BRB No. 10-0318 BLA

GILBERT R. WRISTON (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 02/09/2011
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Ann Marie Scarpino (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 appeals the Decision and Order (08-BLA-5488) of Administrative Law Judge Thomas M. Burke awarding benefits on a 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). This case involves a subsequent claim filed on June 28, 2007.[1] After crediting claimant[2] with sixteen years of coal mine employment,[3] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2007 claim on the merits. Considering all of the evidence, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of a gas exchange impairment caused by coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found that the evidence established that claimant's total disability was due to both his clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Employer also challenges the administrative law judge's finding that the x-ray evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer further challenges the administrative law judge's finding that the evidence establishes that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The

[1] Claimant filed previous claims in 1983, 1987, 2000, and 2002, all of which have been finally denied. Director's Exhibits 1-4. Claimant's last claim, filed on November 29, 2002, was denied by an administrative law judge, in a Decision and Order dated October 11, 2005, because claimant failed to establish the existence of pneumoconiosis or the existence of a totally disabling pulmonary impairment. Director's Exhibit 4.

[2] Claimant died on May 16, 2009. Claimant's Response Brief at 2. Claimant's surviving spouse, Darlis Wriston, is pursuing his claim.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. 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 (1989) (*en banc*).

Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

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).

Impact of the Recent Amendments

After the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted by Section 1556 of Public Law No. 111-148. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

Claimant and the Director assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits. Employer has not addressed the applicability of Section 1556 to this claim.

Based upon the parties' responses, and our review, we conclude that this case is potentially affected by Section 1556. As will be discussed below, the administrative law judge's award of benefits cannot be affirmed. Because we must remand this case for the administrative law judge to reconsider whether claimant established total disability pursuant to 20 C.F.R. §718.204(b), we will also instruct the administrative law judge, on remand, to consider this case in light of the amendments to the Act.

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 4. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Total Disability

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] The administrative law judge found that claimant worked as a dispatcher during his last year of coal mine employment. Decision and Order at 2. The administrative law judge noted that, as part of his dispatcher duties, claimant testified that he unloaded fifty-pound rock dust bags from trucks, replaced cables on "come-a-longs," and walked forty feet down a hill to turn on water spray for the road. *Id.*

The record contains two new medical reports submitted by Drs. Rasmussen and Zaldivar addressing whether claimant was totally disabled. In his September 4, 2007 report, Dr. Rasmussen noted that claimant, in performing the duties of a dispatcher, assisted in the loading and unloading of supplies. Director's Exhibit 14. Dr. Rasmussen opined that claimant's objective studies revealed "very marked loss of lung function as reflected by the reduced single breath diffusing capacity and marked exercise hypoxia." *Id.* Dr. Rasmussen further opined that claimant did not retain the pulmonary capacity to perform his regular coal mine job. *Id.*

In his July 14, 2008 report, Dr. Zaldivar noted that claimant's position as a dispatcher required him only to answer a telephone, "without having any other activities." Employer's Exhibit 1. In assessing claimant's pulmonary impairment, Dr. Zaldivar stated "[Claimant] . . . is severely impaired from the pulmonary standpoint . . . and incapable of performing anything beyond the sedentary level. He certainly would be able to do the work of a dispatcher, but not much beyond that." Employer's Exhibit 1.

[4] Although the administrative law judge found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), he found that the new arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 6. Because no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Drs. Rasmussen and Zaldivar diagnosed a total and permanent respiratory disability. Decision and Order at 7.

Employer argues that the administrative law judge erred in not considering the entirety of the evidence regarding the exertional requirements of claimant's usual coal mine work. Employer specifically contends that the administrative law judge erred in not considering conflicting evidence regarding the duties that claimant was required to perform as a dispatcher. We agree. As employer correctly maintains, claimant provided contradictory testimony regarding the exertional requirements of his job duties as a dispatcher. At a hearing held in connection with his 2002 claim, claimant testified that his position as a dispatcher did not involve any physical work, and was essentially limited to the answering of telephones.[5] However, at the September 24, 2008 hearing, claimant testified that his job as a dispatcher involved more than just answering telephones. Claimant testified that, in addition to answering the telephones, he (1) assisted in unloading fifty to sixty pound bags of rock dust from trucks; (2) hooked up mine-lights weighing four to five pounds; (3) replaced cable on "come-a-longs" weighing six to eight pounds; and (4) walked forty feet to turn on the water spray for the road. September 24, 2008 Hearing Transcript at 13-16.

As the administrative law judge failed to acknowledge the inconsistent descriptions of the exertional requirements of claimant's coal mine employment contained in the record, resolve the conflicts in this evidence, and provide a rationale for his findings that comports with the requirements of 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), we must remand this case to the

[5] In the adjudication of his prior 2002 claim, a hearing was held on May 6, 2005 hearing. At that time, the following exchange took place:

> Claimant's Counsel: What did you do as a dispatcher?
>
> Claimant: I just answered the telephones.
>
> Claimant's Counsel: Any physical or exertional work involved in doing the job of a dispatcher?
>
> Claimant: No, I'd just sweep up the office sometimes, you know, to keep the lamphouse clean.

May 6, 2005 Hearing Transcript at 13.

administrative law judge for his reconsideration of the exertional requirement of claimant's usual coal mine employment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As the administrative law judge's determination regarding the exertional requirements of claimant's job duties affected his weighing of the new medical opinion evidence on the issue of total respiratory disability, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv). In light of our decision to vacate the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also vacate his finding pursuant to 20 C.F.R. §725.309.

On remand, the administrative law judge must consider all of the relevant evidence and determine the exertional requirements of claimant's usual coal mine employment,[6] then compare those requirements with the physicians' assessments, and determine whether the new evidence establishes total respiratory disability at Section 718.204(b)(2)(iv). *See Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

When considering whether the new medical evidence establishes total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See 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). Moreover, the administrative law judge must weigh all of the relevant new evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *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*).

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[6] When a miner receives a lighter job as a result of his inability to perform his prior, more demanding job, the less strenuous position should not be considered his usual coal mine work. *See* 20 C.F.R. §718.204(e)(3); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-200, 1-204 (1986); *Vargo v. Valley Camp Coal Co.*, 6 BLR 1-1217, 1218 (1984). In this case, claimant testified that he bid for the job of dispatcher because he was "having trouble breathing." September 24, 2008 Hearing Transcript at 13-14. Consequently, in order to avoid any repetition of error on remand, we instruct the administrative law judge that, when determining if claimant could perform his "usual coal mine work" under 20 C.F.R. §718.204(b), he must consider whether claimant bid for the lighter job of dispatcher because of an inability to perform his prior job as a beltman.

Application of the Recent Amendments

On remand, should the administrative law judge determine that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), he must consider whether 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, on remand, finds that claimant is entitled to the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant did not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow both parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.[7]

[7] Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Because four of the five physicians who are dually qualified as B readers and Board-certified radiologists rendered positive x-ray interpretations, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis. Decision and Order at 8. The Fourth Circuit court has expressed its disapproval of "counting heads" to resolve conflicting evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992) (stating that "counting heads" is a "hollow" way to resolve conflicts in the evidence); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). In evaluating x-ray evidence, the Board has recognized that an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). In this case, the administrative law judge, in finding that the x-ray evidence established the existence of pneumoconiosis, focused exclusively on the number of dually-qualified readers who read x-rays as positive for pneumoconiosis. Consequently, the administrative law judge did not provide a sufficient evaluation of the x-ray evidence of record, and he must do so on remand.

Accordingly, the administrative law judge's Decision and Order awarding benefits 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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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