BRB No. 13-0225 BLA

KENNETH R. ARDUINI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HELVETIA COAL COMPANY	)	DATE ISSUED: 02/26/2014
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Linda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-5466) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on October 1, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718, the administrative law judge credited claimant with 20.6 years of coal mine employment, based on the parties' stipulation. The administrative law judge determined that, although claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), he invoked the presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), as he had more than fifteen years of underground coal mine employment and established that he is

totally disabled at 20 C.F.R. §718.204(b).[1] The administrative law judge further found, however, that employer successfully rebutted the presumption by proving that claimant's totally disabling pulmonary impairment is not due, "in whole or in part," to coal dust exposure. Decision and Order at 20. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge mischaracterized the pulmonary function studies of record, which affected his weighing of the evidence relevant to rebuttal. Claimant further contends that the administrative law judge did not accurately characterize the medical opinions of Drs. Celko, Houser and Rasmussen, and erred in crediting the opinions of Drs. Fino and Zaldivar. Employer responds, asserting that any error by the administrative law judge is harmless and urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.

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.[2] 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 light of the administrative law judge's finding that the evidence of record, when considered as a whole, was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), we ordinarily would not consider claimant's allegation that the administrative law judge erred in determining that the pulmonary function study evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). However,

[1] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 4; Decision and Order at 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

because claimant contends that the administrative law judge's mischaracterization of the pulmonary function study evidence caused him to err in finding that employer established rebuttal of the amended Section 411(c)(4) presumption, we will address claimant's arguments regarding the administrative law judge's weighing of this evidence.

The administrative law judge determined that the record contained pulmonary function studies administered on November 23, 2010, July 21, 2011, November 14, 2011 and May 23, 2012, and he considered them in accordance with Appendix B to 20 C.F.R. Part 718, which sets forth the standards for interpreting pulmonary function studies. Decision and Order at 12-13; Director's Exhibit 11; Claimant's Exhibits 3, 4; Employer's Exhibit 6. The administrative law judge summarized his analysis in a table in which he indicated that claimant's height was reported as sixty-four inches on the studies obtained on November 23, 2010, November 14, 2011 and May 23, 2012, and as sixty-five inches on the study obtained on July 21, 2011. Decision and Order at 12. Upon weighing the pulmonary function study results, the administrative law judge found that five of the eight tests produced qualifying values.[3] *Id*. at 12-13. With respect to the November 23, 2010 post-bronchodilator test, the administrative law judge determined that, in contrast to the pre-bronchodilator test, it was nonqualifying, as the FEV1 value exceeded the qualifying value set forth in the table at Appendix B to 20 C.F.R. Part 718. *Id*. at 12; Director's Exhibit 11. Regarding the pulmonary function study performed on May 23, 2012, the administrative law judge found that it was nonqualifying, as both the pre-bronchodilator and post-bronchodilator FVCs and FEV1/FVC ratios exceeded the table values. Decision and Order at 13; Claimant's Exhibit 4. The administrative law judge concluded:

> While a numerical majority of the test results qualified, the most recent testing of May 23, 2012, failed to do so. Given the fact that pneumoconiosis is a progressive condition and should not improve over time, I find that the most recent results are the most probative.

Decision and Order at 13. Accordingly, the administrative law judge found that total disability "has not been demonstrated by a preponderance of the evidence pursuant to 20 C.F.R. §718.204(b)(2)(i)."[4] *Id*.

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

[4] The administrative law judge further found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iii), as the blood gas studies were nonqualifying and there is no evidence of cor pulmonale with right-sided congestive heart

Upon addressing the issue of whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge weighed the opinions of Drs. Celko, Houser, Rasmussen, Fino and Zaldivar. Decision and Order at 20; Director's Exhibits 10, 11, 15; Claimant's Exhibits 1, 3; Employer's Exhibits 6, 8, 9, 20, 21, 24. The administrative law judge discredited the opinions in which Drs. Celko, Houser, and Rasmussen diagnosed a totally disabling pulmonary impairment, caused by smoking and coal dust exposure, as they did not sufficiently explain the improvement in claimant's pulmonary function study results over time. Decision and Order at 20. In contrast, the administrative law judge found that:

> Doctors Fino and Zaldivar, however, do offer a compelling explanation which is supported by the *diagnostic testing results* – that the claimant's severe, total pulmonary disability is due to panlobular emphysema with bronchospasm caused by smoking and not coal dust inhalation. . . . Doctor Zaldivar specifically supported his opinion that smoking alone is the cause of [c]laimant's pulmonary impairment by the fact that he has bronchospasms and *improvement with bronchodilators*, whereas damage from coal dust inhalation is not responsive to bronchodilators. . . . Doctor Zaldivar specifically states that [c]laimant's subsequently *improved breathing studies of May 2012* are a further indication of emphysema with bronchospasm caused by smoking. [Dr.] Fino, like Dr. Zaldivar, also describes how the diagnostic evidence in the case, such as *improvement after the administration of bronchodilators* during pulmonary function studies, is indicative of smoking-induced emphysema and not coal dust inhalation.
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> . . . In the present case, Dr. Celko performed the *last set of testing*[,] *which showed the improvement* . . . [I]n this specific case[,] the improvement in diagnostic testing results discredits the notion that claimant has a progressive condition such as coal workers['] pneumoconiosis.

Id. at 20-21 (emphasis added) (citations omitted); Director's Exhibit 15; Employer's Exhibits 6, 8, 9, 20, 21, 24. The administrative law judge concluded that the opinions of Drs. Fino and Zaldivar proved that claimant's totally disabling impairment was due

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failure. Decision and Order at 14. However, the administrative law judge determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, "met the requirements to invoke the presumption that he has legal pneumoconiosis." *Id*. at 15.

solely to cigarette smoking and, therefore, employer established rebuttal of the amended Section 411(c)(4) presumption. Decision and Order at 21.

Claimant contends that errors in the administrative law judge's consideration of the pulmonary function study evidence affected his weighing of the medical opinions relevant to the cause of claimant's totally disabling impairment, and rebuttal of the amended Section 411(c)(4) presumption. Claimant argues specifically that the administrative law judge listed incorrect post-bronchodilator FEV1 and FVC values for the November 23, 2010 pulmonary function study and that, if he had used the correct values, in conjunction with claimant's age of sixty-seven, he would have found that the post-bronchodilator test was qualifying. Regarding the most recent study, performed on May 23, 2012 study, claimant alleges that the administrative law judge mischaracterized both the pre-bronchodilator and post-bronchodilator FEV1/FVC ratios.

Employer concedes that the administrative law judge "relied on erroneous values for some of the testing," but argues that the error is harmless because, after reviewing all of the evidence, the administrative law judge "ultimately found that claimant was totally disabled from a respiratory or pulmonary impairment and invoked the presumption." Employer's Responsive Brief at 4. Employer asserts that substantial evidence supports the administrative law judge's finding that employer successfully rebutted the presumption.

After reviewing the relevant evidence, the administrative law judge's findings, and the parties' arguments on appeal, we hold that the administrative law judge's mischaracterization of the values produced on the November 23, 2010 and May 23, 2012 pulmonary function studies tainted his determination that employer established rebuttal of the amended Section 411(c)(4) presumption, which must therefore be vacated. With respect to the post-bronchodilator test conducted on November 23, 2010, claimant correctly asserts that the administrative law judge erroneously identified the post-bronchodilator FEV1 as 2.20, when the actual value was 1.23, and he misstated the FVC result as 2.98, when it was 3.01. Decision and Order at 12; Director's Exhibit 11. Consequently, we vacate the administrative law judge's finding that the November 23, 2010 post-bronchodilator test was nonqualifying. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Regarding the pulmonary function study conducted on May 23, 2012, the administrative law judge found that both the pre-bronchodilator and post-bronchodilator tests did not qualify because the FVCs and FEV1/FVC ratios were "too high." Decision and Order at 13. Claimant correctly asserts that the administrative law judge erred in identifying the FEV1/FVC ratio on both tests as 62%, while the actual pre-bronchodilator and post-bronchodilator results were 46%, which is below the 55% ratio set forth in the table. *See* 20 C.F.R. §718.204(b)(2)(i)(C); Appendix B to 20 C.F.R. Part 718; Claimant's

Exhibit 4. Because the administrative law judge did not accurately characterize the values produced on the May 23, 2012 study, we vacate his finding that both the pre-bronchodilator and post-bronchodilator tests were nonqualifying. *See Anderson*, 12 BLR at 1-113. We further vacate the administrative law judge's determination that the results of this study support the conclusion that claimant's pulmonary function improved over time. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Based on the administrative law judge's reliance on his mischaracterization of the pulmonary function study evidence to resolve the conflicting medical opinions on the cause of claimant's totally disabling impairment in favor of employer's experts, we also vacate the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption. *Id.*

We will now turn to a consideration of claimant's additional allegations of error regarding the administrative law judge's weighing of the medical opinion evidence on the cause of claimant's totally disabling impairment. Claimant maintains correctly that the administrative law judge substituted his opinion for that of the medical experts in finding that claimant's disabling obstructive impairment was partially reversible, and that this meant that coal dust exposure was not the cause of the fixed, irreversible component of the impairment.[5] *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 20. Based on the administrative law judge's reliance on the latter finding, we vacate the administrative law judge's decision to discredit the opinions of Drs. Celko, Houser, and Rasmussen, because they did not sufficiently acknowledge the reversibility of claimant's obstructive impairment.

We further hold that there is merit in claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Fino and Zaldivar, without considering whether they relied upon premises that conflict with the medical science endorsed by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Specifically, the administrative law judge did not address the significance of the statements in which Drs. Fino and Zaldivar indicated that coal dust exposure cannot be identified as the cause of

[5] We also note that the administrative law judge's determination that claimant showed improvement after the administration of bronchodilators is inconsistent with Dr. Celko's handwritten comments that the November 23, 2010 and May 23, 2012 pulmonary function studies, showed no "BD response," and Dr. Fino's similar handwritten comments that claimant had "no clinically significant B.D. response." Director's Exhibits 11, 15; Claimant's Exhibit 4.

an obstructive impairment in the absence of x-ray evidence of clinical pneumoconiosis – a position that is contrary to the DOL's position.[6] 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); Employer's Exhibits 9 at 31, 40-41, 10 at 46-58, 65-66. The administrative law judge also did not determine whether the conclusions expressed by Drs. Fino and Zaldivar are consistent with the DOL's recognition that miners who smoke have an additive risk for developing significant obstruction, and that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms.[7] 65 Fed. Reg. 79,940-43, 79,971 (Dec. 20, 2000); *see Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. We vacate, therefore, the administrative law judge's decision to credit the opinions of Drs. Fino and Zaldivar.

In summary, we vacate the administrative law judge's findings with respect to the pulmonary function study evidence, the medical opinions relevant to the cause of claimant's totally disabling obstructive impairment, and the issue of whether employer rebutted the amended Section 411(c)(4) presumption. On remand, the administrative law judge must first reconsider the pulmonary function study evidence and must begin by rendering a finding as to claimant's height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). The administrative law judge must then determine, based on claimant's age at the date of testing and the correct FEV1, FVC, and FEV1/FVC values, whether each pre-bronchodilator and post-bronchodilator test is qualifying at Appendix B to 20 C.F.R. Part 718. In so doing, the administrative law judge must identify the table height that he uses, and set forth the reason for his choice. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-41, 1-44 (2008); *see also Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84-85 n.6 (4th Cir. 1995) (citing the

[6] Dr. Fino stated, "I consider this man's situation, the negative chest x-ray is important in assessing the contribution of coal mine dust to his obstruction and disability." Employer's Exhibit 8. Dr. Fino testified at his deposition that he used "the negative x-ray as a marker of the amount of emphysema due to coal mine dust inhalation that would be causing a reduction in FEV1." Employer's Exhibit 9 at 31. When Dr. Zaldivar was asked whether coal dust exposure could be a cause of claimant's severe obstructive impairment, he stated, "[i]f you have coal workers' pneumoconiosis, you can have this damage. Of course, the CT scan would not look like this CT scan and the chest x-ray would not look like this chest x-ray." Employer's Exhibit 10 at 47.

[7] Dr. Fino indicated that he agreed with the view that coal dust exposure does not cause clinically significant decrements in FEV1. Employer's Exhibit 9 at 30. Dr. Zaldivar testified that, although he agreed that coal dust-induced emphysema and smoke-induced emphysema occurred through similar mechanisms at the time that the revised definition of legal pneumoconiosis was adopted, "[i]n the year 2011 the picture is not as clear." Employer's Exhibit10 at 64.

Office of Workers' Compensation Programs Manual, which specifically mandates using the closest greater height when a miner's actual height falls between heights listed in the table). We further remind the administrative law judge that recency, in and of itself, is not a sufficient reason to credit the results of one objective study over another, and that a nonqualifying study does not, by itself, establish the absence of an impairment. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Gober v. Matthews*, 574 F.2d 772, 778 (3d Cir. 1978).

After reconsidering the pulmonary function study evidence, the administrative law judge must reconsider the opinions of Drs. Celko, Houser, Rasmussen, Fino and Zaldivar, in light of his findings regarding the pulmonary function study evidence, to determine whether employer has rebutted the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis, or that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment.[8] 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013); *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, BLR (7th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge must address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the scope, and bases of, their diagnoses. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge should also consider the extent to which the physicians' opinions are consistent with the scientific views endorsed by the DOL in the preamble to the 2001 amendments to the regulations. *See Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. When setting forth his findings on remand, the administrative law judge must identify the evidence on which he relies and set forth the rationale underlying his decision, in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[8] On remand, the administrative law judge must be mindful that, because claimant invoked the Section 411(c)(4) presumption, the burden has shifted to employer to rebut the presumption. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Thus, contrary to employer's suggestion, the administrative law judge's finding that claimant, without the benefit of the presumption, did not establish the existence of clinical pneumoconiosis does not, *per se*, affirmatively establish that claimant does not have pneumoconiosis, or that his total disability did not arise out of, or in connection with, his coal mine employment.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, 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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REGINA C. McGRANERY
Administrative Appeals Judge