BRB No. 12-0281 BLA

JACKIE E. HATFIELD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GRACE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/27/2013
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5756) of Administrative Law Judge Stephen M. Reilly denying benefits 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 claim filed on May 20, 2009.

After crediting claimant with seventeen years of coal mine employment,[1] the administrative law judge found that the x-ray evidence did not establish 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 did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[2] The administrative law judge further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Because claimant did not establish that he is totally disabled, the administrative law judge further found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Alternatively, the administrative law judge found that, even

[1] Claimant's last coal mine employment was in Kentucky. Hearing Transcript at 36. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] "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 to that deposition caused by dust exposure in 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).

[3] In his decision, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

if claimant had invoked the Section 411(c)(4) presumption, the presumption "would be rebutted" by the medical opinions stating that claimant's respiratory impairment is due to smoking. Decision and Order at 13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the x-ray evidence in finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Further, claimant contends that substantial evidence does not support the administrative law judge's findings that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the arterial blood gas study and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iv). Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits.[4] The Director, Office of Workers' Compensation Programs, 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).

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

We initially address claimant's challenge to the administrative law judge's finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis

[4] In its response brief, employer also argued that the administrative law judge erred in finding that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), submitted a Motion to Strike, arguing that employer's responsible operator argument should have been raised in a cross-appeal, since it was not responsive to the arguments raised in claimant's brief. *See* 20 C.F.R. §802.212(b). By Order dated August 20, 2012, the Board granted the Director's motion and struck that portion of employer's response brief challenging the administrative law judge's responsible operator determination. Accordingly, the administrative law judge's responsible operator determination is affirmed.

pursuant to 20 C.F.R. §718.201(a)(1). The administrative law judge considered seven interpretations of five x-rays taken on December 12, 2000, March 21, 2001, August 12, 2009, March 25, 2010, and October 19, 2010. Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the December 12, 2000 x-ray as positive for pneumoconiosis. Claimant's Exhibit 3. Dr. Powell, a B reader, interpreted the March 21, 2001 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Rasmussen, a B reader, interpreted the August 12, 2009 x-ray as positive for pneumoconiosis. Director's Exhibit 20. However, Dr. Meyer, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 23. Dr. Forehand, a B reader, interpreted the March 25, 2010 x-ray as positive for pneumoconiosis, Claimant's Exhibit 6, and Dr. Meyer interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Finally, Dr. Tarver, a B reader and Board-certified radiologist, interpreted the October 19, 2010 x-ray as negative for pneumoconiosis. Employer's Exhibit 3.

The administrative law judge began his analysis by correctly noting that he could accord greater weight to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 4. The administrative law judge accorded "little weight" to the two positive x-rays of December 1, 2000 and March 21, 2001, because employer did not have the opportunity to submit its own readings of those x-rays, and "because the progressive nature of pneumoconiosis makes these X-rays less probative than x-rays taken at a later date." Decision and Order at 5. Regarding the next two x-rays, taken on August 12, 2009 and March 25, 2010, the administrative law judge accorded greater weight to Dr. Meyer's negative readings, based on Dr. Meyer's superior radiological qualifications, and found that both x-rays were negative for pneumoconiosis. Further, he found that the October 19, 2010 x-ray was negative for pneumoconiosis, based upon Dr. Tarver's uncontradicted negative reading. The administrative law judge concluded that "the X-ray evidence, considered as a whole, does not establish clinical pneumoconiosis." *Id.* at 5.

Claimant contends that the administrative law judge erred in citing the progressive nature of pneumoconiosis as a reason to discount the early, positive x-rays from 2000 and 2001. Claimant's Brief at 4. Further, claimant asserts that, contrary to the administrative law judge's determination, employer "had ample opportunity" to submit a reading of the December 1, 2000 x-ray.[5] Claimant's Brief at 4. Claimant's contentions have merit, in

[5] Claimant concedes that employer was not provided with the March 21, 2001 x-ray for rereading, and that therefore, the administrative law judge reasonably discounted that x-ray. Claimant's Brief at 4; *see* 20 C.F.R. §718.102(d). With respect to the December 1, 2000 x-ray, the record reflects that employer stated, in its closing brief to the administrative law judge, that it received the x-ray too late to have it reread. Claimant

part, but in the circumstances of this case, claimant demonstrates no reversible error by the administrative law judge.

Claimant correctly argues that, contrary to the administrative law judge's statement, recognition of "the progressive nature of pneumoconiosis" does not make earlier, positive x-rays "less probative than x-rays taken at a later date," if the later x-rays are negative. Decision and Order at 5; *see Woodward*, 991 F.2d at 321, 17 BLR at 2-87 (explaining that "subsequent negative x-ray readings do not illustrate the expected deterioration in the miner's condition, but rather an improvement . . . which is inconsistent with the normal course of the disease"). However, as noted, claimant concedes that the administrative law judge reasonably discounted the March 21, 2001 x-ray on another ground. *See* n.5, *supra*. Further, claimant does not challenge the administrative law judge's qualitative analysis of the readings of the August 12, 2009, March 25, 2010, and October 19, 2010 x-rays to find that those three x-rays are negative for pneumoconiosis. The administrative law judge, therefore, was left with one positive x-ray and three negative x-rays. Based on the administrative law judge's proper analysis of the weight of the x-ray evidence, we conclude that his error in considering the earlier x-rays was harmless, *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009), and that substantial evidence supports his finding that the x-ray evidence, "considered as a whole," did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-84-85. That finding is therefore affirmed.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred in addressing whether the medical opinion evidence established the existence of legal pneumoconiosis, by failing to take into account the entirety of Dr. Rasmussen's medical opinion. Claimant's argument has merit. The administrative law judge discounted Dr. Rasmussen's opinion that claimant suffers from chronic obstructive pulmonary disease (COPD)/emphysema, due to both cigarette smoking and coal mine dust exposure, because he found that Dr. Rasmussen failed to provide a basis for his opinion. Decision and Order at 11. However, in his deposition, Dr. Rasmussen explained that he attributed claimant's COPD/emphysema to both cigarette smoking and coal mine dust exposure based upon the small amount of airways obstruction in comparison to claimant's gas exchange impairment. Employer's Exhibit 19-20. Although the administrative law judge admitted Dr. Rasmussen's deposition testimony into evidence, Decision and Order at 2, the administrative law judge did not address this evidence when evaluating the conflicting medical opinions regarding the etiology of

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disputes this assertion and employer does not explain it. Claimant's Brief at 4; Employer's Brief, Nov. 9, 2011, at 5.

claimant's COPD.[6] We must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for him to consider all of the relevant evidence. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Claimant argues further that the administrative law judge erred in finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[7] The record contains the results of three blood gas studies: Dr. Rasmussen conducted a study on August 12, 2009; Dr. Jarboe conducted a study on March 25, 2010; and Dr. Broudy conducted a study on October 19, 2010. All three of the blood gas studies produced non-qualifying values at rest.[8] Director's Exhibits 20, 22; Employer's Exhibit 2. Dr. Rasmussen, however, also administered an exercise blood gas study on August 12, 2009, which produced qualifying values. Director's Exhibit 20. Neither Dr. Jarboe nor Dr. Broudy administered an exercise blood gas study.[9]

The administrative law judge found that the two non-qualifying, resting blood gas studies conducted in 2010 were entitled to more weight than the qualifying, exercise study conducted in 2009:

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[6] The administrative law judge credited the contrary opinions of Drs. Jarboe and Rosenberg, that claimant's COPD is due solely to smoking, because he found their opinions to be better explained than the opinion of Dr. Rasmussen. Decision and Order at 11.

[7] Because claimant does not challenge the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, since 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).

[8] A "qualifying" arterial blood gas study meets the values specified in the tables found in Appendix C to Part 718. 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[9] The regulations provide that if the results of a blood gas study at rest are non-qualifying, "an exercise blood-gas test shall be offered to the miner unless medically contraindicated." 20 C.F.R. §718.105(b). Review of the record does not indicate the reason that neither Dr. Jarboe nor Dr. Broudy offered claimant an exercise blood gas study.

> It should be noted that neither Dr. Jarboe nor Dr. Broudy reported blood gas studies for exercise, while Dr. Rasmussen's only qualifying results were during the exercise test. While the lack of exercise testing is concerning, the results of the resting studies indicate an improving trend with the most recent results "far exceeding" the values necessary to qualify. As such, I give those two tests more weight than the marginally qualifying test given many months earlier. Therefore, I find that the blood gas evidence does not establish total disability.

Decision and Order at 6 (footnote omitted).

Claimant contends that the administrative law judge erred in failing to consider Dr. Rasmussen's medical opinion regarding the relevance of the subsequent resting blood gas studies to a determination of whether claimant's qualifying exercise blood gas study indicates that he is totally disabled. We agree. During a July 13, 2011 deposition, Dr. Rasmussen indicated that only a subsequent normal exercise blood gas study, not a subsequent normal resting blood gas study, would draw into question the results of his qualifying exercise blood gas study. Employer's Exhibit 6 at 29. In an August 29, 2011, supplemental report, Dr. Rasmussen further addressed the subsequent resting blood gas studies, and disagreed with employer's experts' opinions that those studies indicated that claimant is not totally disabled. He stated:

> Dr. Rosenberg made a great deal out of the fact that the resting arterial blood gas studies were much higher than mine and higher than even the difference in elevation implying that were [claimant] to have been tested his blood gases would have remained normal. This, of course has no basis in fact. Resting blood gases are extremely variable as noted by a study of Dr. Lenfant. In fact, between the resting studies and the standing rest, [claimant's] PO2 rose 5 mmHg and subsequently dropped 15 mmHg during his light exercise. This opinion by Dr. Rosenberg has no merit.

Claimant's Exhibit 10 (footnote omitted). Because neither Dr. Broudy nor Dr. Jarboe performed an exercise blood gas study, Dr. Rasmusssen opined that the results of their studies did not undermine claimant's qualifying exercise blood gas study, and he reiterated his opinion that claimant is totally disabled by a respiratory or pulmonary impairment. *Id.*

Although the administrative law judge admitted Dr. Rasmussen's deposition testimony and supplemental report into evidence, Decision and Order at 2, the administrative law judge did not address that evidence when evaluating the conflicting blood gas studies. Because the administrative law judge failed to take into account all of the relevant evidence, remand is required. *See* 30 U.S.C. §923(b); *Morrison v. Tenn.*

Consol. Coal Co., 644 F.3d 473, 480, 25 BLR 2-1, 2-10 (6th Cir. 2011); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-625, 2-638 (6th Cir. 2003). We, therefore, vacate the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and remand the case for further consideration of all of the relevant evidence.

Because the administrative law judge's reconsideration of the arterial blood gas study evidence could affect the weight accorded to the medical opinion evidence, we also vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, when reconsidering whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must consider the entirety of each physician's opinion, and 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 Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If, on remand, the administrative law judge finds that the blood gas study or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), he must weigh all of the relevant evidence together, both like and unlike, to determine whether claimant's pulmonary impairment precludes him from performing his usual coal mine employment as a repairman, a job that the administrative law judge found "involved moderate to moderate-heavy labor." Decision and Order at 3; *see* 20 C.F.R. §718.204(b)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *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).

Because we have vacated the administrative law judge's finding that claimant did not establish total disability, we also vacate his determination that claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. On remand, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), he must then determine whether claimant has established invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will address claimant's contentions of error insofar as they relate to the administrative law judge's alternative finding that, even if claimant had invoked the Section 411(c)(4) presumption, employer rebutted the presumption by proving that claimant's impairment is due to smoking. If a miner invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did

not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.

The administrative law judge found that the Section 411(c)(4) presumption was "rebutted by the weight of the medical opinions as expressed by Dr. Jarboe and Dr. Rosenberg who explained how [claimant's] impairment arose out of his extensive smoking history." Decision and Order at 13. The administrative law judge's finding was based on his earlier determination that claimant failed to establish that his COPD/emphysema is related to his coal mine dust exposure. Decision and Order at 11. Contrary to the administrative law judge's analysis, employer bears the burden to make "an affirmative showing . . . that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work." *Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Moreover, as discussed above, in weighing the medical opinion evidence regarding the etiology of claimant's respiratory impairment, the administrative law judge failed to consider the entirety of Dr. Rasmussen's opinion, which was contrary to those of Drs. Jarboe and Rosenberg. Consequently, should the administrative law judge, on remand, find that claimant invokes the Section 411(c)(4) presumption, he must reconsider whether employer has met its burden to establish rebuttal of the presumption, taking into account all of the relevant evidence.

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 consideration 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