BRB No. 08-0334 BLA

L.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREEN RIVER COAL COMPANY	)	
	)	DATE ISSUED: 01/16/2009
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

John R. Sigmond (Penn Stuart & Eskridge), Bristol, Tennessee, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-05099) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge noted that the claim before him was a subsequent claim and that, pursuant to 20 C.F.R. §725.309(d), claimant was required to establish that he is totally disabled in order to

establish a change in an applicable condition of entitlement.[1] The administrative law judge found that the newly submitted medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and denied benefits accordingly.

Claimant argues on appeal that the administrative law judge erred in finding that the newly submitted pulmonary function studies and medical opinions are not sufficient to establish total disability under Section 718.204(b)(2)(i), (iv). Claimant also objects to the administrative law judge's admission of Employer's Exhibits 1-8. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.[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).

If 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

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[1] The miner's first claim for benefits was filed on June 23, 1993, and was denied by the district director on December 14, 1993, on the ground that claimant failed to establish total disability. Director's Exhibit 1. Claimant filed his second, and current, claim for benefits on October 21, 2002. Director's Exhibit 2. The district director issued a Proposed Decision and Order finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but denied benefits, as claimant did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 25. When forwarded to the Office of Administrative Law Judges (OALJ), Administrative Law Judge Robert L. Hillyard remanded the case to the district director because he found that the examination performed by Dr. Simpao at the request of the Department of Labor was deficient, as the physician did not adequately address the issues of total disability and total disability due to pneumoconiosis. After Dr. Simpao performed another examination and submitted his report, claimant's case was again forwarded to the OALJ and assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge).

[2] We affirm the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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 last claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

We will first address claimant's arguments regarding the administrative law judge's consideration of the newly submitted medical opinions at Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge erred in discrediting the opinions in which Drs. O'Bryan and Simpao indicated that claimant has a pulmonary impairment that prevents him from doing his usual coal mine work. Dr. O'Bryan examined claimant on August 5, 2003, and reported that his last coal mine employment involved construction and loading coal on trains and in the tipple. Director's Exhibit 14. Dr. O'Bryan diagnosed a moderate restrictive ventilatory impairment that "would preclude [claimant's] return to the coal mine." *Id*. Dr. Simpao examined claimant on March 11, 2003, and noted that claimant last worked as a loader and pumper. Director's Exhibit 11. Dr. Simpao initially opined that claimant has a mild pulmonary impairment that would not restrict him from performing his usual coal mine job. Director's Exhibits 11, 34 at 5. When asked to clarify his total disability opinion on remand from Administrative Law Judge Robert L. Hillyard, Dr. Simpao stated that the pulmonary function studies dated March 11, 2003 and May 5, 2003, revealed a moderate pulmonary impairment, and the blood gas study obtained on March 11, 2003 showed a significant pulmonary impairment. Claimant's Exhibit 4. Dr. Simpao concluded that claimant "has a significant pulmonary impairment" and that "[h]e is totally disabled from pneumoconiosis and the pulmonary impairment that arose from it." *Id*.

The administrative law judge found:

> Drs. O'Bryan and Simpao merely offer conclusory statements as to the miner's total disability and inability to resume his last coal mine job. Neither doctor explains the degree of physical limitations that result from the disabled condition, nor do they explain how the disability precludes the miner from engaging in the physical requirements of the miner's last coal mine job.

Decision and Order at 11. Claimant asserts that these opinions are sufficient to establish that he is totally disabled because both are based on "an examination which included

employment, medical, symptomatology, and smoking histories, as well as pulmonary function testing … this testing and evidence has been deemed a sufficient basis for a physician's opinion." Claimant's Appeal Brief at 9.

Claimant's contention is without merit. The administrative law judge acted within his discretion as fact-finder in discrediting these opinions under Section 718.204(b)(2)(iv), as the physicians did not indicate an awareness of the exertional requirements of claimant's usual coal mine work, did not describe claimant's physical limitations, and did not set forth the rationale underlying their opinions. *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). We affirm, therefore, the administrative law judge's decision to discredit these opinions and his finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv).

Claimant further asserts that the administrative law judge erred in determining that the newly submitted pulmonary function study (PFS) evidence does not support a finding of total disability under Section 718.204(b)(2)(i). The record contains six newly submitted PFSs. Dr. O'Bryan obtained a study on August 5, 2003, which did not produce qualifying values.[4] Director's Exhibit 14. Dr. Simpao performed tests on March 11, 2003, May 5, 2003, and March 2, 2005. Director's Exhibit 11; Claimant's Exhibit 2. The PFSs obtained on May 5, 2003 and March 2, 2005 were qualifying, while the PFS dated March 11, 2003, produced nonqualifying results. Dr. Long invalidated the study obtained on March 11, 2003, due to less than optimal effort and Dr. Hippensteel invalidated the March 2, 2005 PFS based upon claimant's hesitation and less than optimal effort during some of the maneuvers. Director's Exhibit 34; Employer's Exhibit 16. On September 11, 2004, Dr. Baker performed a PFS that did not produce qualifying values. Employer's Exhibit 22. Dr. Repsher's study, performed on August 14, 2007, produced qualifying results, but Dr. Repsher questioned the reliability of the results due to claimant's poor effort. Employer's Exhibit 8.

