BRB No. 13-0163 BLA

EZRA R. GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETTY B COAL COMPANY	)	
	)	
and	)	
	)	
THE FIRE & CASUALTY COMPANY of CONNECTICUT, c/o ARROWPOINT CAPITAL	)	DATE ISSUED: 01/06/2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-05354) of Administrative Law Judge Christine L. Kirby (the administrative law judge), awarding

benefits on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim on January 5, 2010.[1] Director's Exhibit 3.

In her Decision and Order issued December 4, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress 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 or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there is 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, 260 (2010). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

After crediting claimant with 16.8 years of underground coal mine employment,[2] the administrative law judge found that the new evidence established that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus found that claimant established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and considered his claim on its merits. Based on claimant's years of qualifying coal mine employment and the finding of total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed four previous claims, all of which were finally denied. Director's Exhibit 1; Administrative Law Judge Exhibits 2, 3. Claimant's most recent prior claim, filed on March 31, 2004, was denied by Administrative Law Judge Linda S. Chapman on June 14, 2006, because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). Administrative Law Judge Exhibit 2. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Gibson v. Betty B Coal Co.*, BRB No. 06-0749 BLA (July 26, 2007) (unpub.).

[2] Claimant's last coal mine employment was in Virginia. Hearing Transcript at 25. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

On appeal, employer argues that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment and that he is totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. 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).

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

Qualifying Coal Mine Employment

Employer contends that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment. The administrative law judge found, and employer agrees, that claimant's Social Security earnings records establish approximately 12.8 years of coal mine employment. Decision and Order at 8; Employer's Brief at 4. The administrative law judge, however, also credited claimant's testimony that he performed coal mine employment from 1971 to 1975 that was not reflected in his Social Security earnings records, because he was paid in cash. Decision and Order at 8. The administrative law judge credited claimant with four additional years of coal mine employment for that time period, and therefore found that claimant established at least 16.8 years of qualifying coal mine employment. *Id*.

Employer argues that the administrative law judge erred in crediting claimant with four years of coal mine employment between 1971 and 1976. Employer's Brief at 4-7. Employer first contends that the administrative law judge mischaracterized claimant's testimony. Specifically, employer contends that claimant was "non-responsive" at the hearing, when claimant's counsel asked him if he began working in mines four years before 1976, and asserts that claimant never testified that he worked for four years between 1971 and 1976. Employer's Brief at 6; Hearing Transcript at 17. Employer, however, overlooks claimant's deposition testimony. As summarized by the administrative law judge, claimant testified that from 1971 to 1975, he worked for a coal mine operator that paid him in cash, and did not pay Social Security taxes. Decision and Order at 6; Director's Exhibit 16, Deposition Transcript at 21-23. We therefore reject employer's allegation of error in this aspect of the administrative law judge's decision.

Employer argues further that the administrative law judge failed to consider all the relevant record evidence when she credited claimant with four years of coal mine employment between 1971 and 1976. Employer's Brief at 5. Employer notes that in his first claim, filed on June 12, 1972, claimant indicated on his application that he last worked for Rose and Brooks Coal Company in 1971. Employer's Brief at 5; Director's Exhibit 1. Employer notes further that on October 23, 1974, at the hearing on claimant's first claim, claimant testified before Administrative Law Judge Oscar Isaacson that he last worked in coal mine employment in 1971, and that since then he was engaged only in farming. Employer's Brief at 5; Director's Exhibit 1. Claimant's second claim application, filed on September 4, 1987, indicated that he worked for employer from March 1, 1976 to August 31, 1987. Director's Exhibit 1. Employer points out that in two questionnaires claimant filled out for Dr. Endres-Bercher in the second claim, he did not list any coal mine employment between his time with Rose and Brooks Coal Company, in 1971, and his time with employer, beginning in 1976. Employer's Brief at 5; Director's Exhibit 1.

In crediting claimant with four years of coal mine employment between 1971 and 1976, the administrative law judge stated that she reviewed "all of Claimant's testimony contained in the record, the Social Security earnings records, pay documents, claim applications and medical reports," and determined that claimant's testimony was credible, observing that claimant's account of his coal mine employment history was "consistent over the course of several years." Decision and Order at 8. The administrative law judge, however, did not specifically address the evidence cited by employer, which, if credited, appears inconsistent with claimant's deposition testimony that he worked in coal mine employment for four years between 1971 and 1975. The administrative law judge, therefore, did not adequately explain her finding of four additional years of coal mine employment during that period, as required by the Administrative Procedure Act (APA), 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, 1-165 (1989).

Accordingly, we must vacate the administrative law judge's finding that claimant had 16.8 years of qualifying coal mine employment. Because we have vacated the administrative law judge's finding regarding claimant's years of coal mine employment, we must also vacate her determination that claimant invoked the Section 411(c)(4) presumption, and vacate the award of benefits. 30 U.S.C. §921(c)(4); Decision and Order at 15. On remand, the administrative law judge must address all the relevant evidence regarding the length of claimant's qualifying coal mine employment, and provide an explanation for her findings, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Total Disability and a Change in the Applicable Condition of Entitlement

When 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(c);[3] *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(c)(3). Claimant's prior claim was denied because claimant did not establish total disability. Administrative Law Judge Exhibit 2. Therefore, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. *See* 20 C.F.R. §725.309(c)(3), (4).

The administrative law judge found that the new pulmonary function study evidence failed to establish total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i), and that the new arterial blood gas study evidence was "inconclusive to either establish the presence or absence" of a totally disabling respiratory impairment, pursuant to 20 C.F.R. 718.204(b)(2)(ii). Decision and Order at 9-10. In considering the new medical opinion evidence, the administrative law judge found, based on claimant's testimony, that he performed heavy manual labor. Director's Exhibit 16, Deposition Transcript at 18-19; Hearing Transcript at 16-21; Decision and Order at 11. The administrative law judge credited the opinions of Drs. Al-Khasawneh, Fino, and Splan that claimant is totally disabled, and found that Dr. Rosenberg's opinion was unclear on the issue of total disability. Decision and Order at 11-14. The administrative law judge thus concluded that the preponderance of the new medical opinion evidence established that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(iv). *Id.* at 14.

Employer contends that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 9. We disagree. In his initial report, Dr. Rosenberg noted that claimant retained a normal total lung capacity, that his diffusion capacity was "only borderline reduced," and that his oxygenation was preserved with exercise. Employer's Exhibit 1 at 14-15. Dr. Rosenberg thus concluded that claimant was not totally disabled. *Id*. at 15. In a supplemental report, however, Dr. Rosenberg noted that a more recent arterial blood gas study performed by Dr. Splan was qualifying,[4]

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

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

and revealed an "oxygenation abnormality," which Dr. Rosenberg attributed to "some form of interstitial involvement or chronic pneumonia which would be a disorder of the whole person." Employer's Exhibit 5 at 2. Dr. Rosenberg concluded that "[w]hile the more recent blood gas is qualifying, this does not represent disability related to past coal mine dust exposure." *Id*. The administrative law judge noted that Dr. Rosenberg did not clearly explain in his supplemental report whether he now believed that claimant had a totally disabling respiratory impairment, even if the impairment was not due to coal dust exposure. Decision and Order at 13-14. The administrative law judge permissibly concluded that Dr. Rosenberg's opinion on the issue of total disability was unclear, given his conclusion that the new blood gas study revealed an oxygenation abnormality, but that it "d[id] not represent disability related to past coal mine dust exposure," which can be read as addressing the distinct issue of disability causation, pursuant to 20 C.F.R. §718.204(c). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Employer also contends that the administrative law judge erred in crediting the opinions of Drs. Splan, Fino, and Al-Khasawneh. Dr. Splan determined that claimant's pulmonary function study was "consistent with small airways disease," and that his blood gas study showed "moderate arterial hypoxemia at rest." Claimant's Exhibit 4. Dr. Splan concluded that claimant has a "mild degree" of pulmonary impairment, but that he "could not return to work in the coal mines based upon an established diagnosis of coal worker's [sic] pneumoconiosis." *Id*. Employer notes that Dr. Splan diagnosed claimant as having only a "mild" or "moderate" impairment, and argues that his opinion cannot support a finding of total disability because it is an opinion that claimant should not return to his coal mine employment only because he has pneumoconiosis. Employer's Brief at 9-10. This argument lacks merit. A diagnosis of a mild impairment can support a finding of total disability if the impairment prevents a miner from performing his usual coal mine employment. *See Killman v. Director, OWCP*, 415 F.3d 716, 719, 23 BLR 2-250, 2-258-59 (7th Cir. 2005); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). Given her conclusion that claimant's job required heavy manual labor, the administrative law judge reasonably determined that Dr. Splan's opinion supported a finding that claimant cannot perform his usual coal mine work, and thus is totally disabled. *See* 20 C.F.R. §718.204(b)(1); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc).

Employer also argues that the administrative law judge erred in crediting the opinions of Drs. Fino and Al-Khasawneh because, employer contends, their opinions that claimant is totally disabled "were based entirely upon the assumption that claimant's arterial blood gas studies were qualifying," contrary to the administrative law judge's own conclusion that the overall blood gas study evidence was inconclusive. Employer's Brief at 8. We disagree.

Dr. Fino, who was aware that claimant's coal mine employment required heavy labor, observed that claimant had a reduced diffusing capacity, and noted that claimant's PO2 values decreased during an exercise blood gas study. Director's Exhibit 9. Therefore, Dr. Fino diagnosed "an impairment in oxygen transfer," and concluded that claimant "would be disabled from his last mining job or a job requiring similar effort." Director's Exhibit 9 at 8; Employer's Exhibit 6. Dr. Al-Khasawneh concluded his report by stating that claimant is totally disabled based on an "[a]rterial blood gas at rest that is abnormal and does meet the Department of [Labor] criteria for disability and impairment," but he also noted that claimant's pulmonary function testing revealed a "moderately reduced" diffusion capacity, and that his resting blood gas study revealed "severe hypoxemia." Director's Exhibit 8. Dr. Al-Khasawneh diagnosed claimant with a "severe pulmonary impairment." *Id*. The administrative law judge permissibly credited the opinions of Drs. Fino and Al-Khasawneh as reasoned, and supportive of a finding that claimant is totally disabled. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark*, 12 BLR at 1-155.

Because substantial evidence supports the administrative law judge's decision to credit the opinions of Drs. Splan, Fino, and Al-Khasawneh, and to discredit Dr. Rosenberg's opinion, we affirm her finding that the new medical opinion evidence establishes that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14.

Finally, employer contends that the administrative law judge erred by relying only on the new medical opinion evidence to find that claimant is totally disabled, without weighing all of the medical evidence together, including the pulmonary function and arterial blood gas study evidence. Employer's Brief at 10-11. We reject this argument. In finding total disability established, the administrative law judge considered the evidence relevant to each subsection of 20 C.F.R. §718.204(b)(2), finding that the pulmonary function study evidence was non-qualifying under subsection (i), that the blood gas studies yielded both qualifying and non-qualifying values at subsection (ii) and were therefore inconclusive, and that the medical opinion evidence established total disability pursuant to subsection (iv). More specifically, she found that the medical opinion evidence, in which the physicians took into account the results of claimant's blood gas studies, pulmonary function studies, and diffusion capacity studies, established that claimant has a respiratory impairment that prevents him from performing his usual coal mine employment. We therefore conclude that the administrative law judge's decision is sufficient to show that she considered all of the relevant evidence together in finding that claimant established total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

Therefore, we affirm the administrative law judge's finding that the new medical evidence established that claimant is totally disabled, pursuant to 20 C.F.R.

§718.204(b)(2). Consequently, we affirm the administrative law judge's determination that claimant established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c).

On remand, if the administrative law judge finds that claimant has at least fifteen years of qualifying coal mine employment, because claimant has established total disability, he will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted the presumption by disproving the existence of pneumoconiosis, or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)). If the administrative law judge finds that claimant does not establish sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption, the administrative law judge must consider whether claimant has established that he is entitled to benefits pursuant to 20 C.F.R. Part 718, by establishing the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203, and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order 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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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