BRB No. 12-0101 BLA

HARVEY J. GOWER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 12/19/2012
	)	
and	)	
	)	
PEABODY INVESTMENTS	)	
	)	
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 Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order – Awarding Benefits (2009-BLA-5811) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on June 6, 2008.[1] After crediting claimant with twenty years of underground coal mine employment, based on a stipulation by the parties, the administrative law judge found that the new evidence submitted in support of this subsequent claim established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the new evidence outweighed the earlier evidence, and that total respiratory disability was established pursuant to Section 718.204(b) overall. The administrative law judge therefore found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially requests that the case be held in abeyance pending resolution of the challenges to the constitutionality of the PPACA.[3] On the merits of entitlement, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total respiratory disability pursuant to Section 718.204(b), arguing that the administrative law judge applied an improper standard in weighing the

[1] Claimant's most recent prior claim was filed on June 1, 1993. Director's Exhibit 2. It was denied by the district director on June 1, 1999, because claimant failed to establish any of the elements of entitlement. *Id*. No further action was taken until claimant filed the current claim. Director's Exhibit 4.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

medical evidence. Employer therefore contends that the administrative law judge erred in finding that the evidence is sufficient to establish invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). Employer also contends that the administrative law judge erred in finding that it failed to establish rebuttal.[4] In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's request that the case be held in abeyance pending resolution of the challenges to the PPACA. The Director also urges the Board to reject employer's contention that the administrative law judge erred in considering the preamble to the regulations in weighing the medical opinion evidence.[5]

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.[6] 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).

Employer contends that the administrative law judge erred in finding that the weight of the pulmonary function study evidence was qualifying and, therefore, established a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i). Specifically, employer contends that the administrative law judge: (1) erred in rounding down the FEV_1/FVC ratio values in the June 19, 2008 study from 55.27% to 55%; (2) failed to determine whether the individual pulmonary function tests were qualifying or non-qualifying; and (3) erred in failing to consider the effects of claimant's age on the claimant's pulmonary function study results. Employer's Brief at 11-13. Further, employer contends that the administrative law judge did not properly weigh the contrary probative evidence against the pulmonary function study evidence in finding that total respiratory disability was established pursuant to Section 718.204(b) overall.

[4] Employer submitted a Reply Brief reiterating its arguments.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibits 2, 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

In evaluating the evidence at Section 718.204(b)(2)(i),[7] the administrative law judge found that the record contains three pulmonary function studies,[8] each consisting of pre- and post-bronchodilator results, and that of these six sets of data, four yielded qualifying results and two yielded non-qualifying results.[9] Based on the weight of the pulmonary function study results, the administrative law judge found that the preponderance of this objective medical data supports a finding of total disability, as it satisfies one of the criteria for establishing total respiratory disability set forth in the regulations. 20 C.F.R. §718.204(b); Decision and Order 10.

However, as employer correctly contends, the administrative law judge, in weighing the pulmonary function study results, is not permitted to round the values yielded by these studies. Specifically, Section 718.204(b)(2)(i)(c) states that a test is qualifying if it yields a percentage of ***55 or less*** with the FEV_1/FVC ratio, 20 C.F.R.

[7] The administrative law judge initially found that there was no evidence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, therefore, that claimant is ineligible for the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); Decision and Order at 9. Additionally, the administrative law judge found that none of the blood gas studies yielded qualifying results, *see* 20 C.F.R. §718.204(b)(2)(ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure, *see* 20 C.F.R. §718.204(b)(2)(iii). *Id.*; Director's Exhibit 13; Claimant's Exhibit 1. The administrative law judge did not further consider this evidence on the issue of total respiratory disability pursuant to 20 C.F.R. §718.204(b).

[8] The record contains three pulmonary function studies dated June 19, 2008, January 21, 2009 and March 25, 2009, each consisting of pre- and post-bronchodilator results. The June 19, 2008 study, administered for Dr. Jaworski, yielded values reported as: FEV_1=1.49, FVC=2.70 and FEV_1/FVC=55.27% on the pre-bronchodilator portion, and FEV_1=1.57, FVC=3.00 and FEV_1/FVC=52.31% on the post-bronchodilator portion. Director's Exhibit 13. The January 21, 2009 study, administered for Dr. Saludes, yielded values reported as: FEV_1=1.51, FVC=3.29 and FEV_1/FVC=46% on the pre-bronchodilator portion, and FEV_1=1.49, FVC=3.42 and FEV_1/FVC=44% on the post-bronchodilator portion. Claimant's Exhibit 1. The March 25, 2009 study, administered for Dr. Renn, yielded pre-bronchodilator values of: FEV_1=1.44, FVC=2.72 and FEV_1/FVC=53%, and post-bronchodilator values of FEV_1=1.67, FVC=3.06 and FEV_1/FVC=55%. Director's Exhibit 30.

[9] The administrative law judge noted that one of the non-qualifying tests produced qualifying values based on claimant's height as recorded with the test, but was non-qualifying based on a height of 65.8 inches, as calculated by the administrative law judge. Decision and Order at 4; *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

§718.204(b)(2)(i)(c) (emphasis added), and the Board has held that the regulations do not provide for the rounding of these values.[10] *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767, 1-770 (1984) (interpreting ventilatory study results under 20 C.F.R. Part 727). Here, Dr. Jaworski, for whom the June 19, 2008 test was administered, recorded the FEV_1/FVC ratio value as 55.27%, whereas the administrative law judge, in discussing this study, truncates the value yielded by the study to 55%. Decision and Order at 4; Director's Exhibit 13. Because the administrative law judge impermissibly truncated the FEV_1/FVC value from 55.27% to 55%, thus resulting in a qualifying pre-bronchodilator study, we vacate the administrative law judge's Section 718.204(b)(2)(i) findings and remand the case to the administrative law judge for further consideration of the evidence. 20 C.F.R. §718.204(b)(2)(i); *Bolyard*, 6 BLR at 1-770. On remand, therefore, the administrative law judge must reconsider the pulmonary function study evidence, correctly addressing the values as recorded by the physicians and determine whether the pulmonary function study evidence, as a whole, is sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i).

Further, the administrative law judge must consider the impact that claimant's age has on his pulmonary function study results. The administrative law judge properly found that pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying, if the values produced by the miner would be qualifying for a 71 year old. Decision and Order at 4 n.3 In the case of a miner older than 71 years, however, employer may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment.[11] *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24

[10] The Board has also held that the interpretation of the blood gas study results using the tables in Appendix C "encompasses neither the 'rounding up' nor 'rounding down' of pCO_2 or pO_2 values, but, rather, follows the express regulatory requirement that the reported test value be 'equal to or less than' the specified table value." *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987).

[11] The administrative law judge noted that Dr. Rosenberg extended the values contained in the pulmonary function study table in 20 C.F.R. Part 718, Appendix B, for miners over the age of 71 years. *See* Employer's Exhibit 3. However, the administrative law judge stated that the Department of Labor (DOL) has "explicitly chosen not to extend the tables and the Benefits Review Board has held that the 71 year-old values are to be used in such cases[,]" citing *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008). Decision and Order at 9 n.14. The administrative law judge did not, however, consider whether Dr. Rosenberg provided any additional explanation as to whether the values yielded by the reviewed studies would be qualifying or non-qualifying in this case. *Meade*, 24 BLR at 1-47.

BLR 1-40, 1-47 (2008). Therefore, in weighing the conflicting evidence, the administrative law judge must address employer's contention that it provided medical evidence demonstrating that the test results did not establish total disability. *See* Employer's Brief at 13.

Additionally, on remand, in determining whether total respiratory disability is established pursuant to Section 718.204(b) overall, the administrative law judge must reconsider all of the relevant evidence and weigh that evidence together, like and unlike, in determining whether total respiratory disability is established. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In particular, in weighing the medical opinion evidence, the administrative law judge must consider it in light of its underlying documentation and determine whether the opinions are reasoned. *See* 20 C.F.R. §718.204(b)(2)(iv); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields*, 10 BLR at 1-22.

If, on remand, the administrative law judge again determines that total respiratory disability is established pursuant to Section 718.204(b), claimant is entitled to invocation of the amended Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has met its burden of establishing rebuttal with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment.[12] *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir.

[12] On remand, contrary to employer's suggestion, the administrative law judge may refer to the preamble to the amended regulations when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 16-21. The preamble to the amended regulations sets forth how DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may evaluate expert opinions, therefore, in conjunction with DOL's discussion of sound medical science in the preamble to the amended regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, BLR (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, BLR (6th Cir. 2012). In addition, contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Looney*, 678 F.3d at 316; *Adams*, 694 F.3d at 801-02. Rather, the administrative law judge may, within his discretion, consult the preamble as an authoritative statement of medical principles accepted by DOL, and consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions in this case.

1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefit 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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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

Looney, 678 F.3d at 314-16; *see Adams*, 694 F.3d at 801-02; *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).