BRB No. 14-0053 BLA

JERRY L. FARMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARTHUR TRUCKING COMPANY	)	DATE ISSUED: 08/29/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5008) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim[1] filed on August 30, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). Based on the filing date of this claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge credited the miner with at least thirty years of underground coal mine employment, but determined that the evidence failed to establish a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Because the newly submitted evidence did not establish total disability, the administrative law judge found that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also determined that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his consideration of the arterial blood gas studies and medical opinion evidence relevant to whether he is totally disabled by a respiratory or pulmonary impairment. Claimant also contends that the administrative law judge incorrectly found that his coal mine work required light manual labor and that the administrative law judge further erred in crediting Dr. Castle's opinion, attributing his blood gas impairment to heart disease.[3]

[1] Claimant filed an initial claim for benefits on January 18, 2001, which was denied by the district director on May 5, 2001, because claimant failed to establish total disability. Director's Exhibit 1. Claimant took no further action until filing the current subsequent claim on August 30, 2010. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant established at least thirty years of underground coal mine employment, and that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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.[4] 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).

When 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(c);[5] *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(c)(3). Because claimant's failure to establish total disability was the reason for denial of his prior claim, claimant was required to establish this element in order to obtain a review of the merits of his claim. *See* 20 C.F.R. §725.309(c)(3), (4).

Claimant challenges the administrative law judge's finding that he did not establish a totally disabling respiratory or pulmonary impairment, and that he was not entitled to invoke the amended Section 411(c)(4) presumption. In evaluating whether claimant established total disability, the administrative law judge noted that he was required to make a finding of the exertional requirements of claimant's last coal mine job as a truck driver. Decision and Order at 24-25. The administrative law judge stated:

> For the last two years of his coal mine employment, [claimant] hauled coal. The *Dictionary of Occupational Titles* [(DOT)] includes this job under the category of dump truck and indicates a medium level exertion requirement. The definition notes that the driver may pull levers or turn cranks to tilt the truck's body and dump its contents, and may load the truck by hand or by

[4] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibit 4; June 5, 2013 Hearing Transcript at 24. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c) (2014).

> operating a mechanical loader. [Claimant] testified that he only had to climb up the steps into the cab and drive the truck. While he had to work in twelve-hour shifts, he further testified that the exertion required for this task was primarily mental. Accordingly, I find that [claimant's] last coal mining position required light manual labor.

Id, citations omitted.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the two pulmonary function tests, conducted by Drs. Rasmussen and Zaldivar, were non-qualifying for total disability. Decision and Order at 9, 24. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that the record contains two arterial blood gas (ABG) studies dated January 21, 2011 and May 23, 2011. The January 21, 2011 ABG study, administered by Dr. Rasmussen, yielded non-qualifying results at rest, and qualifying results with exercise.[6] Director's Exhibit 12. The May 23, 2011 study, administered by Dr. Zaldivar, yielded non-qualifying results, at rest and with exercise. Director's Exhibit 14. The administrative law judge gave little weight to Dr. Dr. Zaldivar's ABG studies, noting Dr. Rasmussen's opinion that "the testing produced little possibility for an accurate 'exercise' reading considering that Dr. Zaldivar exercised [claimant] for merely two minutes and fifty-five seconds." Decision and Order at 22. The administrative law judge discussed Dr. Rasmussen's qualifying ABG study in conjunction with the medical opinion evidence.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar, and Castle. Dr. Rasmussen examined claimant at the request of the Department of Labor on January 21, 2011, and he was deposed on May 31, 2013. Director's Exhibit 12; Claimant's Exhibit 3. Based on the pulmonary function testing he obtained, Dr. Rasmussen diagnosed a minimal, irreversible obstructive respiratory impairment. Director's Exhibit 12. He opined that claimant's ABG study showed minimal resting hypoxia but impaired oxygen transfer during exercise. *Id*. Dr. Rasmussen described claimant's pattern of impairment as consistent impairment caused by coal dust exposure. Dr. Rasmussen testified that he was told that claimant was a truck driver and opined that claimant retained the pulmonary capacity to perform light work associated with simply driving the truck, but that claimant was unable to perform moderate or heavy labor, such as changing tires or performing repairs to the truck. Claimant's Exhibit 3. Dr. Rasmussen attributed claimant's disabling respiratory

[6] A qualifying 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, Appendix C. A non-qualifying study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(ii).

impairment to his history of coal mine dust exposure. *Id.* Dr. Rasmussen considered claimant's heart disease as a potential cause of his impairment, but stated, "[t]here is nothing to suggest cardiac disease caused his impairment. He exceeded his anaerobic threshold quite normally at 63% of his predicted maximum oxygen uptake and showed no evidence of increased VD/VT ratio and did not over-ventilate." *Id*.

Dr. Zaldivar examined claimant on May 23, 2011 and was deposed on June 3, 2013. Director's Exhibit 14; Employer's Exhibit 16. Dr. Zaldivar noted normal resting and exercise ABG studies, normal spirometry, normal lung volumes, and normal diffusion. Director's Exhibit 14. Dr. Zaldivar concluded that claimant has "no pulmonary impairment whatsoever," and he attributed claimant's shortness of breath to a combination of asthma, heart disease, obesity, and low energy level resulting from untreated sleep apnea. Director's Exhibit 14; Employer's Exhibit 16 at 11-12. Dr. Zaldivar further testified that asthma is a disease of the population at large, and "not ever caused by coal mining." Employer's Exhibit 16 at 30.

Dr. Castle performed a medical records review and was deposed on May 17, 2013. Employer's Exhibits 11, 15. Dr. Castle described claimant's pulmonary function testing as "essentially normal," except for a few occasions of very minimal airway obstruction. Employer's Exhibit 11. He concluded that claimant has no respiratory impairment. *Id*. Dr. Castle attributed claimant's abnormality in blood gas transfer to heart disease and stated that he did not have "a coal mine dust induced lung disease" because the results of the ABG studies varied, with the January 21, 2011 ABG demonstrating minimal hypoxemia at rest with a fall in PO2 with exercise, and the May 23, 2011 ABG study showing normal oxygenation, at rest and with exercise. *Id*. Dr. Castle concluded that the January 21, 2011 ABG study results did not indicate the type of permanent changes associated with coal workers' pneumoconiosis. Rather, Dr. Castle opined that the cause of the January 21, 2011 ABG study irregularity was "likely related to diastolic cardiac dysfunction occurring with exercise." *Id*.

The administrative law judge stated that "Dr. Castle's explanation of diastolic cardiac dysfunction associated with [claimant's] hypertension [is] a more persuasive explanation for the qualifying result" of the January 21, 2011 exercise ABG study. *Id*. The administrative law judge gave little weight to Dr. Zaldivar's opinion on disability because it was based on the May 23, 2011, non-qualifying ABG he administered, "during which [Dr. Zaldivar] exercised [claimant] for merely two minutes and fifty-five seconds." *Id*. The administrative law judge concluded:

> While Dr. Castle partly bases his opinion on Dr. Zaldivar's ABG study involving the brief exercise of [claimant], he additionally bases his opinion on other valid physiologic studies and attributes the qualifying ABG study to [claimant's] heart disease and hypertension. . . . Given Dr. Castle's

> explanation of the qualifying arterial blood gas study, I find the claimant has not established total disability due to oxygen impairment.

Id. Weighing all of the evidence together, the administrative law judge concluded that claimant failed to carry his burden of proof to establish a totally disabling pulmonary or respiratory impairment. *Id*.

Initially, claimant asserts on appeal that the administrative law judge erred in concluding that claimant's coal mine employment required light manual labor. Claimant's Brief at 12. Claimant specifically asserts that the administrative law judge erred by not relying on the DOT to find that claimant's work as a truck driver involved a medium level of exertion, and that he is totally disabled, in light of Dr. Rasmussen's opinion that he is unable to perform his usual coal mine work. *Id*. Contrary to claimant's assertion, the administrative law judge explained that the description in the DOT describes a number of tasks not included by claimant in his testimony about the physical demands of his job. *Id*. For example, the administrative law judge noted that the DOT includes tasks such as pulling levers to dump the truck's contents, loading the truck by hand, or operating a mechanical loader, whereas claimant testified he only had to climb steps into the cab, and that the primary exertion of his job was mental. Decision and Order at 25, *citing* Hearing Transcript at 30. We conclude that the administrative law judge acted within his discretion in relying on claimant's testimony in determining that claimant performed light manual labor. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The weight to be assigned to the evidence and the determinations concerning the credibility of the hearing witnesses are within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Therefore, we conclude that the administrative law judge acted within his discretion in finding that claimant's last coal mining position required light manual labor.

Claimant next asserts that the administrative law judge erred in failing to make a specific finding regarding whether claimant established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(ii), based on Dr. Rasmussen's qualifying ABG study. Claimant argues that the administrative law judge "did not specifically discuss whether ABG studies themselves, regardless of the cause of the impairment shown by the studies, demonstrated total disability." Claimant's Brief at 10. Claimant's argument has merit. Contrary to the administrative law judge's analysis, the proper inquiry at 20 C.F.R. §718.204(b)(2)(ii) is whether the ABG studies indicate the presence of a totally disabling respiratory or pulmonary impairment. The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether rebuttal of the amended Section

411(c)(4) presumption has been established by evidence proving that the miner's disability did not arise out of, or in connection with, his coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(ii); 20 C.F.R. §718.204(c); 30 U.S.C. §921(c)(4). We conclude that the administrative law judge erred in determining that Dr. Rasmussen's qualifying ABG study was insufficient to establish that claimant is totally disabled, based on Dr. Castle's opinion regarding the cause of the qualifying results. Therefore, we vacate the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii). Additionally, to the extent that the administrative law judge's findings with respect to the ABG study evidence affected his credibility determinations with regard to the weight he accorded the medical opinions on the issue of total disability, we vacate the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

On remand, in reconsidering whether claimant has established total disability, the administrative law judge is required to explain the weight accorded the conflicting ABG and medical opinions, and make specific findings pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If the administrative law judge determines that total disability has been demonstrated under one or more of the subsections, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record, and reach a determination as to whether claimant satisfied his burden to establish a totally disabling respiratory impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). If the administrative law judge finds that claimant is totally disabled, and thereby entitled to invoke the amended Section 411(c)(4) presumption, the administrative law judge may conclude that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge must then determine whether employer has rebutted the presumption. 30 U.S.C. §921(c)(4). In reaching his credibility determinations on remand, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the Administrative Procedure Act.[7] *See Wojtowicz*, 12 BLR at 1-165. If claimant is unable to establish total disability, a requisite element of entitlement, benefits are precluded pursuant to 20 C.F.R. Part 718.

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the 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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BETTY JEAN HALL, Acting
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge