BRB No. 11-0401 BLA

FREDDIE E. BAISDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DAVIDSON MINING, LIMITED LIABILITY CORPORATION	)	DATE ISSUED: 02/21/2012
	)	
	)	
Employer-Respondent	)	
	)	
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.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Charleston, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Paul Edenfield (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 the Decision and Order Denying Benefits (2010-BLA-5357) of Administrative Law Judge Richard A. Morgan, with respect to a claim filed on April 6, 2009, 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). The administrative law judge credited the miner with at least nineteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(b)(2). Additionally, the administrative law judge determined that claimant did not invoke the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because he did not have a totally disabling respiratory impairment.[1] The administrative law judge also found that claimant did not establish total disability causation at 20 C.F.R. §718.204(c) and denied benefits.

On appeal, claimant argues that the administrative law judge erred in relying on an invalid blood gas study to determine that he did not establish total disability and, therefore, did not invoke the rebuttable presumption at amended Section 411(c)(4). Claimant also contends that the administrative law judge erred in finding that he did not establish the existence of pneumoconiosis on the merits. Claimant further asserts that, because the administrative law judge revealed bias against claimant when weighing the credibility of his testimony, this case must be remanded to a different administrative law judge. Employer responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge improperly gave weight to the invalid blood gas study.[2]

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, is rational,

[1] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had at least nineteen years of qualifying coal mine employment and his finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. The Administrative Law Judge's Findings

The administrative law judge determined that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as neither the pulmonary function studies of record, dated May 26, 2009 and November 11, 2009, produced qualifying values[4] and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 20; Director' Exhibit 16; Employer's Exhibit 1. Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the blood gas studies obtained on May 26, 2009 and November 11, 2009. The administrative law judge determined that the May 26, 2009 study, which was obtained by Dr. Rasmussen, produced qualifying values during exercise, while the November 11, 2009 study, which was performed by Dr. Zaldivar, produced non-qualifying values at rest and after exercise. Decision and Order at 9, 21; Director's Exhibit 16; Employer's Exhibit 1. The administrative law judge further found that, although Dr. Rasmussen and claimant questioned the validity of Dr. Zaldivar's study, "the best-qualified pulmonologist, Dr. Rosenberg, was able to objectively calculate that it nevertheless showed no disability. Moreover no deviation from [Department of Labor arterial blood gas study] procedures was established." Decision and Order at 21. The administrative law judge also acknowledged Dr. Zaldivar's explanation that the blood gas study results reflected claimant's "deconditioning" and the fact that he is overweight. *Id*. Based upon these

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. 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).

[4] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

findings, the administrative law judge concluded that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially determined that claimant's last coal mine job, as chief electrician, required heavy manual labor. Decision and Order at 21. The administrative law judge stated, "because the claimant's respiratory symptoms do not render him unable to walk short distances, i.e., he walks a mile a day, as opposed to testimony that he experiences shortness of breath carrying a gallon of milk, I find he has not proven he is incapable of performing his prior coal mine employment." *Id*. The administrative law judge then found that "the better qualified pulmonologists," Drs. Rosenberg and Zaldivar, did not diagnose a disabling respiratory impairment and that their opinions were supported by the objective testing. *Id*. at 22; Employer's Exhibits 1, 5-7. The administrative law judge accorded little weight to Dr. Rasmussen's diagnosis of a totally disabling respiratory impairment, based on a "barely qualifying" exercise blood gas study, as Dr. Rasmussen's opinion conflicted with the administrative law judge's finding that the blood gas studies of record are insufficient to establish total disability.[5] Decision and Order at 22; Claimant's Exhibit 5. Accordingly, the administrative law judge concluded that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). *Id*.

II. Arguments on Appeal

Claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Rosenberg and Zaldivar, that claimant does not have a totally disabling respiratory impairment, as they relied on the invalid exercise study performed by Dr. Zaldivar on November 11, 2009. Based upon the administrative law judge's error at 20 C.F.R. §718.204(b)(2)(iv), claimant argues that he has invoked the presumption at amended Section 411(c)(4). Claimant also contends that the administrative law judge exhibited bias when he discredited claimant's testimony concerning his exertional limitations. Claimant requests, therefore, that the Board reverse the administrative law judge's Decision and Order reassign this case to a different administrative law judge.

Employer responds, arguing that the administrative law judge properly addressed any issues with Dr. Zaldivar's exercise blood gas study and acted within his discretion in finding no evidence of a totally disabling respiratory impairment. The Director contends

[5] The administrative law judge further noted, "additionally and not at all determinative, there was testimony that Dr. Rasmussen's [blood gas study] results might have been influenced by the different barometric pressure in the higher Beckley, [West Virginia], environs, although his test was not incorrectly interpreted under the regulations." Decision and Order at 22.

that the administrative law judge erred in determining that Dr. Zaldivar's exercise blood gas study was valid and nonqualifying. The Director states that, contrary to the administrative law judge's finding, Dr. Rosenberg's opinion did not provide a basis for crediting the exercise portion of the November 11, 2009 study. The Director also asserts that this error is not harmless.

We agree with claimant and the Director, that the administrative law judge did not properly assess the validity of Dr. Zaldivar's November 11, 2009 exercise blood gas study. Under the terms of 20 C.F.R. §718.105(b):

> A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, *blood shall be drawn during exercise*.

20 C.F.R. §718.105(b) (emphasis added). The exercise study did not comply with the requirements of the regulation in light of Dr. Zaldivar's acknowledgment that claimant's blood was not drawn until after he stopped walking on the treadmill. Employer's Exhibit 1. Thus, the administrative law judge's statement, that "no deviation from [Department of Labor arterial blood gas study] procedures was established," is not supported by substantial evidence. Decision and Order at 21.

In addition, Dr. Rosenberg's opinion does not provide a valid rationale for the administrative law judge's decision to credit the November 11, 2009 exercise test. Dr. Rosenberg conceded that, contrary to the requirements of 20 C.F.R. §718.105(b), claimant's blood was not drawn until after the exercise portion of the study had ended. Employer's Exhibit 5. The administrative law judge accepted Dr. Rosenberg's assertion that he could calculate the exercise values that would have been produced on Dr. Zaldivar's study, if the study had been properly administered, by extrapolating from the at-rest values and from the values produced on Dr. Rasmussen's earlier blood gas study. Decision and Order at 21; Employer's Exhibits 5, 6. As the Director maintains, however, there is nothing in the regulations that permits relying upon extrapolated values to determine whether, pursuant to 20 C.F.R. §718.204(b)(2)(ii), a blood gas study has yielded results that are equal to or less than the values set forth in Appendix C to 20 C.F.R. Part 718. Although the Board has held that an otherwise reliable and probative blood gas study must not be rejected for failing to satisfy a non-critical quality standard, *Orek v. Director, OWCP*, 10 BLR 1-51 (1987), the administrative law judge did not render a finding that the requirement that the miner's blood be drawn during exercise is a non-critical quality standard, nor did he consider whether Dr. Rosenberg cited any established medical standards in support of his method of calculating what the exercise values would have been.

We also agree with claimant and the Director, that the flaws in the administrative law judge's consideration of the November 11, 2009 exercise blood gas study cannot be treated as harmless error. If Dr. Zaldivar's non-qualifying exercise study is determined to be invalid on remand, Dr. Rasmussen's uncontradicted qualifying exercise study could support a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii), which may then impact the weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[6]

Regarding claimant's assertion that the administrative law judge has exhibited bias against claimant, requiring reassignment of this case to a different administrative law judge, we hold that claimant has not identified evidence sufficient to establish bias. As previously indicated, when comparing the exertional requirements of claimant's usual coal mine work and his functional limitations, the administrative law judge stated, "because the claimant's respiratory symptoms do not render him unable to walk short distances, i.e., he walks a mile a day, as opposed to testimony that he experiences shortness of breath carrying a gallon of milk, I find he has not proven he is incapable of performing his prior coal mine employment." Decision and Order on Remand at 21. Contrary to claimant's argument, the quoted passage is too brief and too ambiguous to establish that that administrative law judge exhibited bias against claimant. *See Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). We reject, therefore, claimant's request for reassignment. However, because the administrative law judge did not identify the evidence that purportedly establishes that claimant walks a mile a day, or adequately explain his finding, we cannot affirm the administrative law judge's determination that claimant failed to prove that he is totally disabled under 20 C.F.R. 718.204(b)(2)(iv). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(ii) and (iv), and remand the case to the administrative law judge for reconsideration of the blood gas study and medical opinion evidence. On remand, the administrative law judge must initially reconsider the validity of Dr. Zaldivar's November 11, 2009 exercise blood gas study and determine whether claimant has established total disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge must then reconsider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), based on his reconsideration of the blood gas study evidence. In the event that the administrative law judge finds that total disability has been established under 20 C.F.R. §718.204(b)(2)(ii), (iv), he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Fields v. Island Creek*

[6] In this regard, the Director, Office of Workers' Compensation Programs, notes that the Fourth Circuit has held that at-rest and post-exercise blood gas studies are separate tests, entitled to independent weight. Director's Brief at 3; *see Gray v. Director,* OWCP, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991).

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 determines that claimant has failed to establish total disability under 20 C.F.R. §718.204(b)(2), an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. If the administrative law judge finds total disability established, he must then reconsider whether claimant has invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[7] In the event that the administrative law judge finds that the presumption is invoked, he is required to consider whether employer has rebutted the presumption.

If the administrative law judge reaches the issue of whether the preponderance of the medical opinion evidence establishes the presence or absence of pneumoconiosis, he must address both legal and clinical pneumoconiosis. In resolving any conflicts in the medical opinion evidence, the administrative law judge is required to consider the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their

[7] The administrative law judge determined that claimant satisfied the other prerequisites for invocation of amended Section 411(c)(4) because his claim was filed after January 1, 2005, and he had at least fifteen years of qualifying coal mine employment. Decision and Order at 24.

respective diagnoses.[8] *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). Lastly, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *See Wojtowicz*, 12 BLR at 1-165.

[8] "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 is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Accordingly, the administrative law judge's 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 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