenberg, who reviewed the pulmonary function studies obtained by Drs. Simpao and Powell, similarly observed that, "with proper treatment," claimant "can achieve near normal pulmonary function tests." Employer's Exhibit 2 at 4.

[7] The administrative law judge noted that "Dr. Selby reported that Dr. Simpao's testing does not meet the disability standards set forth in the federal register." This was an editorial error by the administrative law judge. More accurately, *Dr. Simpao* stated, incorrectly, that his pulmonary function study "do[es] not meet the disability standards set [forth] in the federal register." Director's Exhibit 11 at 23. As noted, Dr. Simpao's pulmonary function study yielded qualifying values.

administrative law judge's determination was claimant's pulmonary condition at the time of the hearing, we reject claimant's allegation of error. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Substantial evidence supports the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The finding is, therefore, affirmed.

Considering the medical opinions pursuant to Section 718.204(b)(2)(iv), the administrative law judge reviewed the opinions of Drs. Simpao, Baker, Rosenberg, and Selby. Based on the results of the December 15, 2006, pre-bronchodilator-only pulmonary function study, Dr. Simpao opined that claimant has a moderate obstructive and mild restrictive impairment that prevents him from performing the lifting and walking required by his job as a parts runner. Director's Exhibit 11 at 23. Dr. Baker, based on the results of the April 30, 2008, pre-bronchodilator-only pulmonary function study, opined that claimant has a moderate obstructive defect and a mild degree of restriction. Claimant's Exhibit 1 at 3. Dr. Baker described claimant's impairment as "a class 3 impairment or 25 to 50% of the whole person . . . based on table 5-12-107, chapter 5, 'Guides to the Evaluation of Permanent Impairment.'" *Id.*

When later deposed, Dr. Baker opined that, when claimant is given a bronchodilator, no restriction is detected and his obstructive impairment drops to a "mild" level of approximately "20 to 25% of impairment." Claimant's Exhibit 1 (Deposition Tr. at 26-27). Dr. Baker noted, however, that although claimant's post-bronchodilator values are not qualifying under the regulations, a "mild" lung impairment "is still a significant impairment in terms of what you can do." *Id.* at 27. Dr. Baker concluded that claimant would have difficulty performing the tasks of his usual coal mine employment. Claimant's Exhibit 1 (Deposition Tr. at 12, 33-35). Dr. Baker added that claimant should avoid further dust exposure, which would worsen his condition. Claimant's Exhibit 1 (Deposition Tr. at 19, 34). By contrast, Drs. Rosenberg and Selby opined that claimant is not totally disabled. Employer's Exhibits 2-4.

The administrative law judge discounted Dr. Simpao's opinion because it was based on the earliest pulmonary function study, which the administrative law judge found to be undercut by the later studies, and because Dr. Simpao is not a Board-certified pulmonologist. Decision and Order at 7. The administrative law judge credited Dr. Baker's opinion that claimant has a "mild" impairment, but found that the doctor's opinion was merely an advisory against further dust exposure. *Id.* at 7-8. Specifically, the administrative law judge found that Dr. Baker "did not address the [c]laimant's exertional capacity to work in reclamation or in parts running." Decision and Order at 8. Having discounted the opinions of Drs. Simpao and Baker, the administrative law judge found that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

With respect to the weight accorded Dr. Simpao's opinion, claimant again contends that the administrative law judge relied on an "unfounded statement" by Dr. Selby, regarding the pulmonary function studies, to discredit Dr. Simpao's total disability opinion. Claimant's Brief at 7. As we have already rejected that argument, claimant's renewed contention lacks merit.

Claimant next argues that substantial evidence does not support the administrative law judge's finding that Dr. Baker did not address whether claimant could perform his usual coal mine employment with a mild impairment. Claimant's Brief at 6. We agree. The administrative law judge stated that his review of Dr. Baker's deposition revealed that Dr. Baker merely addressed whether claimant could withstand further exposure to dust, not whether he could perform his job as a parts runner. An opinion that a claimant should avoid further exposure to coal dust is not a diagnosis of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). While portions of Dr. Baker's testimony include his discussion of dust exposure, Claimant's Exhibit 1 (Deposition Tr. at 19; 33:14-19, 34:1-6), other portions do not. *Id.* at 12, 26-28, 33:21-25, 34:16-24). The administrative law judge's decision does not discuss the totality of Dr. Baker's testimony that claimant would have difficulty performing his coal mine work with a mild impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Because the administrative law judge did not address the totality of Dr. Baker's opinion, we must vacate his finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for him to consider the entirety of Dr. Baker's testimony. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On remand, the administrative law judge must again consider the opinions of Drs. Rosenberg and Selby. *Id.*

Application of Section 411(c)(4)

Because this case was filed after January 1, 2005, and claimant was credited with at least thirty years of coal mine employment, the administrative law judge, on remand, must consider whether the evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings 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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JUDITH S. BOGGS
Administrative Appeals Judge