In his Decision and Order, the administrative law judge omitted the qualifying PFS that Dr. Simpao performed on May 5, 2003, without explanation, and addressed the remaining studies. The administrative law judge determined that the test performed by Dr. Repsher on August 14, 2007, was the only PFS that produced qualifying results, but noted that Dr. Repsher questioned its validity "based on his assessment that claimant

[4] 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, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

exhibited extremely poor effort, causing inconsistencies in the results." Decision and Order at 9. The administrative law judge further stated:

> Of the five physicians that administered or reviewed the pulmonary function tests, three cited substantial compliance issues rendering the tests non-conforming. I find the reliability of the tests to be in doubt and the probative value of the tests to be diminished … The conclusion that the miner exerted less than optimal effort not only places Dr. Repsher's test in doubt, but also other tests that yielded non-qualifying values … [D]espite any deficiency in cooperation and comprehension, the demonstrated ventilatory capacity was still above the table values on most of the tests. Had the claimant exhibited greater effort, the test results on the non-qualifying tests could only have been higher.

Decision and Order at 10. The administrative law judge concluded, therefore, that total disability was not established pursuant to Section 718.204(b)(2)(i).

Claimant argues that the administrative law judge's finding under Section 718.204(b)(2)(i) cannot be affirmed as the administrative law judge did not consider the qualifying study performed by Dr. Simpao on May 5, 2003 and did not acknowledge that the study obtained by Dr. Simpao on March 2, 2005 was qualifying. These contentions have merit. Dr. Simpao examined claimant at the request of the Department of Labor (DOL) on March 11, 2003. Director's Exhibit 11. Because the qualifying PFS that Dr. Simpao obtained on that date was invalidated, he obtained a second study on May 5, 2003, which produced qualifying values. *Id.* Dr. Burki reviewed the May 5, 2003 study and determined that it was valid. *Id.* Although claimant did not designate this PFS on the Evidence Summary Form that he submitted to the administrative law judge, it was admissible under 20 C.F.R. §725.406(b), as part of the complete pulmonary evaluation provided by DOL. In addition, claimant is correct in contending that the March 2, 2005 PFS performed by Dr. Simpao produced qualifying results. Claimant's Exhibit 2. The administrative law judge identified this study as qualifying in his summary of the medical evidence, *see* Decision and Order at 5, but when rendering his finding under Section 718.204(b)(2)(i), he indicated that the PFS performed by Dr. Repsher on August 14, 2007 was the only study that produced qualifying results. Decision and Order at 9.

Because the administrative law judge did not accurately characterize the quantity or quality of the newly submitted PFS evidence, we vacate his findings that claimant did not establish total disability at Section 718.204(b)(2)(i) or a change in an applicable condition of entitlement under Section 725.309(d). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Accordingly, we also vacate the denial of benefits and remand the case to the administrative law judge for reconsideration of this evidence. The administrative law judge must first identify the newly submitted PFSs that are admissible under 20 C.F.R. §§725.406(b) and 725.414(a)(2), (3), and then determine whether each

study is qualifying. When considering the validity of individual studies, the administrative law judge may credit the invalidation reports of reviewing physicians, but must explain why the reviewing physician's assessment is more credible than that of the administering physician. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

Lastly, claimant argues that Employer's Exhibits 1-8 were not properly admitted into the record, as Employer's Exhibit 1 and Employer's Exhibit 8 exceed the evidentiary limitations on x-ray evidence, while Employer's Exhibits 2-7 are not admissible as treatment records because there is no proof that they were obtained while claimant was treated for a respiratory or pulmonary condition pursuant to Section 725.414(a)(4). Because we have vacated the denial of benefits and remanded the case to the administrative law judge for reconsideration, we direct the administrative law judge to address claimant's objections to the admission of Employer's Exhibits 1-8 on remand.[5]

Regarding Employer's Exhibit 1, which consists of Dr. Wheeler's negative interpretation of an August 5, 2003 x-ray, employer designated this reading as rehabilitative evidence in response to Claimant's Exhibit 1, which consists of Dr. Brandon's positive reading of the same film. However, the administrative law judge did not consider Dr. Brandon's interpretation in his Decision and Order nor is it clear that Dr. Wheeler's reading constitutes rehabilitative evidence pursuant to Section 725.414(a)(3)(ii).[6] The administrative law judge must, therefore, render a finding as to the admissibility of Dr. Wheeler's x-ray interpretation on remand. In addition, the administrative law judge must address the admissibility of Employer's Exhibits 2-7, which contain x-ray interpretations from claimant's treatment records and Dr. Sparks's treatment notes. Pursuant to Section 725.414(a)(4), such evidence is admissible without regard to the evidentiary limitations, but only if the treatment was "for a respiratory or pulmonary or related disease." 20 C.F.R. §725.414(a)(4). The administrative law judge must also render a finding as to the admissibility, under 20 C.F.R. §718.107, of Employer's Exhibit 8, which consists of Dr. Wheeler's interpretation of a CT scan dated

[5] The administrative law judge's admission of this evidence did not affect his consideration of the issue of total disability, as Employer's Exhibits 1-8 include evidence which may pertain to the existence of pneumoconiosis, rather than total respiratory or pulmonary disability.

[6] Under 20 C.F.R. §725.414(a)(3)(ii), "where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing." 20 C.F.R. §725.414(a)(3)(ii).

August 14, 2007.[7] Although claimant is incorrect in maintaining that Dr. Wheeler's reading of the CT scan exceeds the limitations on x-ray evidence, the administrative law judge should determine whether the prerequisites of Section 718.107 have been met before he admits this evidence.[8] *See Webber v. Peabody Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*).

[7] Absent other specific exceptions set out in 20 C.F.R. §725.414, the administrative law judge can admit evidence in excess of the evidentiary limitations if the proponent of the evidence establishes good cause for its admission. 20 C.F.R. §725.456(b)(1).

[8] Under 20 C.F.R. §718.107:

> (a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.
>
> (b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge