BRB No. 08-0343 BLA

R. E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
	)	DATE ISSUED: 01/30/2009
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Julie A. Webb (Craig & Craig), Mount Vernon, Illinois, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5744) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent 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).[1] Claimant filed his claim for benefits on May 10, 2005. Director's Exhibit 2. The administrative law judge credited claimant with thirty-six years of coal mine employment.[2] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering this subsequent claim, the administrative law found that the medical evidence developed since the prior denial of benefits did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3] and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in his weighing of the medical evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(i), (iv).

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).

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[1] Claimant's initial claim for benefits, filed on September 5, 1986, was denied on October 30, 1986, because claimant failed to prove the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibits 1, 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Because claimant does not challenge the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), or total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered three new medical opinions. Dr. Istanbouly examined and tested claimant and diagnosed granulomatous changes on chest x-ray, and chronic obstructive pulmonary disease (COPD) based on a pulmonary function study. Dr. Istanbouly attributed claimant's COPD primarily to coal mine dust exposure.[4] Director's Exhibit 10 at 3; Claimant's Exhibit 3 at 17. Dr. Cohen examined and tested claimant and diagnosed pneumoconiosis based on chest x-ray, and a moderate obstructive impairment that was significantly contributed to by coal dust exposure and possibly by 7.5 pack-years of tobacco smoking. Claimant's Exhibit 1 at 11; Claimant's Exhibit 4 at 29, 31. However, Dr. Renn reviewed the medical evidence of record and concluded that claimant does not have pneumoconiosis, but suffers from a possible mild obstructive ventilatory impairment due solely to aging or senile emphysema. Director's Exhibit 19; Employer's Exhibit 6.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "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). The administrative law judge accorded less weight to the diagnoses of clinical pneumoconiosis rendered by Drs. Istanbouly and Cohen to the extent the diagnoses were based on x-rays that more qualified readers had read as negative and the administrative law judge had found did not establish the

[4] Dr. Istanbouly noted that claimant's remote, 7.5 pack-year smoking history was insufficient to have caused chronic obstructive pulmonary disease or emphysema. Claimant's Exhibit 3 at 13. Based on claimant's testimony and the physicians' reports, the administrative law judge found that claimant smoked three-quarters of a pack of cigarettes per day for ten years, and quit when he was thirty. Decision and Order at 3.

existence of pneumoconiosis under Section 718.202(a)(1). Turning to the physicians' opinions regarding legal pneumoconiosis, the administrative law judge found that Dr. Istanbouly did not explain why claimant's moderate obstruction detected on pulmonary function study could not be due to advanced age rather than coal dust exposure. Further, the administrative law judge discounted Dr. Cohen's diagnosis of legal pneumoconiosis because Dr. Cohen failed to respond to Dr. Renn's criticism that the December 5, 2006 pulmonary function study that Dr. Cohen administered, and upon which he relied to diagnose a moderate obstructive impairment, was invalid due to claimant's failure to maintain maximum effort on the study. Finding persuasive Dr. Renn's opinion that claimant has a mild obstructive impairment due solely to the effects of aging, the administrative law judge determined that claimant did not meet his burden to establish the existence of pneumoconiosis.

Both claimant and the Director contend that the administrative law judge erred by discrediting Dr. Cohen's diagnosis of legal pneumoconiosis based on the alleged invalidity of the pulmonary function study he administered, without considering Dr. Cohen's testimony that claimant's effort was maximal and the study was valid. Claimant's Brief at 7; Director's Brief at 1-2. We agree. Contrary to the administrative law judge's finding, Dr. Cohen discussed the validity of the pulmonary function study in his deposition:

> We look to make sure that there is no extrapolated volume error, which means that there is no hesitation at the beginning of the forced vital capacity maneuver. [Claimant] did not have an extrapolated volume error. We make sure that the test is exhaled for at least six seconds in order for it to be a valid test, and [claimant] did exhale for at least six seconds. And then we look at the repeatability criteria, which is to see whether or not—If the person is doing a maximal effort, then it's usually very repeatable. If they are doing submaximal efforts, it's very hard for people that are giving you a submaximal effort to repeat it within the degree that is required by the ATS and ERS.
>
> [Q. And did [claimant] provide a maximal effort based on his pulmonary function testing?]
>
> A. Yes.

Claimant's Exhibit 4 at 39. The administrative law judge erred in failing to consider Dr. Cohen's testimony along with Dr. Renn's opinion when assessing the validity of the December 5, 2006 pulmonary function study. *See* 30 U.S.C. §923(b); *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002). Thus, the administrative law judge's basis for discounting Dr. Cohen's diagnosis of legal pneumoconiosis is not

supported by substantial evidence. *See* 33 U.S.C. §921(b)(3). We must therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §§718.202(a)(4), 725.309(d), and remand the case for the administrative law judge to reconsider the validity of the pulmonary function study underlying Dr. Cohen's diagnosis of legal pneumoconiosis, and to reweigh the doctor's opinion in light of whatever finding the administrative law judge makes regarding the study. Because the administrative law judge's reconsideration of Dr. Cohen's pulmonary function study and his opinion regarding the etiology of claimant's obstructive impairment could also affect the administrative law judge's analysis of the other opinions,[5] we instruct the administrative law judge to reconsider whether the new medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4). If so, claimant will have established a change in an applicable condition of entitlement, and the administrative law judge must then determine whether all of the evidence of record establishes claimant's entitlement to benefits. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two new pulmonary function studies administered on August 9, 2005, and on December 5, 2006. The record reflects that, for a male miner who is 71 years old, the maximum age for which qualifying[6] values are specified in Appendix B of 20 C.F.R. Part 718, and who is claimant's height, which the administrative law judge found to be 67.7 inches, the August 9, 2005 study administered by Dr. Instanbouly was non-qualifying, and the December 5, 2006 study administered by Dr. Cohen was qualifying both pre-bronchodilator and post-bronchodilator. However, because claimant was 83 years old when he took the 2005 test and 84 when he took the 2006 test, the administrative law judge extrapolated qualifying values for older miners from the table values. In this way, the administrative law judge determined that the August 9, 2005 study was non-qualifying, and that the December 5, 2006 study was qualifying only in its post-bronchodilator values. Additionally, the administrative law judge again found that Dr. Cohen did not respond to Dr. Renn's opinion that Dr. Cohen's December 5, 2006 pulmonary function study was invalid. The administrative law judge therefore found that

[5] The record reflects that Dr. Cohen specifically explained that claimant's moderate obstructive impairment could not be attributed entirely to aging. Claimant's Exhibit 4 at 26-28. Further, contrary to the administrative law judge's finding, Dr. Istanbouly explained why he did not attribute claimant's moderate obstructive impairment to the effects of aging. Claimant's Exhibit 3 at 18, 21.

[6] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(i), (ii).

total disability was not established because "there [was] not a preponderance of the qualifying pulmonary function test results." Decision and Order at 11.

As discussed above, the administrative law judge erred in failing to consider Dr. Cohen's testimony that claimant's effort was maximal on the December 5, 2006 pulmonary function study and that the study was valid. 30 U.S.C. §923(b). Moreover, the Director argues that the administrative law judge erred in his analysis of whether the pulmonary function studies were qualifying for total disability under the regulatory tables when he extrapolated qualifying values beyond the maximum table age. Director's Brief at 5 n.5. Subsequent to the issuance of the administrative law judge's Decision and Order, the Board held that pulmonary function studies performed on a miner who is older than 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.J.M. v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008).

In view of the foregoing, we vacate the administrative law judge's finding that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). On remand, the administrative law judge must take into account Dr. Cohen's testimony when considering the validity of the December 5, 2006 pulmonary function study. Further, the administrative law judge must reconsider the new pulmonary function study evidence based upon the table values for a 71 year old male of claimant's height. *K.J.M.*, 24 BLR at 1-47. The administrative law judge must also provide employer with an opportunity to submit evidence indicating that the "ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling pulmonary impairment." *K.J.M.*, 24 BLR at 1-48. In response, claimant may provide medical evidence supporting a disability finding based on the test results and claimant's actual age. *K.J.M.*, 24 BLR at 1-47.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the administrative law judge erred in his analysis of the new medical opinion evidence by according more weight to the opinion of Dr. Renn, than to the contrary opinions of Drs. Cohen and Istanbouly, in determining that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 9. The Director argues that the administrative law judge's erroneous analysis of the pulmonary function study evidence affected his weighing of the medical opinions, and he argues that the administrative law judge erred in failing to consider the doctors' opinions regarding total disability in light of the exertional requirements of claimant's usual coal mine employment. Director's Brief at 2-4. We agree.

The administrative law judge found that while Drs. Istanbouly and Cohen opined that claimant lacks the respiratory capacity to perform his usual coal mine employment, Dr. Renn opined that claimant has a mild obstructive impairment that leaves him with the respiratory capacity to perform his usual coal mine employment. The administrative law

judge accorded more weight to Dr. Renn's opinion because he found that it was based on "normal" objective testing. Decision and Order at 11. However, as discussed, *supra*, the administrative law judge's finding, that the pulmonary function study evidence did not establish total disability, cannot stand. Because the administrative law judge's weighing of the medical opinion evidence was based in part upon his weighing of the pulmonary function study evidence, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration of the new medical opinions on the issue of total disability. On remand, the administrative law judge must consider the new medical opinions regarding whether claimant's obstructive impairment is totally disabling in light of the physicians' understanding of the exertional requirements of claimant's usual coal mine employment as a belt spillage man.[7] *See Killman v. Director, OWCP*, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005).

On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), he must weigh all 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)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*). If the administrative law judge finds that the new evidence establishes total disability, claimant will have established a change in an applicable condition of entitlement, and the administrative law judge must then determine whether all of the evidence of record establishes claimant's entitlement to benefits. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[7] The administrative law judge found that claimant's last coal mine employment was as a belt spillage man. Evidence regarding the exertional requirements of claimant's job as a belt spillage man is of record. Claimant's Exhibit 1 at 4; Claimant's Exhibit 4 at 29; Hearing Transcript at 17, 22. The record also contains Dr. Cohen's testimony that the lifting, shoveling, and walking required by the belt spillage job constituted very heavy exertion. Claimant's Exhibit 4 at 29.

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 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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BETTY JEAN HALL
Administrative Appeals Judge