BRB No. 09-0821 BLA

JOSEPH WARNETSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/19/2010
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman, Carbondale, Pennsylvania, for claimant.

Richard A. Seid (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5646) of Administrative Law Judge Ralph A. Romano rendered on a subsequent claim[1] filed

[1] Claimant's first claim for benefits, filed on September 10, 2001, was denied on October 29, 2004, because claimant did not establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1; *Warnetsky v. American Silt Processing Co.*, BRB No. 04-0241 BLA (Oct. 29, 2004) (unpub.). Claimant filed his current claim on September 13, 2006. Director's Exhibit 3. After the district director denied benefits, claimant timely requested modification of the district director's decision, which the district director denied. Director's Exhibits 16, 17, 24, 25, 29. At claimant's request, the claim was referred to the Office of Administrative Law Judges for a hearing.

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 administrative law judge credited claimant with thirty years of coal mine employment,[2] based on the parties' stipulation, and found that the medical evidence developed since the denial of claimant's prior claim did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found, therefore, that claimant did not establish a change in the applicable condition of entitlement, and denied benefits pursuant to 20 C.F.R. §725.309(d). Alternatively, assuming *arguendo* that the new evidence established total disability, the administrative law judge found that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the new medical opinion evidence when he found that it did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. In support of this motion, the Director states that he failed to discharge his statutory duty, pursuant to Section 413(b), 30 U.S.C. 923(b), to provide claimant with a complete pulmonary evaluation. Further, the Director argues that the administrative law judge's alternative finding, that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), is inadequately explained and thus, does not comply with the Administrative Procedure Act (APA), 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).

By Order dated May 12, 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. The Director has responded, stating that a recent amendment to the Act could affect this case, as the present claim was filed after January 1, 2005, and claimant was credited with thirty years of coal mine employment. The Director further states that, although the administrative law judge found that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), that finding must be vacated because claimant did not receive a pulmonary evaluation from the Director addressing that element of entitlement. Director's Supplemental Brief at 2. Thus, the Director maintains that the

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 5. 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*).

denial of benefits must be vacated and the case remanded to the administrative law judge to "obtain a supplemental opinion from Dr. Levinson addressing whether [c]laimant is totally disabled. . . ." Motion to Remand at 15. The administrative law judge must then consider whether claimant is entitled 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.

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. 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). The prior denial was based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2),(3).

Complete Pulmonary Evaluation

In analyzing the new medical opinion evidence, the administrative law judge found that there was no opinion that claimant is totally disabled. Specifically, the administrative law judge found that Dr. Levinson, who examined claimant on behalf of

[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 Department of Labor pursuant to Section 413(b), 30 U.S.C. 923(b), "was unable to opine whether [c]laimant suffers from total respiratory disability." Decision and Order at 15. The administrative law judge noted further that Dr. Talati opined that claimant has a mild impairment that would not prevent him from performing his usual coal mine employment.[4]

The Director argues that he failed to meet his obligation to provide a complete pulmonary evaluation because Dr. Levinson did not address the issue of total disability. Specifically, the Director notes that, although Dr. Levinson examined and tested claimant on October 19, 2006, he declined to assess the extent of claimant's respiratory or pulmonary impairment because "it does not appear that [claimant] has given a maximal effort [on] ventilatory studies."[5] Director's Exhibit 6 at 4. The record reflects that Dr. Levinson's report of the October 19, 2006 pulmonary function study did not indicate the degree of claimant's cooperation and understanding on the test. Director's Exhibit 10 at 2. A consulting physician reviewed the pulmonary function study tracings for the Department of Labor and invalidated the study due to suboptimal effort, cooperation, and comprehension. *Id.* at 1. The district director scheduled claimant for another pulmonary function study, which Dr. Levinson administered on November 30, 2006.[6] Director's Exhibit 9. The Director informs the Board, however, that "Dr. Levinson did not supplement his report with an opinion on [c]laimant's pulmonary disability in light of the valid November 2006 study. Without such an opinion, his report continues to lack a required component, *viz.*, an assessment of [c]laimant's pulmonary disability."[7] Motion to Remand at 14.

[4] The administrative law judge discounted Dr. Talati's opinion that claimant is not totally disabled, because Dr. Talati did not indicate whether he understood that claimant's coal mine employment required heavy labor. Decision and Order at 15.

[5] Dr. Levinson diagnosed claimant with cardiac disease due to arteriosclerosis, and chronic obstructive pulmonary disease due, in part, to coal mine dust exposure. Director's Exhibit 6 at 4.

[6] Dr. Levinson listed claimant's cooperation and comprehension on the November 30, 2006 pulmonary function study as "fair." Director's Exhibit 9 at 1. The Director states that the November study "was valid," Motion to Remand at 14, and the administrative law judge accepted it as valid. Decision and Order at 7, 14.

[7] Additionally, a review of Dr. Levinson's report reflects that he left blank the section of the medical report form that asked him to assess the extent to which each cardiopulmonary diagnosis contributes to claimant's respiratory impairment. Director's Exhibit 6 at 4.

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101, 725.406. In view of the Director's concession that Dr. Levinson's report is incomplete and, therefore, fails to meet the Director's statutory obligation, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2),(c) and his denial of benefits, and remand this case to the administrative law judge for further evidentiary development consistent with the Director's Motion to Remand.[8] *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-147 (*en banc*); *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994).

Application of Section 411(c)(4)

Because this claim was filed after January 1, 2005, and claimant was credited with thirty years of coal mine employment, after claimant has been provided with a complete pulmonary evaluation, the administrative law judge, on remand, must consider whether the new evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §9211(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 evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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, any additional evidence submitted must be consistent with the

[8] Based on the Director's Motion to Remand, we decline to affirm the administrative law judge's finding that "Dr. Talati's evaluation satisfies the Director's obligation to provide a complete pulmonary evaluation." Decision and Order at 9 n.4. The Director notes that, at claimant's request, the Department of Labor designated Dr. Levinson to conduct the pulmonary evaluation for claimant under 30 U.S.C. §923(b), 20 C.F.R. §725.406. Based on 30 U.S.C. §923(b) and its implementing regulations, the Director views Dr. Levinson's report as the one that must satisfy his statutory duty. Motion to Remand at 7-12. Further, the Director states that Dr. Talati's medical report is the Director's own affirmative-case medical report pursuant to 20 C.F.R. §725.414(a)(3)(iii), which the Director procured after the claim was referred to the administrative law judge for a hearing. *Id.* at 7. In sum, the Director makes clear that he does not intend that Dr. Talati's report be considered the Department's pulmonary evaluation for purposes of 30 U.S.C. §923(b). *Id.* at 14-15.

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 Denying Benefits is vacated, the Director's Motion to Remand is granted, 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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REGINA C. McGRANERY
Administrative Appeals Judge