BRB No. 14-0061 BLA

ALBERT HOLIDAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 08/19/2014
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits on Remand and the Order on Reconsideration of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits on Remand and the Order on Reconsideration (2008-BLA-5493) of Associate Chief Administrative Law Judge William S. Colwell with respect to a claim filed on April 13, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In its previous decision, the Board affirmed the administrative law judge's findings that claimant established more than fifteen years of coal mine employment in a surface mine with dust conditions similar to those found in an underground mine, and that he established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). *Holiday v. Peabody Coal Co.*, BRB No. 11-0690 BLA, slip op. at 5-9 (July 24, 2012)(unpub.). The Board further affirmed, therefore, the administrative law judge's determination that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[1] *Id*. at 9. However, the Board vacated the award of benefits because the administrative law judge did not properly weigh the opinions of Drs. Repsher, Tuteur, and Gagon in finding that employer did not rebut the presumed existence of legal pneumoconiosis. *Id*. at 9-12. The Board also vacated the administrative law judge's finding that employer did not rebut the presumed fact that claimant's totally disabling impairment was caused by pneumoconiosis. *Id*. at 12. The Board remanded the case to the administrative law judge for reconsideration.

On remand, the administrative law judge determined that employer did not rebut the presumption that claimant has legal pneumoconiosis or that his totally disabling respiratory impairment is due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits commencing May 2007, the month in which claimant filed his claim.

On appeal, employer argues that the Board should reconsider its holding affirming the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). In the alternative, employer asserts that, even if claimant properly invoked the presumption at amended Section 411(c)(4), the administrative law judge made the presumption irrebuttable by relying on the sole qualifying exercise blood gas study to discredit the opinions of Drs. Repsher and Tuteur on the issues of legal pneumoconiosis and disability causation. Employer also states that the administrative

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

law judge overlooked relevant evidence and erred in relying on the preamble to the 2001 revisions to the regulations. Further, employer contends that the administrative law judge erred in finding that benefits commenced as of May 2007. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and urges the Board to reject employer's request that the Board reconsider its previous holding that claimant established total disability and further reject employer's contention that the administrative law judge erred in relying on the preamble, when weighing the medical opinion evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[2] 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).

I. Reconsideration of the Board's Holding at 20 C.F.R. §718.204(b)(2)

Employer initially requests that the Board reconsider its holding affirming the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii),(iv) or, in the alternative, seeks to preserve its objection to the Board's prior holding. When the case was initially before the administrative law judge, he weighed the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), and gave more weight to the qualifying exercise study conducted by Dr. Gagon on August 30, 2007, than to the non-qualifying studies at rest conducted on October 25, 2007, April 16, 2008, and December 5, 2008. Decision and Order at 23. The administrative law judge found that the study obtained by Dr. Gagon was more probative, as claimant's "last job as a heavy equipment operator required physical exertion." *Id*. However, Drs. Tuteur and Repsher questioned the validity of Dr. Gagon's exercise study, asserting "that a 'venous,' as opposed to 'arterial,' sample was taken." *Id*. at 22. The administrative law judge gave less weight to the opinions of Drs. Tuteur and Repsher for several reasons. The administrative law judge observed that Dr. Repsher had been inconsistent in his testimony about the effect of claimant's weight on the blood gas values; and the administrative law judge determined that there was no evidence that the study had been conducted improperly. *Id*. at 22-23. The administrative law judge relied on the opinion of Dr. Kennedy, whose expertise in blood gas testing was superior to both Drs. Tuteur and Repsher. *Id*. at 23. Dr. Kennedy prepared a validation report in which he stated that

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

the exercise study was valid, and that he did not find that a "venous sample" had been taken. Director's Exhibit 14. Therefore, the administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 24.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave less weight to the opinions of Drs. Repsher and Tuteur, that claimant does not have a totally disabling respiratory impairment, because they relied on their invalidation of Dr. Gagon's exercise blood gas study. Decision and Order at 25. The administrative law judge also determined that their opinions were insufficiently reasoned and documented. *Id*. In contrast, the administrative law judge gave more weight to Dr. Gagon's opinion, that claimant is totally disabled, because it was based on claimant's symptoms, as well as a qualifying exercise blood gas study and observations from his physical examination of claimant. *Id*. Further, the administrative law judge observed that Dr. Gagon was aware of the exertional requirements of claimant's last coal mine employment.[3] *Id*. Accordingly, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. The administrative law judge further determined that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on a weighing of all relevant evidence together. *Id*.

In the present appeal, employer again challenges the administrative law judge's weighing of the blood gas study and medical opinion evidence under 20 C.F.R. §718.204(b)(2). Claimant and the Director assert that the "law of the case" doctrine applies and, therefore, the Board should refuse to reconsider the issue of total disability. In its reply brief, employer contends that the doctrine does not apply in this case, as the administrative law judge's findings were erroneous and its application could "work a manifest injustice," by permitting a claimant to receive benefits he is not entitled to receive. Employer's Reply Brief at 4.

All of the arguments raised by employer in the present appeal were raised and rejected by the Board in employer's prior appeal. Contrary to employer's contention, the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(ii), (iv), were not erroneous and, therefore, we decline to disturb our prior holdings affirming them.[4] *See*

[3] The record reflects that claimant was last employed as a dozer operator where he pushed coal out of a pit and sometimes into the hopper, and loaded coal with the dozer or front-end loader. Director's Exhibit 4.

[4] The Board determined that the administrative law judge permissibly gave more weight to Dr. Kennedy's validation of the qualifying August 30, 2007 exercise blood gas study, based upon his superior credentials as the co-author of several articles in the field of blood gas testing. *Holiday v. Peabody Coal Company*, BRB No. 11-0690 BLA, slip op. at 6-7 (July 24, 2012)(ubpub.). The Board also affirmed the administrative law

Williams v. Healy-Ball-Greenfield, 22 BRBS 234 (1989) (Brown, J. dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Therefore, we reject employer's request that the Board reconsider its holding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the presumption at amended Section 411(c)(4).

II. Rebuttal of the Section 411(c)(4) Presumption

In order to establish rebuttal of the presumption, employer must affirmatively establish either that claimant does not have clinical or legal pneumoconiosis, [5] or that his respiratory disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), implemented by 20 C.F.R. §718.305; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011). In considering whether employer rebutted the amended Section 411(c)(4) presumption, the

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judge's weighing of the medical opinions of Drs. Gagon, Repsher, and Tuteur to find that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), holding that the administrative law judge rationally gave more weight to Dr. Gagon's opinion because he found it was reasoned and documented. *Id*. at 7-9. The Board also held that the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Repsher and Tuteur based on their mistaken belief that the qualifying exercise blood gas study from August 30, 2007 was invalid. *Id*. at 9. Further, the Board rejected employer's argument that the administrative law judge did not properly weigh all relevant evidence in determining that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id*. at 9.

[5] The regulation at 20 C.F.R. §718.201 provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

administrative law judge, on remand, found that employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order and Remand at 7. However, the administrative law judge determined that the opinions of Drs. Repsher and Tuteur were insufficient to rebut either the presumed existence of legal pneumoconiosis or the presumption that claimant is totally disabled due to pneumoconiosis. *Id*. at 14-18.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Tuteur because they determined, contrary to the administrative law judge's finding, that claimant is not totally disabled due to a respiratory impairment. Employer also asserts that the administrative law judge's finding violated the Administrative Procedure Act (APA),[6] as he did not provide an explanation for his weighing of the opinions of Drs. Repsher and Tuteur. Employer states that the administrative law judge did not consider Dr. Repsher's testimony, that if claimant had a respiratory impairment, it improved after Dr. Gagon's evaluation. Employer also alleges that the administrative law judge did not evaluate Dr. Tuteur's testimony, that the validity of the blood gas study was irrelevant to determining the etiology of claimant's impairment. Employer further asserts that, to the extent the administrative law judge provided an explanation, it was an explanation that the Board previously rejected. Employer's allegations of error have no merit.

Employer does not dispute that Drs. Repsher and Tuteur opined that claimant does not have a respiratory impairment of any degree.[7] Instead, employer again raises issues

[6] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[7] Dr. Repsher found that claimant "has no objective evidence of pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine work or work of a similarly arduous nature in a different industry." Employer's Exhibit 4. Dr. Repsher cited his view that the exercise blood gas study is invalid in support of his opinion. Employer's Exhibit 29 at 47. In his supplemental opinion, submitted after the enactment of amended Section 411(c)(4), Dr. Repsher stated that claimant's "arterial blood gases were normal, both at rest and with exercise, when adjusted for his near morbid obesity and the probable mixed arteriovenous blood sample, taken with a single stick while he was exercising on a treadmill." Employer's Exhibit 31. Similarly, Dr. Tuteur determined that claimant "has no significant impairment of pulmonary function and no significant impairment of cardiac function. Thus, he could not be disabled because of [sic] impairment of a pulmonary problem of any cause." Employer's Exhibit 34.

concerning the validity of the exercise blood gas study that the administrative law judge relied on to find total disability established at 20 C.F.R. §718.204(b)(2)(ii). However, the Board previously affirmed the administrative law judge's determination that claimant established total disability and, as discussed *supra*, the Board will not alter its holding on this issue. There is also no merit to employer's contention that the administrative law judge violated the APA by discrediting the opinions of Drs. Repsher and Tuteur because they found that claimant does not have a respiratory impairment.[8] The administrative law judge discussed each of the physicians' opinions before permissibly determining, in compliance with the APA, that to the extent that they are premised on a determination that claimant does not have a respiratory impairment, they are insufficient to rebut the presumed existence of legal pneumoconiosis. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988); Decision and Order on Remand at 14-16, 17-18.

Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal by affirmatively proving that claimant does not have legal pneumoconiosis. Further, as the administrative law judge based his finding that employer did not rebut the presumption that claimant is totally disabled due to pneumoconiosis on his findings concerning total disability and legal pneumoconiosis, we also affirm this determination. Therefore, we further affirm the award of benefits.

III. Commencement of Benefits

On remand, the administrative law judge found:

> In this case, the earliest medical determination of total disability due to pneumoconiosis is Dr. Gagon's August 2007 report. Dr. Gagon based his diagnosis of totally disabling coal dust induced chronic bronchitis and reduced pulmonary reserve on physical examination findings, complaints and symptoms, accurate work and smoking histories, and qualifying blood gas test results on exercise.
>
> The record provides no medical evidence between the May 2007 claim filing date, and the August 2007 date of Dr. Gagon's report. Thus, while it is reasonable that the miner became totally disabled at some point

[8] As the administrative law judge provided a rational reason for discrediting the opinions of Drs. Repsher and Tuteur, we need not address the rest of employer's arguments concerning the administrative law judge's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

> prior to Dr. Gagon's report, the precise date of such disability due to pneumoconiosis cannot be determined from this record. Therefore, benefits are payable from May 2007, the month in which Claimant filed his claim.

Decision and Order on Remand at 19.

Employer contends that the administrative law judge's finding is erroneous, as he did not address the fact that claimant worked as a truck driver after he left the mines. Employer observes that, pursuant to 20 C.F.R. §725.504(c), if claimant returns to coal mine employment or "comparable and gainful work," benefits are not payable. Therefore, employer asserts that "the [administrative law judge] was required to consider whether [claimant's] employment as a truck driver following his coal mine employment was comparable to his work as a mobile equipment operator in the mines." Employer's Brief at 27. Employer maintains that remand is not necessary on this issue because claimant's testimony establishes, as a matter of law, that his work as a truck driver was identical to his employment at the surface mine.

Employer's arguments have merit, in part. Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 891-92, 22 BLR 2-514, 2-530 (7th Cir. 2002); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). As the administrative law judge rationally determined that there was no evidence in the record indicating the exact date that claimant became totally disabled due to pneumoconiosis, he awarded benefits commencing May 2007, the month in which the claim was filed. 20 C.F.R. §725.503(b). However, employer is correct that, pursuant to 20 C.F.R. §725.504(c), the administrative law judge should have considered whether claimant's work as a truck driver at a copper mine was comparable to his previous coal mine employment[9] such that payments should

[9] On Form CM-913, entitled "Description of Coal Mine Work and Other Employment," claimant stated that his most recent coal mine employment was as a dozer operator and front-end loader. Director's Exhibit 4. Claimant also indicated that he worked as a truck driver, dragline oiler, and coal shooter at the coal mines. *Id*. During his deposition on October 22, 2007, claimant testified that he was currently working as a truck driver at a copper mine, which requires him to sit for twelve hours and does not require heavy lifting. Director's Exhibit 33 at 8-9, 12-13. Claimant also testified that he would not be able to drive a truck for employer at a coal mine because of the dust in the

have been suspended during the time that he held that position.[10] See *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). We disagree, however, with employer that, as a matter of law, claimant's position at the copper mine constituted comparable and gainful work. This is a question of fact for the administrative law judge to resolve. Consequently, we vacate the administrative law judge's finding that benefits are payable from May 2007, and remand the case to the administrative law judge for him to compare claimant's work for the copper mine with his previous coal mine employment. On remand, the administrative law judge must determine whether benefits should be suspended from May 2007, when claimant filed his claim, to October 2007, when claimant ended his employment with the copper mine.

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equipment and the roughness of the ride. *Id*. at 39, 41. As a dozer operator, claimant indicated that, although he worked in an enclosed cab, dust still got in. *Id*. at 44.

[10] Pursuant to 20 C.F.R. §725.504(c), "where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable . . . for the period during which the miner continues to work."

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits on Remand 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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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge