BRB No. 10-0620 BLA

HARVEY E. FURROW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 07/20/2011
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5082) of Administrative Law Judge Robert B. Rae awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on September 24, 2007.[1] After

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[1] Claimant's two previous claims, filed on August 13, 1990 and August 25, 1998, were finally denied because claimant failed to establish any of the elements of entitlement. Director's Exhibits 1, 2. Although claimant also filed claims in 2002 and

crediting claimant with thirty-one years of coal mine employment,[2] at least fifteen years of which were underground, the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 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 qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be 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, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[3] 30 U.S.C. §921(c)(4). Applying amended Section 411(c)(4), the administrative law judge found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, he found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.[4]

2004, these claims were withdrawn, and are therefore "considered not to have been filed." 20 C.F.R. §725.306(b).

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 2. Accordingly, this case arises within the jurisdiction 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*).

[3] In an April 1, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit additional evidence and argument. Claimant, employer and the Director, Office of Workers' Compensation Programs, each submitted position statements regarding the potential applicability of Section 411(c)(4) to this case. None of the parties requested an opportunity to submit additional evidence.

[4] The administrative law judge subsequently issued an Amended Decision and Order on July 20, 2010, wherein he corrected a "typographical error" in his initial

On appeal, employer argues 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 employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. [5]

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).

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

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decision regarding the correct date for the commencement of benefits.

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established thirty-one years of coal mine employment, with at least fifteen years underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Total Disability

Employer contends that the administrative law judge erred in his consideration of the new pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains the results of four new pulmonary function studies conducted on March 30, 2007, July 26, 2007, January 30, 2008, and October 28, 2008. The administrative law judge accorded "little weight" to the qualifying[6] October 28, 2008 pulmonary function study conducted by Dr. Baker, because Dr. Baker indicated that the test results were not reproducible.[7] Claimant's Exhibit 4.

The administrative law judge also accorded little weight to the July 26, 2007 pulmonary function study conducted by Dr. Hippensteel, because the administrative law judge found that the results of the study were also not reproducible. The record reflects that although Dr. Hippensteel indicated that the "severely reduced" pre-bronchodilator MVV was "invalid with a suboptimal breathing rate," the doctor did not question the reliability of the remaining values. Employer's Exhibit 1. Specifically, Dr. Hippensteel did not question the reliability of the non-qualifying, pre-bronchodilator FVC and FEV1/FVC values, or the non-qualifying, post-bronchodilator FEV1, FVC, and FEV1/FVC values. *Id.* Consequently, employer's argument that the administrative law judge failed to provide a proper basis for according less weight to the non-qualifying values from the July 26, 2007 pulmonary function study has merit.

The administrative law judge next found that the March 30, 2007 pulmonary function study conducted by Dr. Agarwal, and the January 30, 2008 pulmonary function study conducted by Dr. Zaldivar, are valid. While the pre-bronchodilator portion of the March 30, 2007 pulmonary function study produced qualifying values, the post-bronchodilator portion of the study produced non-qualifying values. Director's Exhibit 12. The January 30, 2008 pulmonary function study produced non-qualifying values, both before and after the administration of a bronchodilator. Employer's Exhibit 2. In finding that the new evidence established total disability, the administrative law judge relied upon these two pulmonary function studies to support his finding. Decision and Order at 15. The administrative law judge, however, failed to provide a basis for his

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[6] 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).

[7] In addressing the validity of the October 28, 2008 pulmonary function study, Dr. Baker stated that claimant "would have a FEV1 that meets the disability standard. The results, however, are not reproducible. This would bring into question what his true pulmonary function is." Claimant's Exhibit 4.

determination.[8] Consequently, the administrative law judge's finding regarding the pulmonary function study evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically, 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[9]

Employer also argues 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 administrative law judge considered four new medical opinions submitted by Drs. Agarwal, Baker, Hippensteel, and Zaldivar. Dr. Agarwal opined that claimant suffers from a totally disabling respiratory impairment. Director's Exhibit 12; Claimant's Exhibit 3. In light of invalid pulmonary function study results, Dr. Baker was not able to accurately assess the extent of claimant's pulmonary impairment. Claimant's Exhibit 4. Drs. Hippensteel opined that, from a pulmonary standpoint, claimant is capable of performing his usual coal mine employment. Employer's Exhibit 1. Dr. Zaldivar opined that claimant suffers from a variable pulmonary impairment. Employer's Exhibit 7. Dr. Zaldivar opined, however, that with extensive bronchodilator treatment, claimant "may be able to perform moderate to heavy labor." *Id.*

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[8] Because the January 30, 2008 pulmonary function study conducted by Dr. Zaldivar produced non-qualifying values, both before and after the administration of a bronchodilator, this study does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Moreover, although the administrative law judge discussed whether the degree of reversibility demonstrated by the pulmonary function studies supported a diagnosis of pneumoconiosis, chronic obstructive pulmonary disease, or asthma, Decision and Order at 8, he did not discuss what the degree of reversibility revealed in terms of whether the respective values supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

[9] The administrative law judge found that all four of the new arterial blood gas studies, conducted on March 30, 2007, July 26, 2007, January 30, 2008, and October 28, 2008, are non-qualifying, and therefore did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9; Director's Exhibit 12; Claimant's Exhibit 4; Employer's Exhibits 1, 2. Because this finding is supported by substantial evidence, it is affirmed. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

In considering the new medical opinion evidence, the administrative law judge accorded the opinions of Drs. Hippensteel and Zaldivar "very little weight" because the physicians had reviewed information from claimant's withdrawn claims that was not admitted into evidence in this claim. Decision and Order at 12-13. Based upon the opinions of Drs. Agarwal and Baker, the administrative law judge found that the new medical evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 15.

Employer contends that the administrative law judge erred in according very little weight to the opinions of Drs. Hippensteel and Zaldivar on the ground that their opinions were based, in part, on inadmissible medical evidence. Specifically, employer asserts that the administrative law judge's complete discrediting of the opinions of Drs. Hippensteel and Zaldivar was "unnecessarily harsh" under the circumstances of this case, where the opinions of the doctors are not inextricably tied to the inadmissible evidence, but rather, are based primarily on the results of their own examinations. Employer's Brief at 7-8.

The administrative law judge accorded little weight to the opinions of Drs. Hippensteel and Zaldivar because he found that the doctors had reviewed evidence not admitted into the record; specifically two reports prepared by Dr. Rasmussen in 2003 and 2005.[10] The administrative law judge found that Dr. Hippensteel's and Dr. Zaldivar's medical conclusions were inseparable from the inadmissible evidence:

> Dr. Hippensteel's reliance on the inadmissible evidence is extensive and the overall efficacy of his report is severely impacted by the use of the reports and other test results from the withdrawn claims. I will consider the actual test results from the testing he conducted during his examination and the pertinent social and medical histories he took from the [c]laimant . . . . I find his overall opinions are inextricably tied to the inadmissible evidence and as a result, I give his opinions very little weight. I have considered the doctor's extensive reliance on the inadmissible evidence in rendering [my] decision.
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> Dr. Zaldivar also based his two reports on inadmissible evidence, utilizing the same reports by Dr. Rasmussen and also relying very heavily on Dr. Hippensteel's derivative and largely inadmissible report. . . . His reliance on the inadmissible evidence is extensive and the overall efficacy of his

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[10] This evidence was apparently developed in connection with claimant's withdrawn claims filed in 2002 and 2004.

report is even more severely impacted than that of Dr. Hippensteel by the use of the reports and other test results from the withdrawn claims. . . . I find his overall opinions are too inextricably tied to the inadmissible evidence and, as a result, I give his opinions little weight.

Decision and Order at 12-13.

The applicable regulations are silent as to what an administrative law judge should do when evidence that exceeds the evidentiary limitations is referenced in an otherwise admissible medical opinion. Thus, the disposition of this issue is committed to an administrative law judge's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). However, an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Id*. Moreover, even if an administrative law judge finds that a medical opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, as acknowledged by the administrative law judge, *see* Decision and Order at 12, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67. Exclusion of evidence is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

In this case, the administrative law judge did not adequately explain the basis for his determination that the opinions of Drs. Hippensteel and Zaldivar were inextricably tied to their review of the inadmissible medical evidence.[11] *See Wojtowicz,* 12 BLR at 1-165. Moreover, the administrative law judge failed to explain why he elected to accord

[11] The record reflects that, although Dr. Hippensteel noted his agreement with Dr. Rasmussen's opinion, that claimant is not totally disabled from a pulmonary standpoint, Dr. Hippensteel's opinion is also supported by the results of his own objective studies, including a non-qualifying post-bronchodilator pulmonary function study, and a non-qualifying arterial blood gas study. Employer's Exhibit 1. Dr. Zaldivar opined that claimant was capable of performing his usual coal mine work based upon "the result of the blood gases of record and the fact that [claimant's] airway obstruction, and even the restriction of vital capacity, is reversible." Employer's Exhibit 2. Although Dr. Zaldivar reviewed the results of Dr. Rasmussen's excluded pulmonary function studies, Dr. Zaldivar relied upon the results of Dr. Agarwal's March 30, 2007 pulmonary function study, interpreting the study as revealing "reversible airway obstruction." Employer's Exhibit 2.

very little weight to the opinions, rather than one of the lesser sanctions set forth in *Harris*. Consequently, we vacate the administrative law judge's decision to accord "very little weight" to the opinions of Drs. Hippensteel and Zaldivar, and remand the case for the administrative law judge to reconsider the opinions of Drs. Hippensteel and Zaldivar in accordance with *Harris*.[12] The administrative law judge's finding, that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), is therefore vacated.[13]

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we further vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d). On remand, should the administrative law judge find that the new evidence establishes either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b),[14] claimant will have established a change in

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[12] The administrative law judge's additional findings, that claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and that employer did not rebut the presumption, were also based, in part, on the administrative law judge's decision to accord very little weight to the medical opinions of Drs. Hippensteel and Zaldivar. Decision and Order at 18. Moreover, contrary to the administrative law judge's characterization of their opinions, Drs. Hippensteel and Zaldivar provided reasons for their opinions that claimant does not suffer from legal pneumoconiosis. *Id.* Dr. Hippensteel explained that claimant's partial reversibility in lung function was consistent with chronic bronchitis unrelated to his occupational exposure. Employer's Exhibit 1. Dr. Zaldivar based his diagnosis of asthma, a condition that he found unrelated to coal mine dust exposure, on evidence of reversible airway obstruction, a finding that Dr. Zaldivar noted was documented by Dr. Agarwal's examination. Employer's Exhibit 7. Consequently, we vacate the administrative law judge's findings related to invocation and rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[13] As employer accurately notes, Dr. Baker indicated that he was not able to assess claimant's "true pulmonary function" due to unreliable pulmonary function study results. Claimant's Exhibit 4. Given Dr. Baker's acknowledgment, the administrative law judge failed to explain how Dr. Baker's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 15.

[14] If, on remand, the administrative law judge finds that the new pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(1), or that the 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

an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2007 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's prior claims. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In considering the merits of the claim, the administrative law judge would be required to reconsider, *inter alia*, whether claimant is entitled to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

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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*).