

BRB No. 12-0450 BLA

LARRY LEE MOTSINGER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	
)	
and)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	DATE ISSUED: 06/17/2013
)	
)	
Employer/Intervener-Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Subsequent Claim of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

B. Duane Willis (Manier & Herod Law Offices), Nashville, Tennessee, for intervener.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-BLA-05832) of Administrative Law Judge Stephen M. Reilly, rendered on a subsequent claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The administrative law judge initially determined that claimant had a coal mine employment history of nine years and a smoking history of at least sixty pack-years. Upon weighing the newly submitted evidence under 20 C.F.R. Part 718, the administrative law judge found that claimant did not establish any of the requisite elements of entitlement. The administrative law judge further found, therefore, that claimant failed to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his consideration of the evidence relevant to whether he suffers from legal pneumoconiosis and is totally disabled by it. Employer has not filed a response brief in this appeal. An intervening party, Insurance Company of North America (INA), has responded and urges affirmance of the administrative law judge's denial of benefits.² The Director, Office of Workers' Compensation Programs, filed a letter indicating that he will not submit a substantive response in claimant's appeal, unless specifically requested to do so.³

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,

¹ Claimant filed prior claims for benefits on April 27, 1999 and May 18, 2001, each of which was denied by the district director because claimant did not establish any of the elements of entitlement. Director's Exhibits 1, 2. Claimant filed the current subsequent claim on October 16, 2008. Director's Exhibit 4.

² Insurance Company of North America (INA), in its role as Ziegler Coal Company's insurer, filed a motion to intervene, in light of the dissolution of the latter entity. Administrative Law Judge Jeffrey Tureck granted INA's motion at a hearing held on March 16, 2010. *See* Hearing Transcript at 8. Subsequent to the hearing, the case was reassigned to Judge Stephen M. Reilly (the administrative law judge).

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant worked nine years in coal mine employment, smoked for at least sixty pack-years, and failed to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because claimant did not establish at least fifteen years of underground, or substantially similar coal mine employment, he is not eligible for the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Subsequent Claim

When 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); *see 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 any of the requisite elements of entitlement.⁵ Director’s Exhibit 2. Consequently, claimant must establish, based on newly submitted evidence, at least one of the elements in order to obtain a review of his claim on the merits. *See White*, 12 BLR at 1-3.

II. Legal Pneumoconiosis

We first address claimant’s assertion that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).⁶ The record contains the newly submitted medical opinions of Drs. Cohen, Istanbouly and Repsher. Dr. Cohen examined claimant on April 15, 2008 and recorded a coal mine employment history of fourteen years and a smoking history of thirty-six pack years. Claimant’s Exhibits 2, 3. Dr. Cohen specifically opined that claimant has chronic lung disease in light of his symptoms of cough, dyspnea on exertion and wheezing, and the reduction in his FEV1 on

⁴ The record indicates that claimant’s coal mine employment was in Illinois. Director’s Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁵ In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

⁶ Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment” and “includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

pulmonary function testing. Claimant's Exhibits 2, 3 at 17. Dr. Cohen noted that claimant is on oxygen and that the pulmonary function testing he obtained showed a moderately severe obstructive defect, while the arterial blood gas testing showed significant gas exchange abnormalities. Claimant's Exhibit 2. Dr. Cohen explained that he based his diagnosis of chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure, on the results of his clinical examination, the objective testing he conducted, and claimant's work, smoking and medical histories. Claimant's Exhibits 2, 3 at 17. At Dr. Cohen's deposition, he stated that he would not change his opinion, that coal dust exposure was a significant contributing cause of claimant's COPD, if claimant's actual smoking history was sixty, rather than thirty-six, pack-years. Claimant's Exhibit 3 at 44.

Dr. Istanbuly examined claimant on January 19, 2009 on behalf of the Department of Labor and noted that claimant worked as a miner for ten years and smoked two packs of cigarettes per day for thirty-three years. Director's Exhibit 12. Dr. Istanbuly diagnosed coal workers' pneumoconiosis and COPD, caused primarily by smoking, but "secondarily" related to coal dust exposure. *Id.* He further opined that claimant was disabled by his COPD. *Id.* Dr. Repsher examined claimant on November 9, 2010 and indicated that claimant worked in the mines for fourteen years and had a smoking history of more than twenty-five pack years. INA Exhibit 1. Dr. Repsher opined that claimant did not have coal workers' pneumoconiosis and attributed claimant's COPD to smoking, aggravated by the effects of aging. *Id.* Dr. Repsher did not address whether claimant was totally disabled. *Id.*

The administrative law judge observed that the physicians who provided the newly submitted medical opinions agreed that claimant has COPD, based on his symptoms and the pulmonary function study results showing an obstructive respiratory impairment, but disagreed as to whether coal dust exposure was a significant contributing cause of claimant's COPD. Decision and Order at 13. With respect to Dr. Cohen's opinion, the administrative law judge stated:

I give less weight to Dr. Cohen's opinion concerning the cause of [claimant's] COPD because it is inconsistent with [Department of Labor (DOL)] regulations and the objective medical data. . . . I also consider that Dr. Cohen's opinion is based on an assumption that is contrary to the Act, because he employed the NIOSH standards for total disability as opposed to the Knudson equations used by the DOL. Dr. Cohen based his diagnosis of COPD and his consideration of the etiology of the disease on the fact that [claimant's] FEV1 was not reversible to "normal or near normal" even though it was reversible to above the disability standards under the Knudson equations. (CX-3 at 17). Dr. Cohen admitted that under the Knudson equations, [claimant] would not have been totally disabled. (CX-

3 at 37). In his opinion, Dr. Cohen did not consider the weight of pulmonary function testing in the record that showed reversibility to above disability standards. Dr. Cohen did not fully account for the reversibility of [claimant's] impairment. I accord Dr. Cohen's opinion less weight.

Id. at 14. The administrative law judge gave "little weight" to Dr. Istanbuly's opinion on the ground that he "did not describe the rationale" for his conclusions. *Id.* Regarding Dr. Repsher, the administrative law judge found that "he expressed opinions contrary to the Act when stating that a miner could not have emphysema without [radiographic] evidence of pneumoconiosis." *Id.*, citing 65 Fed. Reg. 79,943 (Dec. 20, 2000). However, the administrative law judge also stated:

I accord Dr. Repsher's opinion some weight when he stated that the contribution of coal dust to [claimant's] disease was "de minimus" as compared to smoking and aging. This is consistent with DOL's policy that smoking and coal dust are additive in causing clinically significant airways obstruction." 65 Fed. Reg. 79,940. Dr. Repsher accounted for the contribution of both agents and [claimant's] age to find that [claimant's] disease was not significantly caused by coal dust.

Decision and Order at 14, quoting INA Exhibit 1. The administrative law judge concluded that "the medical opinion evidence cannot support a finding of legal pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 14.

Claimant argues that the administrative law judge erred in giving less weight to Dr. Istanbuly's opinion, noting that Dr. Istanbuly's opinion "is significantly stronger" than the medical opinion that supported an award of benefits in *Alnon v. Peabody Coal Co.*, BRB No. 98-1578 BLA (Sept. 2, 1999) (unpub.). Claimant's Brief at [2] (unpaginated). Contrary to claimant's assertion, an unpublished decision by the Board under a different set of factual circumstances has no binding effect on this case. In *Alnon*, the Board held that the administrative law judge acted within his discretion in crediting a treating physician's opinion diagnosing pneumoconiosis, in part, because he treated the miner for several years prior to his death. *Alnon*, BRB No. 98-1578 BLA, slip op. at 5-6. In the present case, Dr. Istanbuly is not a treating physician. Moreover, the administrative law judge acted within his discretion in giving little weight to Dr. Istanbuly's diagnosis of COPD related, in part, to coal dust exposure, because he "did not describe the rationale for his opinion." Decision and Order at 14; see *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001). We affirm, therefore, the administrative law judge's determination that Dr. Istanbuly's opinion was insufficient to establish the existence of legal pneumoconiosis.

However, we agree with claimant that the administrative law judge did not provide valid reasons for discrediting Dr. Cohen's opinion under 20 C.F.R. §718.202(a)(4). In according "little weight" to Dr. Cohen's opinion, the administrative law judge conflated the issues of the existence of legal pneumoconiosis and total disability by focusing on whether Dr. Cohen's diagnosis of a *disabling* obstructive respiratory impairment was reasoned and documented. Decision and Order at 14. Contrary to the administrative law judge's analysis, in order to establish the existence of legal pneumoconiosis, claimant is required to prove only that he has a chronic lung disease or respiratory or pulmonary impairment arising out of coal mine employment not a *disabling* respiratory or pulmonary impairment arising out of coal mine employment. See 20 C.F.R. §§718.201(a)(2); 718.202(a)(4). In addition, as discussed, *infra*, the pre-bronchodilator pulmonary function studies conducted by Dr. Cohen on April 15, 2008 produced qualifying values indicating total disability, applying the Knudson equations set forth in the regulations.⁷ Furthermore, the fact that claimant's FEV1 values improved to "above disability standards" after he was administered a bronchodilator, does not undermine Dr. Cohen's explanation that he attributed claimant's COPD, in part, to coal dust exposure, because claimant did not have complete reversibility of his FEV1 to "normal or near normal." Claimant's Exhibit 2; see *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Stalcup*, 477 F.3d at 484, 24 BLR at 2-37. Similarly, although Dr. Cohen testified that the DOL should revise the disability tables set forth in the regulations in accordance with the NIOSH standards, it was error for the administrative law judge to summarily reject his opinion as "contrary to the Act," as Dr. Cohen discussed the Knudson equations and explained the basis for his opinion in light of the evidence of record. Claimant's Exhibit 3. Thus, because the administrative law

⁷ In promulgating the regulations at 20 C.F.R. Part 718, the Department of Labor (DOL) derived predicted normal values for FEV1, FVC and MVV by gender, height, and age from a study published in *The American Review of Respiratory Disease*. 43 Fed. Reg. 17,729-31 (Apr. 25, 1978), citing R.J. Knudson, *et al.*, *The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age*, 113 Am. Rev. Respir. Dis. 587-660 (May 1976). The DOL determined that an acceptable benchmark for establishing total disability would be if a miner's pulmonary capacity was no more than 60% of these values. 45 Fed. Reg. 13,711 (Feb. 29, 1980). Accordingly, the DOL created tables of values that were 60% of the predicted normal for FEV1, FVC, and MVV, according to gender, height, and age, with 71 being the maximum age for which figures are reported. 20 C.F.R. Part 718, Appendix B. A "qualifying" pulmonary function study or arterial blood gas study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i), (ii). No changes were made to Appendix B when the regulations were revised. See 65 Fed. Reg. 79,953 (Dec. 20, 2000).

judge did not provide a valid rationale for discrediting Dr. Cohen's diagnosis of legal pneumoconiosis, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), we vacate the administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

III. Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the pulmonary function studies conducted by Dr. Istanbuly on January 12, 2009 and by Dr. Cohen on April 15, 2008. Both studies were qualifying for total disability before the use of a bronchodilator, and were non-qualifying after a bronchodilator was administered. *See* Director's Exhibit 12; Claimant's Exhibit 2. The administrative law judge found that the "results point towards a conclusion that [claimant] is disabled." Decision and Order at 5. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the blood gas studies dated January 12, 2009 and April 15, 2008 were non-qualifying for total disability. With respect to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that the only two physicians who addressed the issue of total disability, Drs. Istanbuly and Cohen, agreed that claimant was totally disabled from performing his usual coal mine work.⁸ The administrative law judge, however, determined that claimant is not totally disabled, offering the following rationale:

The weight of the evidence in its entirety does not establish total disability. I give little weight to [claimant's] testimony and I do not give great weight to any of the medical opinion evidence. The arterial blood gas testing does not establish total disability. Although the pulmonary function tests point towards disability they are insufficient to outweigh the balance of the evidence pointing towards no disability. Therefore, I find that [claimant] has not shown that he is totally disabled.

Decision and Order at 15-16.

We agree with claimant that the administrative law judge has not identified the contrary evidence "pointing towards no disability" to which he referred and did not adequately explain the basis for his finding that claimant is not totally disabled. Decision

⁸ The regulation set forth at 20 C.F.R. §718.204(b)(2)(iii) is not relevant in this case, as the record does not contain any evidence indicating that claimant is suffering from cor pulmonale with right-sided congestive heart failure.

and Order at 16; *see Wojtowicz*, 12 BLR at 1-165; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Although the administrative law judge determined correctly that the pO₂ and pCO₂ values on claimant's blood gas studies were non-qualifying, he did not consider Dr. Cohen's determination that claimant was totally disabled based, in part, on abnormalities in his A-a gradient, as revealed in these studies. *See Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *see also Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984) (arterial blood gas studies and pulmonary function studies measure different types of impairment). Furthermore, although Dr. Cohen utilized the NIOSH standards in assessing the degree of claimant's impairment, the administrative law judge did not adequately explain why this is significant, in light of claimant's pre-bronchodilator pulmonary function tests, which are qualifying under the Knudson equations used in the regulations.⁹

Finally, the administrative law judge gave little weight to Dr. Cohen's disability opinion on the ground that Dr. Cohen did not have an accurate understanding of the exertional requirements of claimant's job. The administrative law judge stated:

Dr. Cohen opined that [claimant] was totally disabled from performing his job in the slurry pit[,] which constituted heavy to very heavy manual labor. I found that [claimant] performed moderate to heavy manual labor[,] not heavy to very heavy manual labor as found by Dr. Cohen. Because of this difference, I also give this portion of Dr. Cohen's opinion little weight.

Decision and Order at 15.

Absent further explanation, however, there appears to be little distinction between Dr. Cohen's description of the exertional requirements of claimant's job and that set forth by the administrative law judge, as they both indicated that claimant's last coal mine employment involved *heavy manual labor*.¹⁰ Dr. Cohen outlined the specific job duties claimant would be unable to perform as follows:

⁹ Although claimant had non-qualifying post-bronchodilator results, the Department of Labor has stated that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability." *See* 45 Fed. Reg. 13682 (1980).

¹⁰ The administrative law judge summarized claimant's hearing testimony regarding his job duties, noting that claimant said that he last worked in maintenance, which required him to check panel boxes and light switches, and to pull cables to check for defects. The administrative law judge stated that claimant "described that pulling . . . cables for maintenance would require about 75 pounds of force. Considering this

Pulmonary function testing shows a moderately severe obstructive defect. Resting arterial blood gases show significant gas exchange abnormalities at rest. This degree of impairment is clearly totally disabling for his last coal mine job moving *heavy* belt rollers, splicing belts, shoveling, and lifting *heavy* parts.

Claimant's Exhibit 2 (emphasis added). Because the administrative law judge's analysis does not satisfy the APA, we vacate the his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). *See Wojtowicz*, 12 BLR at 1-165. To the extent that the administrative law judge's credibility determinations at 20 C.F.R. §§718.202(a) and 718.204(b) impacted his findings on the issue of disability causation, we also vacate the administrative law judge's finding that claimant is not totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c), and remand the case for further consideration of all of the requisite elements of entitlement.

IV. Remand Instructions

On remand, the administrative law judge must reconsider Dr. Cohen's opinion under 20 C.F.R. §718.202(a)(4) and determine whether Dr. Cohen's diagnosis of COPD, of which coal dust exposure was a significant contributing cause, constitutes a reasoned and documented diagnosis of legal pneumoconiosis. In so doing, the administrative law judge must consider whether Dr. Cohen's opinion is supported by the factors that he identified as the bases for his conclusion, i.e., the objective data and claimant's medical, employment and smoking histories. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Regarding Dr. Repsher's opinion ruling out the presence of legal pneumoconiosis, the administrative law judge must determine whether Dr. Repsher relied on the assumption that coal dust-related COPD is rare in non-smoking coal miners, which is contrary to the view adopted by the DOL.¹¹ *See Consolidation Coal Co. v. Director OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Circ. 2008); 65 Fed. Reg. 79,943 (Dec. 20, 2000).

description, I find that [claimant] performed moderate to heavy manual labor.” Decision and Order at 4.

¹¹ Claimant alleges that Dr. Repsher's testimony establishes that, absent evidence of “medical or clinical” pneumoconiosis, Dr. Repsher will never make a diagnosis of legal pneumoconiosis. Claimant's Brief at [6] (unpaginated).

When reassessing whether Dr. Cohen’s opinion is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must reconsider his finding that Dr. Cohen’s understanding of claimant’s usual coal mine work conflicted in a significant way with the administrative law judge’s finding that such work required “moderate to heavy” manual labor. Decision and Order at 4. The administrative law judge must set forth the rationale underlying his characterization of claimant’s usual coal mine work and his weighing of Dr. Cohen’s opinion. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge concludes that the newly submitted evidence is sufficient to establish either that claimant has legal pneumoconiosis, or is totally disabled, the administrative law judge must find that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and then render findings on the merits of the claim. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 496, 23 BLR 2-18, 1-35-36 (7th Cir. 2004); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). The administrative law judge must set forth his findings on remand in detail, including the underlying rationales, as required by the APA. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988).

Accordingly, the administrative law judge's Decision and Order Denying Benefits in Subsequent Claim 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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge