BRB No. 12-0656 BLA

GAZI BOKKON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/16/2013
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (09-BLA-5627) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves claimant's request for modification of the denial of a subsequent

claim filed on February 28, 2006.[1]

Initially, in a Decision and Order dated April 3, 2008, the administrative law judge found that the new evidence did not establish 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). The administrative law judge, therefore, determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and he denied benefits.

Claimant timely requested modification. In order to establish a basis for modification of the denial of benefits, claimant has the burden to establish either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a); *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In a Decision and Order dated September 5, 2012, the administrative law judge found that claimant did not establish a mistake in a determination of fact. However, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), thereby establishing a change in an applicable condition of entitlement, as well as a change in conditions. 20 C.F.R. §§725.310, 725.309(d).

Considering the claim on the merits, the administrative law judge noted that Congress enacted 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, amended Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis 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 that he or she has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). Applying amended Section 411(c)(4), the administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment,[2] and that

[1] Claimant initially filed a claim for benefits on June 27, 1973. Director's Exhibit 1. The district director denied the claim because claimant did not establish any of the elements of entitlement. *Id.* Claimant filed a second claim on May 17, 2002, which was also denied for failure to establish any of the elements of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. 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).

he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new evidence established a totally disabling respiratory impairment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge applied an incorrect standard in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge applied an improper rebuttal standard.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). Consequently, to obtain review of the merits of his subsequent claim, claimant had to establish that he suffered from pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment.

Claimant requested modification of the administrative law judge's 2008 denial of his 2006 subsequent claim, based on claimant's failure to establish a change in an applicable condition of entitlement. Therefore, the administrative law judge, in considering claimant's request for modification, addressed whether the evidence developed since the denial of claimant's prior claim, including the evidence submitted since the 2008 denial of benefits, established a change in an applicable condition of

entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

Employer 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)[3] and, therefore, erred in finding a change in an applicable condition of entitlement.[4] The new medical opinion evidence consists of Dr. Chavda's treatment records, and Dr. Tuteur's medical opinion. In a progress note dated February 23, 2010, Dr. Chavda, claimant's family physician, detailed claimant's treatment for shortness of breath with exertion, and noted that claimant's February 10, 2010 pulmonary function study "only shows mild obstructive airway disease." Employer's Exhibit 4. Dr. Chavda concluded that this pulmonary function study "is not disabling." *Id.* However, in a subsequent progress note dated February 24, 2011, Dr. Chavda referenced the pre-bronchodilator FEV1 value from a pulmonary function study taken on the same day, in opining that claimant does not "have enough lung capacity to work [in the] coal mine[s] at [the] present time." *Id.* Dr. Chavda also interpreted claimant's February 24, 2011 pulmonary function study as revealing a "mild obstructive airway defect." Employer's Exhibit 5.

In a report dated January 1, 2011, Dr. Tuteur opined that claimant has "a respiratory impairment most contemporaneously objectively determined as a mild obstructive abnormality without impairment of oxygen gas exchange." Employer's Exhibit 1. Dr. Tuteur opined that this "impairment is of insufficient severity to produce clinical symptoms or disability." *Id.* Although Dr. Tuteur opined that claimant "has an exercise tolerance which prohibits him from continuing work in the coal mine industry," Dr. Tuteur explained that claimant's exercise limitation was appropriate for an eighty-four year old man and "does not reflect the presence of any primary pulmonary process." *Id.* Dr. Tuteur opined that claimant's "disability is in no way related to any impairment of pulmonary function." *Id.*

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Contrary to employer's contention, the administrative law judge did not rely upon a change in law to support claimant's request for modification. Employer's Brief at 5. The administrative law judge merely noted the potential applicability of the Section 411(c)(4) presumption if the evidence was found to establish the existence of a totally disabling respiratory or pulmonary impairment. *See* Decision and Order at 4.

In his consideration of the new medical opinion evidence, the administrative law judge found that Dr. Chavda's "treatment notes are sufficiently documented and reasoned to the extent that it is persuasive that claimant cannot perform work." Decision and Order at 5. The administrative law judge further found that Dr. Tuteur's opinion was "confusing and equivocal and entitled to little weight." *Id.* After noting claimant's use of supplemental oxygen and shortness of breath, the administrative law judge found that "[c]laimant has established total respiratory disability through a series of medical reports." *Id.* at 6. The administrative law judge, therefore, found that the new medical opinion evidence established the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in his consideration of Dr. Chavda's opinion. We agree. The administrative law judge failed to adequately explain how Dr. Chavda's opinion constitutes a well-reasoned and documented diagnosis of a totally disabling pulmonary impairment. Consequently, the administrative law judge's finding does not comport with 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, 1-165 (1989). However, we reject employer's contention that Dr. Chavda's opinion is insufficient, if fully credited, to support a finding that claimant suffers from a totally disabling respiratory impairment. In addition to opining that claimant does not have enough lung capacity to work as a coal miner, Employer's Exhibit 4, Dr. Chavda interpreted claimant's February 4, 2011 pulmonary function study as revealing a "mild obstructive airway defect." Employer's Exhibit 5. The administrative law judge erred in not comparing Dr. Chavda's opinion, that claimant suffers from a mild obstructive defect, with the exertional requirements of claimant's usual coal mine employment in order to assess whether that impairment rendered claimant totally disabled.[5] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Employer also argues that the administrative law judge erred in discrediting Dr. Tuteur's opinion as equivocal. We agree. Although Dr. Tuteur, like Dr. Chavda, diagnosed a mild obstructive abnormality, Dr. Tuteur unequivocally opined that claimant's pulmonary impairment is "of insufficient severity to produce clinical symptoms or disability." Employer's Exhibit 1. Consequently, the administrative law

[5] On remand, the administrative law judge must identify the employment that was the miner's usual coal mine work, and identify the exertional requirements of that employment.

judge mischaracterized Dr. Tuteur's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). 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 this case for further consideration. On remand, when considering whether the new medical opinion evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

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 must weigh all the new evidence together, both like and unlike, to determine whether claimant has established that he is totally disabled 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). If the administrative law judge finds that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as well as a change in conditions pursuant to 20 C.F.R. §725.310.

Moreover, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[6] 30 U.S.C. §921(c)(4).

Finally, employer contends that the administrative law judge applied an incorrect rebuttal standard. The United States Court of Appeals for the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the claimant does not suffer from pneumoconiosis, or that the disease is not related to coal mine work." *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The Sixth Circuit has also recognized that employer bears the burden to "affirmatively prove[] the absence of pneumoconiosis. . . ." *Morrison*, 644 F.3d at 480 n.5, 25 BLR at 2-12 n.5. On remand, should the administrative law judge

[6] Because employer does not challenge the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary for consideration under the Section 411(c)(4) presumption, this finding is affirmed. *Skrack*, 6 BLR at 1-711; 30 U.S.C. §921(c)(4).

find that claimant has invoked the Section 411(c)(4) presumption, he must reconsider whether employer has established rebuttal pursuant to this standard.[7]

Accordingly, the 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those

[7] Employer contends that the rebuttal provisions of Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

limitations to the instant case. However, because the Board has adopted precedent to the contrary, *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), I concur with my colleagues in all respects.

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JUDITH S. BOGGS
Administrative Appeals Judge