BRB No. 08-0698 BLA

F.C.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 07/28/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5821) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 a subsequent claim filed on July 25, 2006.[1]

[1] Claimant initially filed a claim for benefits on August 18, 2004. Director's Exhibit 1. In a Proposed Decision and Order dated April 8, 2005, the district director found that the evidence established that claimant suffered from pneumoconiosis that was caused, at least in part, by his coal mine employment. Director's Exhibit 1. However, the district director found that the evidence did not establish the existence of a totally disabling pulmonary impairment. *Id.* The district director, therefore, denied benefits. There is no indication that claimant took any further action in regard to his 2004 claim.

After noting that employer stipulated that claimant had at least nineteen years of coal mine employment,[2] the administrative law judge further noted that employer, at the hearing, withdrew, as contested issues, the existence of pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b); Hearing Transcript at 20. The administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. The administrative law judge also found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer also argues that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. 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 (1989)(*en banc*).

disability in order to obtain review of the merits of his 2006 claim. 20 C.F.R. §725.309(d)(2), (3).

Total Disability

Employer initially contends that the administrative law judge did not consider all of the relevant arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii).[3] We agree. The record contains three new arterial blood gas studies conducted on October 19, 2006, January 18, 2007, and January 25, 2007. Although claimant's October 19, 2006 arterial blood gas study produced qualifying[4] values both at rest and during exercise, Director's Exhibit 14, claimant's subsequent arterial blood gas studies, conducted on January 18, 2007 and January 25, 2007, produced non-qualifying values both at rest and during exercise. Director's Exhibit 18; Employer's Exhibit 1. In considering the new arterial blood gas evidence, the administrative law judge stated that Dr. Jarboe did not conduct an exercise arterial blood gas study on January 25, 2007. Decision and Order at 7. However, contrary to the administrative law judge's characterization, the results of Dr. Jarboe's exercise arterial blood gas study are found in the record.[5] Director's Exhibit 18. Because the administrative law judge mischaracterized the arterial blood gas study evidence,[6] *Tackett v. Director, OWCP*, 7

[3] Because no party challenges the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5-6. Moreover, because the record contains no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The exercise portion of Dr. Jarboe's January 25, 2007 exercise arterial blood gas study produced non-qualifying values (a pCO2 of 38.7 and a pO2 of 69.9). Director's Exhibit 18.

[6] In his consideration of the new arterial blood gas study evidence, the administrative law judge noted that claimant argued that Dr. Dahhan's January 18, 2007 arterial blood gas study was qualifying because claimant's "pulse was actually lower post exercise than it was pre exercise." Decision and Order at 6. Pulse rates are not determinative of whether an arterial blood gas study is qualifying under the regulations.

BLR 1-703, 1-706 (1985), we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii) and remand the case for further consideration.

Employer also contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The record contains new medical opinions from Drs. Rasmussen, Dahhan, and Jarboe. After noting that claimant's "studies indicate marked loss of lung function as reflected particularly by his impaired oxygen transfer during exercise," Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine job. Director's Exhibit 14. Although Dr. Dahhan opined that claimant suffers from a mild obstructive respiratory impairment, he opined that claimant, from a functional respiratory standpoint, retains the physiological capacity to return to his previous coal mining work. Claimant's Exhibit 1. Dr. Jarboe reached a similar conclusion, diagnosing a mild ventilatory impairment, but opining that claimant retains the functional respiratory capacity to perform his last coal mining job. Director's Exhibit 18.

The administrative law judge accorded greater weight to Dr. Rasmussen's opinion because he found that the doctor provided a better explanation for his assessment of claimant's respiratory impairment than Drs. Dahhan and Jarboe provided. In crediting Dr. Rasmussen's opinion, the administrative law judge explained that:

> I note that Dr. Rasmussen's report fully discusses how the arterial blood gas testing is the basis for the determination that Claimant has a marked loss of lung function, whereas Dr. Dahhan gives a cursory rendition of the results, without explanation. A review of his data shows the results are similar to those obtained by Dr. Rasmussen. As Dr. Rasmussen set forth an explanation for his conclusions, I afford them more weight. His results were reviewed by Dr. R.V. Mettu, [a] board certified pulmonary specialist, who found them technically acceptable. He also cited to a learned journal article by Dr. V.C. dos Santao to substantiate his position.
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> Dr. Jarboe also identified but did not accurately discuss the hypoxemia. Although he reports in his narrative that the hypoxemia improved on exercise, a review of the test report shows that it was not performed. DX 18, p. 8. Therefore, I discount his opinion.

Decision and Order at 6-7 (citations omitted).

See 20 C.F.R. §718.204(b)(2)(ii). The January 18, 2007 arterial blood gas study produced non-qualifying values at rest and during exercise. Employer's Exhibit 1.

Contrary to the administrative law judge's characterization, Dr. Dahhan provided more than a "cursory rendition" of the results of the January 18, 2007 arterial blood gas study, explaining that while claimant's resting values showed mild hypoxemia,[7] the exercise values were normal. Employer's Exhibit 1. The administrative law judge also erred in relying upon his own review of the blood gas study data to find that the results obtained by Dr. Dahhan are similar to those obtained by Dr. Rasmussen. The interpretation of medical data is a medical determination, and an administrative law judge may not substitute his opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). By hypothesizing as to the similarity of the results of the two arterial blood gas studies, the administrative law judge improperly substituted his opinion for that of a medical expert.[8] *See Marcum*, 11 BLR at 1-24.

The administrative law judge also erred in according less weight to Dr. Jarboe's opinion because his report did not contain the results of an exercise arterial blood gas study. As previously discussed, the record contains the results of Dr. Jarboe's non-qualifying exercise arterial blood gas study.

The administrative law judge further erred to the extent that he credited Dr. Rasmussen's opinion, regarding the degree of claimant's respiratory disability, because it was supported by a journal article. The administrative law judge failed to explain how Dr. Santao's journal article, cited by Dr. Rasmussen as supportive of a finding that the coal mines in Kentucky and Virginia "are known to have excessive progressive abnormalities," was a basis to provide additional weight to Dr. Rasmussen's disability assessment.[9] Director's Exhibit 14.

[7] Because Dr. Dahhan diagnosed mild hypoxemia, substantial evidence does not support the administrative law judge's statement that Dr. Dahhan interpreted claimant's resting arterial blood gas values as revealing "severe resting hypoxemia." Decision and Order at 6; Employer's Exhibit 1.

[8] Although the October 19, 1986 arterial blood gas study produced qualifying values at rest and during exercise, the January 18, 2007 arterial blood gas study produced non-qualifying values. Director's Exhibit 14; Employer's Exhibit 1. Moreover, while the October 19, 2006 study produced an exercise PO2 value of 62, the January 18, 2007 study produced an exercise PO2 value of 81.6. *Id.*

[9] The administrative law judge also failed to explain the significance of Dr. Mettu's validation of the results of Dr. Rasmussen's October 19, 2006 arterial blood gas study, as there is no evidence that the arterial blood gas studies conducted by Drs. Dahhan and Jarboe are invalid.

In crediting Dr. Rasmussen's opinion, that claimant is totally disabled from a respiratory standpoint, over the contrary opinions of Drs. Dahhan and Jarboe, the administrative law judge also stated:

> All of the opinion evidence shows that the Claimant has a respiratory disability. Dr. Rasmussen finds that it is totally disabling, but both Drs. Dahhan and Jarboe find that the condition is "mild." I note that even when a Claimant has a "mild" respiratory condition, it may be competent to preclude work in a medium exertional setting. Absent further analysis, I attribute greater weight to Dr. Rasmussen's findings as better reasoned.

Decision and Order at 7.

Contrary to the administrative law judge's characterization, all of the physicians did not opine that claimant has a "respiratory *disability*." Drs. Dahhan and Jarboe opined that claimant's mild respiratory impairment is not disabling. Director's Exhibit 18; Employer's Exhibit 1.

The administrative law judge accurately noted that a physician's assessment of a mild pulmonary impairment, if credited, can support a finding of total disability, depending upon the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). However, the administrative law judge should have first determined whether Drs. Dahhan and Jarboe demonstrated knowledge of the physical requirements of claimant's work in opining that he was not totally disabled.[10] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552 (6th Cir. 2002); *Cornett*, 227 F.3d at 578, 22 BLR at 2-123.

[10] Before an administrative law judge can determine whether a claimant is able to perform his usual coal mine work, he must identify the claimant's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is claimant's burden to establish the exertional requirements of his usual coal mine employment. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

The administrative law judge erred in relying upon the Department of Labor's Dictionary of Occupational Titles to determine that claimant's usual coal mine work required medium exertion. Decision and Order at 7-8. The Dictionary is not contained in the transcript of testimony, either directly, or by appropriate reference and, therefore, the administrative law judge may not rely upon this evidence in his decision. *See* 20 C.F.R. §725.464; *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration.[11]

In light of our decision to vacate the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2006 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in

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In this case, Drs. Rasmussen, Dahhan, and Jarboe each characterized claimant's most recent coal mine employment as a continuous miner operator. Director's Exhibits 14, 18; Employer's Exhibit 1. Dr. Rasmussen noted that this position required "considerable heavy and some very heavy manual labor." Director's Exhibit 14. Dr. Rasmussen noted that claimant's job as a continuous miner operator required him to pull and hang heavy electrical cable, set timbers, shovel, clean the belt, help make "belt moves," and build stoppings. *Id.* In addition to Dr. Rasmussen's description of claimant's coal mine employment, the record contains claimant's statement that his last coal mine employment as a miner operator required him to sit for six hours a day, crawl 70 to 120 feet three times per day, lift fifty pounds "all day," and carry fifty pounds 70 to 120 feet, sixteen times per day. Director's Exhibit 5.

[11] If, on remand, the administrative law judge finds that the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he would be required to 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). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

The record contains evidence of complicated pneumoconiosis that was not addressed by the administrative law judge. *See* Director's Exhibit 14; Claimant's Exhibit 1. Consequently, if the administrative law judge, on remand, finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), he must address whether the evidence establishes the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1).

connection with claimant's 2004 claim. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Total Disability Due to Pneumoconiosis

Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[12] In considering whether the evidence established that claimant's total disability is due to pneumoconiosis, the administrative law judge stated:

> Dr. Rasmussen advises that both smoking and coal dust inhalation contributed [to claimant's total disability] and he relates coal mining exposure to disabling hypoxemia. I accept this opinion. A doctor's opinion, stating that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition, is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability.

Decision and Order at 9. The administrative law judge, therefore, found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer contends that the administrative law judge erred in failing to consider all of the relevant evidence pursuant to 20 C.F.R. §718.204(c). We agree. In considering whether claimant's total disability was due to pneumoconiosis, the administrative law

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[12] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

judge did not discuss the opinions of Drs. Dahhan and Jarboe.[13] An administrative law judge is required to consider all relevant evidence in the record. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge erred in not addressing the conflicting evidence.

Employer also argues that the administrative law judge erred in not addressing evidence calling into question the accuracy of the smoking history relied upon by Dr. Rasmussen. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Dr. Rasmussen recorded claimant's smoking history as one-half pack of cigarettes per day from 1973 to 1998. Director's Exhibit 14. While Drs. Dahhan and Jarboe also recorded smoking histories of a one-half pack of cigarettes per day, they indicated that claimant stopped smoking at a later date than that listed by Dr. Rasmussen.[14] Director's Exhibit 18; Employer's Exhibit 1. Employer also notes that the administrative law judge did not address the significance of the fact that Drs. Dahhan and Jarboe each opined that claimant had elevated carboxyhemoglobin levels at the times of their examinations in January of 2007. Drs. Dahhan and Jarboe interpreted claimant's carboxyhemoglobin levels as compatible with a current smoking history of a pack of cigarettes a day. *Id.* The administrative law judge erred in failing to address all of the relevant evidence regarding the length of claimant's smoking history. *Wojtowicz*, 12 BLR at 1-165. Consequently, on remand, the administrative law judge must make a specific finding as to the length of claimant's smoking history, and reconsider the credibility of the relevant medical opinion evidence in light of that finding. In light of the above referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and instruct the administrative law judge to reconsider the evidence pursuant to 20 C.F.R. §718.204(c), if reached on remand.

[13] Dr. Dahhan opined that claimant's respiratory impairment was attributable to smoking. Employer's Exhibit 1. Dr. Jarboe opined that claimant's mild airflow obstruction was "multifactorial in origin." Director's Exhibit 18. Dr. Jarboe opined that claimant's simple pneumoconiosis and cigarette smoking contributed to his mild ventilatory impairment. *Id.*

[14] Dr. Dahhan indicated that claimant reported quitting in 2003 and Dr. Jarboe indicated that claimant reported quitting in 2001 or 2002. Claimant testified that he quit smoking sometime after he quit work in 2003. Hearing Transcript at 13, 16.

Accordingly, the administrative law judge's Decision and Order awarding benefits 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