BRB No. 07-0911 BLA

L.C. Claimant-Petitioner v. TROJAN MINING and TRAVELERS INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/16/2008 DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits and Decision and Order Denying Claimant's Motion for Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits and Decision and Order Denying Claimant's Motion for Reconsideration (05-BLA-5867) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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). This case involves claimant's request for modification of the denial of a subsequent claim that was filed on October 16, 2002.[1] Director's Exhibit 3.

After crediting claimant with nineteen years and nine months of coal mine employment, as stipulated by the parties,[2] the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). However, the administrative law judge found that the new evidence submitted in claimant's subsequent claim, plus the evidence submitted on modification, did not establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), the element of entitlement that was previously decided against claimant. Accordingly, the administrative law judge denied benefits. *See* 20 C.F.R. §725.309(d). The administrative law judge denied claimant's motion for reconsideration in a brief decision, and reissued his initial decision to include a footnote that was omitted from the previously issued decision, in which the administrative law judge explained that he did not consider a blood gas study that was administered by Dr. Dahhan because the study was invalid.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(ii) and (iv).[3] Employer responds, urging affirmance of the administrative law judge's decision.

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[1] Claimant's first claim for benefits, filed on June 8, 1999, was denied on September 24, 1999, because claimant did not establish total disability. Director's Exhibit 1. Claimant filed his second and current claim on October 16, 2002, Director's Exhibit 3, and it was denied on October 27, 2003, because claimant did not establish total disability or total disability due to pneumoconiosis. Director's Exhibit 27-8. Claimant requested modification on March 3, 2004, Director's Exhibits 28, 29, which was denied on June 4, 2004, because claimant did not establish total disability. Director's Exhibit 34. Claimant again requested modification on August 19, 2004. Director's Exhibits 35, 36.

[2] The record indicates that claimant's coal mine employment took place in Kentucky. Decision and Order at 4; Director's Exhibits 1-52, 6. Accordingly, this case arises within the jurisdiction 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*).

[3] 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)(i), (iii), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15; Claimant's Brief at 8.

The Director, Office of Workers' Compensation Programs, declined to file a substantive 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).

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). Claimant's prior claim was denied because he failed to establish total disability. Consequently, claimant had to submit new evidence establishing total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(d)(3). In considering a request for modification of the denial of a subsequent claim, which was denied based upon a failure to establish a change in an applicable condition of entitlement, the administrative law judge must determine whether the evidence developed in the subsequent claim, including any evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

Claimant first argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to provide a rationale for his finding that the new blood gas studies did not establish total disability, other than to note that one of the four blood gas studies was qualifying,[4] and that all four studies were performed in the same year. Claimant argues that Dr. Forehand's December 4, 2003, qualifying blood gas study is the most recent blood gas study of record, and should have been accorded greatest weight. Claimant also argues that the administrative

[4] 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 and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

law judge erred in considering Dr. Dahhan's May 8, 2004 blood gas study when the administrative law judge had earlier found it to be invalid.

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge discussed the new blood gas study evidence, consisting of non-qualifying studies performed on December 18, 2002, December 30, 2002, and January 8, 2003, Director's Exhibits 12-10, 14-7, 15-9, and one qualifying blood gas study performed on December 4, 2003. Director's Exhibit 35-2, 3. The administrative law judge found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(ii), because only one blood gas study produced qualifying values and all of the testing was done within one calendar year. *See* Decision and Order at 15.

We agree with claimant that the administrative law judge did not adequately explain why he found that the blood gas study evidence did not establish total disability pursuant to Section 718.204(b)(2)(ii). The administrative law judge's analysis amounted to a mere reference to the quantity of the non-qualifying studies that were conducted within the year, contrary to *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-280-81 (6th Cir. 1995) and *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Consequently, we must vacate the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(ii), and remand this case to the administrative law judge for reconsideration of the blood gas study evidence.

Although we remand this case, we reject claimant's argument that the administrative law judge must accord greater weight to the qualifying blood gas study because it was more recent by eleven months. An administrative law judge may, but need not, credit the more recent medical evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). However, the administrative law judge on remand is instructed to take into account comments by physicians as to whether claimant's most recent, qualifying blood gas study of December 4, 2003 reflected a worsening in claimant's blood oxygenation due to a pulmonary or respiratory impairment, since his January 8, 2003 blood gas study. Claimant's Exhibit 3; Employer's Exhibit 4 at 2; Employer's Exhibit 5. On remand, the administrative law judge must determine whether the blood gas study evidence establishes total disability, and provide reasoning to support his determination for crediting or discrediting the evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Finally, claimant's argument that the administrative law judge erred in weighing Dr. Dahhan's May 8, 2004, invalid blood gas study with the other blood gas studies lacks merit. The administrative law judge specifically declined to consider Dr. Dahhan's study since it did not comply with the applicable quality regulation. *See* 20 C.F.R. §718.105 (b); Decision and Order at 7 n.17, 15; Decision and Order Denying Claimant's Motion for Reconsideration at 3; Claimant's Exhibit 1 at 2-3.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant argues that the administrative law judge erred by not explaining why he credited the new opinions of Drs. Broudy, Dahhan, Jarboe, and Hussain,[5] over Dr. Forehand's opinion that claimant is unable to perform his coal mine employment because of a blood gas exchange impairment. Claimant asserts that the administrative law judge improperly relied on the numerical superiority of the medical opinion evidence in finding that claimant did not establish total disability.

The administrative law judge found that the opinions of Drs. Broudy, Dahhan, and Jarboe, that claimant is not totally disabled, were well-reasoned and entitled to probative weight. Decision and Order at 16; Director's Exhibits 14-16, Employer's Exhibits 1, 2, 4. The administrative law judge found that Dr. Forehand's opinion, that claimant is totally disabled, was also well-reasoned and entitled to probative weight. Decision and Order at 16; Director's Exhibit 28. The administrative law judge found that Dr. Hussain's opinion, that claimant has a moderate pulmonary impairment, was entitled to "some weight," because Dr. Hussain did not specifically state whether the moderate impairment was disabling. Decision and Order at 16; Director's Exhibit 12. The administrative law judge found that the opinions of Drs. Broudy, Dahhan, and Jarboe were "the most persuasive on the issue of total disability," and stated that he did "not believe a moderate pulmonary impairment would prevent Claimant from returning to his former coal mine employment . . . ." *See* Decision and Order at 16-17.

We agree with claimant that the administrative law judge failed to explain why he credited the opinions of Drs. Broudy, Dahhan, and Jarboe over that of Dr. Forehand. The administrative law judge did not explain why he found the opinions of Drs. Broudy, Dahhan, and Jarboe to be the most persuasive. Moreover, the administrative law judge did not explain why he found that a moderate pulmonary impairment, as identified by Dr. Hussain, would not render claimant totally disabled for his work as a roof bolter.[6] Consequently, we vacate the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(b)(2)(iv), and we remand this case

[5] The record reflects that Dr. Hussain diagnosed claimant with a moderate impairment. Contrary to claimant's description, the administrative law judge did not determine that Dr. Hussain had affirmatively opined that claimant was not totally disabled. Rather, as will be discussed, the administrative law judge found that the moderate impairment Dr. Hussain diagnosed would not be totally disabling.

[6] The administrative law judge identified claimant's coal mine employment "as a roof bolter [which] required him to lift heavy pieces of metal when [he] did not have the equipment to get them in place, lifting pipe, and crawling in and out of chutes, and belt lines." *See* Decision and Order at 15.

to the administrative law judge for reconsideration of the opinions of Drs. Broudy, Dahhan, Forehand, Hussain, and Jarboe. On remand, the administrative law judge must consider the physicians' respective qualifications,[7] the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge should fully explain his findings. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 416-418, 21 BLR 2-192, 2-197-202 (6th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In sum, we vacate the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iv), and we vacate his attendant conclusion that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§725.309(d), 725.310. We instruct the administrative law judge to reconsider whether the blood gas studies and medical opinions support a finding of total disability, and to then weigh together all contrary probative evidence to determine whether total disability is established pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986). If claimant establishes that he is totally disabled, and thus establishes a change in an applicable condition of entitlement, the administrative law judge, on remand, must determine whether all of the evidence of record establishes each element of claimant's entitlement.

[7] The record reflects that Drs. Broudy, Dahhan, and Jarboe are Board-certified in Internal Medicine and Pulmonary Disease, Director's Exhibits 14-21, 15-25, 16-7; Employer's Exhibit 2 at 3, while Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology. Claimant's Exhibit 1. Dr. Hussain's qualifications are not in the record.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits and Decision and Order Denying Claimant's Motion for Reconsideration are 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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge