BRB Nos. 10-0303 BLA
and 10-0303 BLA-A

WILBUR M. REED	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SLAB FORK COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 02/18/2011
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denial of Benefits (09-BLA-5091) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), rendered on a subsequent 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).[1] The administrative law judge credited claimant with "at least" sixteen years of coal mine employment,[2] Decision and Order at 3, pursuant to the parties' stipulation, and found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that all of the evidence of record established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and that claimant is totally disabled, pursuant to 20 C.F.R. § 718.204(b)(2). The administrative law judge, however, 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 contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that disability causation was not established pursuant to 20 C.F.R. §718.204(c). Additionally, claimant states that this case is potentially affected by a recent amendment to the Act that was enacted by Section 1556 of Public Law No. 111-148, reinstating a rebuttable presumption of total disability

[1] Claimant's first claim, filed on February 6, 1984 was denied by the district director on August 1, 1984, because claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 2. The record does not reflect that claimant took any further action on his 1984 claim. Claimant filed his current claim on February 20, 2008. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

due to pneumoconiosis.[3] Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer alleges that the administrative law judge erred in his analysis of the evidence when he found that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), and urges that the finding be reversed. Further, in the event that the finding of total disability is not reversed, employer asserts that the administrative law judge erred in discounting the medical opinions of its medical experts regarding the cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Finally, regarding the application of Section 1556 to this case, employer states that, if the Board reverses the administrative law judge's total disability finding, there is no need to remand this case for consideration under the recent amendment to the Act, as a finding of total disability is required to establish invocation of the presumption reinstated by Section 1556. Employer argues further that the retroactive application of the amended provision of the Act to this case is unconstitutional. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief addressing the merits of this case, but has submitted briefs in response to both appeals, asserting that the Board must remand this case to the administrative law judge for consideration under the recent amendment to the Act, and urging the Board to reject employer's arguments that application of the amendment to this case is unconstitutional.[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).

[3] The recent amendments to the Act apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides, in relevant part, that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability 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.S.C. §921(c)(4)).

[4] The administrative law judge's findings that claimant established at least sixteen years of coal mine employment, and that he did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Based on the parties' statements and our review, we conclude that this case is potentially affected by Section 1556. The existence of pneumoconiosis is not disputed. At issue in this case is whether the administrative law judge correctly determined that claimant established the existence of a totally disabling respiratory or pulmonary impairment, and, if so, whether the administrative law judge correctly determined that claimant failed to prove that his impairment was materially worsened by pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.203(b), 718.204(c). Since our review of the record reveals that substantial evidence supports the administrative law judge's determination that claimant is totally disabled, discussed *infra*, the only issue which remains under 20 C.F.R. Part 718 is disability causation. Under 20 C.F.R. §718.204(c), claimant bears the burden to establish disability causation. However, under Section 1556, employer bears the burden to rebut the presumption of Section 411(c)(4) that claimant's total disability is due to pneumoconiosis. Since review of the administrative law judge's decision on disability causation would not resolve the issue of claimant's entitlement to Black Lung benefits, it is unnecessary for the Board to review that determination. Accordingly, the case must be remanded for the administrative law judge's consideration in light of the applicable amendment to the Act.

To establish entitlement 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). Claimant's prior claim was denied for failure to establish total disability. Consequently, to obtain review of the merits of the current claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered whether two new blood gas studies established total disability.[5] On March 18, 2008, Dr. Rasmussen conducted resting and exercise blood gas studies, both of which were

[5] The administrative law judge had already determined that two new pulmonary function studies did not establish total disability, and that claimant submitted no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii). Decision and Order at 5, 9-10.

qualifying.[6] Director's Exhibit 10. On July 16, 2008, Dr. Zaldivar conducted resting and exercise studies, neither of which was qualifying. Director's Exhibit 11. Finding Dr. Rasmussen's exercise study to be more probative of claimant's capacity to perform heavy manual labor,[7] the administrative law judge found that the blood gas study evidence established total disability.

Employer contends that the administrative law judge erred in relying on Dr. Rasmussen's exercise study, because no physician of record concluded that the March 18, 2008 exercise study was more probative than the July 16, 2008 exercise study. Employer's Brief at 10. We disagree. The administrative law judge was persuaded by Dr. Rasmussen's explanation that the difference in claimant's exercise heart rates between the March 18, 2008 blood gas study, when Dr. Rasmussen exercised claimant for six minutes, and the July 16, 2008 blood gas study, when Dr. Zaldivar exercised claimant for four minutes, indicated that Dr. Rasmussen's exercise study placed claimant under greater physical stress. Decision and Order at 12. Substantial evidence supports the administrative law judge's credibility determination. Claimant's Exhibit 1. Thus, the administrative law judge permissibly found that Dr. Rasmussen's March 18, 2008 exercise blood gas study better reflected claimant's capacity to perform heavy manual labor, and that therefore, Dr. Rasmussen's qualifying blood gas study outweighed Dr. Zaldivar's non-qualifying blood gas study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). Consequently, we affirm the administrative law judge's finding that the new blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer additionally asserts that, under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge erred in finding that the new medical opinions from Drs. Ghio and Zaldivar, stating that claimant is not totally disabled, did not outweigh Dr. Rasmussen's opinion that claimant is totally disabled. Employer's Brief at 11. We disagree. The administrative law judge permissibly found that the opinions of Drs. Ghio

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[6] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values in Appendix C of Part 718. A "non-qualifying" study yields values exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[7] Based on claimant's testimony, the administrative law judge found that, as a continuous miner operator, claimant helped to hang electric cables and water lines, and to set timbers. Decision and Order at 3. He further found that claimant helped "with pumping work that required dragging heavy pumps." *Id*. The administrative law judge therefore concluded that claimant's work as a continuous miner operator required heavy manual labor. Decision and Order at 12. Employer does not challenge that finding in its cross-appeal. The finding is therefore affirmed. *Skrack*, 6 BLR at 1-711.

and Zaldivar merited less weight, because the physicians relied on the less probative, July 16, 2008 blood gas study, to conclude that claimant is not totally disabled. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-44 (4th Cir. 1997); Director's Exhibit 11; Employer's Exhibits 1, 6, 7. Further, the administrative law judge reasonably discounted Dr. Ghio's opinion that claimant is not totally disabled, because the doctor exhibited no awareness that claimant's usual coal mine employment required heavy manual labor. *See Walker v. Director, OWCP*, 927 F.2d 181, 184, 15 BLR 2-16, 2-21-22 (4th Cir. 1991); Employer's Exhibits 1, 6. We therefore affirm the administrative law judge's finding that total disability was established based on the new medical opinion of Dr. Rasmussen, under 20 C.F.R. §718.204(b)(2)(iv).

Weighing together all of the new evidence regarding total disability, the administrative law judge found that total disability was established pursuant to 20 C.F.R. §718.204(b)(2). *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*). Employer asserts that, in so finding, the administrative law judge failed to consider claimant's non-qualifying pulmonary function studies. Employer's Brief at 11. A review of the administrative law judge's decision reflects that he did not ignore the pulmonary function studies. He specifically found that, because the pulmonary function studies measure only pulmonary function, they do not undermine the blood gas study evidence that claimant cannot sufficiently oxygenate his blood to perform heavy manual labor. Decision and Order at 12. Because substantial evidence supports the administrative law judge's finding that the new evidence establishes total disability at 20 C.F.R. §718.204(b)(2), that finding is affirmed. Therefore, we also affirm the administrative law judge's finding that claimant established a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d).

Total Disability--Merits of the Claim

Considering all of the evidence, both old and new, the administrative law judge found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). In so finding, the administrative law judge determined that the 2008 blood gas study evidence was more probative of claimant's current condition than was the blood gas study, pulmonary function study, and medical opinion evidence that was submitted with claimant's 1984 claim. Decision and Order at 22-23. Employer does not challenge that finding, which is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). For the same reasons that he previously gave, the administrative law judge again found that the more probative, new blood gas study evidence established that claimant is totally disabled. Decision and Order at 22-23. As substantial evidence supports the administrative law judge's finding, on the merits, of total disability pursuant to 20 C.F.R. §718.204(b)(2), the finding is affirmed.

Application of Section 411(c)(4)

This claim was filed after January 1, 2005, claimant was credited with at least sixteen years of coal mine employment, and he has established total disability. Therefore, we vacate the administrative law judge's denial of benefits, and remand this case for the administrative law judge to 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, 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).

Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional. We also deny employer's request to hold this case in abeyance.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge