BRB No. 11-0651 BLA

BILLY J. BYRGE Claimant-Petitioner v. PLATEAU MINING CORPORATION, C/O WELLS FARGO DISABILITY MANAGEMENT, SELF-INSURED THROUGH PLATEAU MINING CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/24/2012 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (09-BLA-5485) of Administrative Law Judge Richard K. Malamphy rendered 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 May 27, 2008.[1] Director's Exhibit 5.

In a Decision and Order issued on May 19, 2011, the administrative law judge credited claimant with "at least" eighteen years of coal mine employment,[2] and found that the new medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). The administrative law judge summarized the new medical opinion evidence regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and summarized the readings of two CT-scans. Then, noting that claimant filed his subsequent claim after January 1, 2005, the administrative law judge noted that Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010.

Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes 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(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden shifts to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id*.

The administrative law judge noted that claimant "was a coal miner for over [eighteen] years," and stated that therefore, the claim would "be analyzed under the fifteen[-]year presumption. . . ." Decision and Order at 9. After summarizing the medical opinion evidence regarding the cause of claimant's respiratory impairment, the

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[1] Claimant filed two previous claims, both of which were finally denied. His first claim, filed on October 7, 1992, was denied by the district director on March 2, 1993, and again on April 24, 1995, because the evidence did not establish that claimant had pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. His second claim, filed on August 1, 2001, was denied as abandoned on April 28, 2003, because claimant failed to provide information necessary for the district director to process the claim. Director's Exhibit 2.

[2] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as claimant was last employed in the coal mining industry in Utah. *See* Director's Exhibits 2, 6, 8, 9; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

administrative law judge stated that the medical reports of Drs. Repsher, Renn,[3] and Hippensteel, submitted by employer, were "better reasoned and more complete," and they indicated that claimant "does not have a respiratory impairment due to occupational dust exposure." Decision and Order at 9. Stating that "[t]his claim should be denied based on these three opinions," the administrative law judge further stated that, "[h]owever, as the [c]laimant is considered to be totally disabled, the undersigned will discuss reasons for such impairment." Decision and Order at 9.

Turning to the new evidence regarding the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), Decision and Order at 9-13, the administrative law judge found that the new pulmonary function study evidence was non-qualifying[4] pursuant to 20 C.F.R. §718.204(b)(2)(i), that the new blood gas study evidence was qualifying pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge summarized the new medical opinion evidence regarding both the existence of total disability, and the causes of claimant's total disability. Decision and Order at 9-13. Finding the opinions submitted by employer "persuasive," the administrative law judge concluded that "the miner is not totally disabled due to a pulmonary impairment related to occupational dust exposure." Decision and Order at 13. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not adequately explain his findings. Claimant thus argues that it is unclear why the administrative law judge either found that claimant failed to invoke the Section 411(c)(4) presumption, or found that the presumption was invoked, but determined that employer rebutted the presumption. Claimant further asserts that the administrative law judge erred in admitting certain evidence into the record. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not submitted a brief in this appeal.

[3] As will be discussed later in this decision, on appeal, claimant and employer agree that the administrative law judge erred in considering Dr. Renn's report as a "medical report" for employer under the evidentiary limitations of 20 C.F.R. §725.414, as Dr. Renn merely reviewed and interpreted objective studies.

[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).

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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 last claim was denied as abandoned. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing an element of entitlement. 20 C.F.R. §725.309(d)(2),(3). The administrative law judge considered whether the new evidence established total disability, and invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4).[5]

As noted above, the administrative law judge found that the new pulmonary function study evidence was non-qualifying for total disability, while the blood gas study evidence was qualifying. 20 C.F.R. §718.204(b)(2)(i),(ii). The administrative law judge also had before him the new medical opinions of Drs. Gagon, James, Repsher, and Hippensteel. 20 C.F.R. §718.204(b)(2)(iv). Drs. Gagon and James opined that claimant is totally disabled by a respiratory or pulmonary impairment, based on the results of his pulmonary function and blood gas studies. Director's Exhibit 13; Claimant's Exhibits 4, 5. In contrast, Dr. Repsher opined that claimant does not have a totally disabling respiratory impairment, but is totally disabled by obesity and lymphedema. Director's Exhibit 15; Employer's Exhibits 15, 19. Dr. Hippensteel opined that claimant does not have a totally disabling respiratory impairment. Employer's Exhibits 8, 14 at 25.

[5] Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 2012 WL 2427810 (June 28, 2012).

However, when asked, on cross-examination, whether claimant has a totally disabling respiratory impairment, Dr. Hippensteel responded that claimant does not have "intrinsic" lung disease, but suffers from obesity and obstructive sleep apnea, which produce a respiratory impairment that prevents claimant from returning to his job in the mines. Employer's Exhibit 14 at 52-54. The administrative law judge found that the opinions of Drs. Repsher and Hippensteel were "persuasive." Decision and Order at 13. Without referring specifically to either invocation or rebuttal of the Section 411(c)(4) presumption, the administrative law judge concluded that claimant "is not totally disabled by a pulmonary impairment related to occupational dust exposure," and denied benefits. *Id*.

Upon reviewing the administrative law judge's Decision and Order in light of the arguments raised on appeal, the Board is unable to discern the bases for the administrative law judge's findings. Specifically, a review of the administrative law judge's Decision and Order reveals a lack of explanation for the administrative law judge's findings, which are cursory in nature and which combine the issues of the existence of total disability and the cause or causes of total disability. As a result, the Board is unable to review the administrative law judge's Decision and Order with reference to the legal standards for invocation and rebuttal set forth in Section 411(c)(4). Accordingly, the administrative law judge's Decision and Order does not comply with 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that every adjudicatory decision include 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); *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we must vacate the administrative law judge's Decision and Order, and remand this case for further consideration.

On remand, the administrative law judge must first determine whether claimant has established invocation of the Section 411(c)(4) presumption. The administrative law judge should initially determine whether claimant has established at least fifteen years of qualifying coal mine employment. If so, the administrative law judge must then determine whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). In so doing, the administrative law judge must consider and weigh all of the relevant evidence under 20 C.F.R. §718.204(b)(2)(i)-(iv), and must explain the bases for his findings and credibility determinations, consistent with the APA. *Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17. The administrative law judge is instructed that, at the invocation stage of Section 411(c)(4), only evidence bearing on the issue of the existence of total respiratory disability is considered. *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989). If claimant establishes total disability, he will have

established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and invoked the Section 411(c)(4) presumption. The burden will then shift to employer to rebut the presumption, either by disproving the existence of pneumoconiosis or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Bosco*, 829 F.2d at 1481, 13 BLR at 2-213 (holding that on rebuttal, employer must "affirmatively establish[] the lack of either pneumoconiosis or a link with [claimant's] mine employment"). In determining whether employer has rebutted the presumption, the administrative law judge, on remand, must discuss and weigh all of the relevant evidence, and set forth the specific bases for his findings. *Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17.

Therefore, this case is remanded for the reasons set forth above. In the interest of judicial economy, and to avoid the repetition of any error on remand, we will briefly address certain evidentiary issues raised by claimant.

X-ray Evidence

Claimant asserts that, in finding that the new x-ray evidence did not establish the existence of pneumoconiosis, the administrative law judge erred in permitting employer to submit multiple negative readings of two digital x-rays dated November 13, 2008 and September 14, 2009. In *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(en banc), the Board held that digital x-rays may be submitted as "other medical evidence" under 20 C.F.R. §718.107,[6] but that each party may submit only one affirmative reading of each digital x-ray. Further, the administrative law judge must determine whether the proponent of a digital x-ray has established that it is medically acceptable and relevant to entitlement. *Webber*, 23 BLR at 1-123. On remand, the administrative law judge must address

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[6] Section 718.107 provides that:

> (a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.
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> (b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107.

whether an x-ray is digital,[7] and allow the parties to submit only one affirmative reading of each digital x-ray. The administrative law judge must then consider the digital x-ray together with any supporting evidence submitted pursuant to 20 C.F.R. §718.107(b), and in conjunction with any rebuttal evidence submitted pursuant to 20 C.F.R. §725.414(a)(2)(ii), if he determines that the proponent of such evidence has established that it is medically acceptable and relevant to entitlement. *Webber*, 23 BLR at 1-135.

Further, we agree with claimant that the administrative law judge erred in considering Dr. Shipley's negative reading of the September 14, 2009 x-ray. The record reflects that employer withdrew Dr. Shipley's reading from the record. Employer's Letter to the Administrative Law Judge, Feb. 18, 2011.

Medical Reports

Claimant argues, and employer agrees, that the administrative law judge erred in considering Dr. Renn's two letters, in which he reviewed and interpreted pulmonary function studies,[8] as an affirmative "medical report" for employer addressing the cause of claimant's disability. Claimant's Brief at 17-19; Employer's Brief at 27 n.4. The record reflects that employer designated the opinions of Drs. Hippensteel and Repsher as its two affirmative medical reports under 20 C.F.R. §725.414(a)(3)(i), and submitted Dr. Renn's pulmonary function study reviews as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii). A "physician's written assessment of a single objective test, such as a . . . a pulmonary function test," as was provided by Dr. Renn, "shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a). Thus, Dr. Renn's letters do not constitute an additional "medical report" for employer.

We reject, however, claimant's assertion that the administrative law judge erred in allowing employer to submit Dr. Repsher's February 16, 2011 letter, in which Dr.

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[7] In its response brief, employer indicates that the November 13, 2008, September 14, 2009, and April 29, 2010 x-rays are digital x-rays. Employer's Brief at 19.

[8] In a letter dated September 9, 2008, Dr. Renn reviewed a pulmonary function study administered on June 25, 2008. Dr. Renn determined that this study was invalid, and he noted that claimant was morbidly obese. He stated, "Obesity, and certainly morbid obesity, adversely affects ventilatory function, primarily by causing a restriction of ventilatory function." Director's Exhibit 15. In a letter dated November 9, 2009, Dr. Renn reviewed a pulmonary function study administered on September 14, 2009. He noted a technical deficiency, but opined that the study was valid. Dr. Renn opined that this test "is consistent with a mixed restrictive and obstructive ventilatory defect. . . . [which is] likely . . . the result of [claimant's] weight and resultant body mass index." Employer's Exhibit 10.

Repsher commented on a January 31, 2011 report from Dr. James. Employer's Exhibit 19. Claimant argues that he submitted Dr. James's January 31, 2011 report as a "rehabilitative" report, in response to Dr. Repsher's review of, and commentary on, Dr. James's original medical report during his October 7, 2010 deposition. Claimant's Brief at 12-13. Claimant asserts that because Dr. James's "rehabilitative" report did not criticize Dr. Repsher's opinion, employer was not entitled to submit Dr. Repsher's February 16, 2011 letter as a "rehabilitative" report in response to Dr. James's report. *Id.*

Contrary to claimant's argument, the evidentiary rules that provide for the rebuttal of specific objective tests underlying a medical report, and that provide for the submission of rehabilitative evidence following such rebuttal,[9] do not govern the issue raised here, namely, a physician's review and comment upon another physician's medical report that is admitted into evidence. The regulations do not provide for the rebuttal of medical reports themselves. Instead, a separate provision allows a party to respond to the other party's medical opinion evidence by having one or both of the doctors who prepared its affirmative medical reports review and address the opinion evidence. Specifically, Section 725.414(a) provides that "[a] medical report may be prepared by a physician who examined the miner and/or *reviewed the available admissible evidence*." 20 C.F.R. §725.414(a) (emphasis added); *see also* 64 Fed.Reg. 54965, 54995 (Oct. 8, 1999)(recognizing that a physician who prepares a medical report may address medical reports prepared by other physicians that are in the record and in conformance with the limitations). Thus, the salient question presented in this case is whether employer and claimant could submit "supplemental reports" in response to each other's affirmative medical reports. Since a medical report may be submitted by a physician who has examined the miner "and/or" reviewed admissible evidence, and the evidentiary limitations do not require that a "medical report" be contained in a single document, 20 C.F.R. §725.414(a)(1), employer's submission of Dr. Repsher's supplemental report, reviewing and commenting on Dr. James's supplemental report, was consistent with the evidentiary limitations. *See generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). We therefore reject claimant's argument that the administrative law judge erred in admitting Dr. Repsher's February 16, 2011 letter into evidence.

[9] The rebuttal and rehabilitative evidence rules are set forth at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, 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