BRB No. 12-0505 BLA

BOYD SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	DATE ISSUED: 06/17/2013
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Neil Richard Clement (Richardson Clement PC), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (11-BLA-5246) of Administrative Law Judge Ralph A. Romano denying 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 a subsequent claim filed on March 16, 2010.[1]

[1] Claimant's previous claim, filed on February 5, 2007, was finally denied by the district director on October 19, 2007, because claimant failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

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 living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

After crediting claimant with twenty-four years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant failed to invoke the Section 411(c)(4) presumption. The administrative law judge further found that claimant failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

To establish entitlement 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

[2] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d).

Claimant initially argues that the administrative law judge erred in failing to find that the new pulmonary function study evidence established total disability. Claimant's Brief at 5-6. In considering whether the pulmonary function study evidence developed since the denial of claimant's prior claim established total disability, the administrative law judge considered the results of four pulmonary function studies conducted on April 22, 2010, August 12, 2010, September 9, 2010, and June 6, 2011.[3] Director's Exhibit 9; Claimant's Exhibit 1; Employer's Exhibit 1. The April 22, 2010 pulmonary function study produced non-qualifying values,[4] both before and after the administration of a bronchodilator. Claimant's Exhibit 1. The August 12, 2010 pulmonary function study produced qualifying values before the administration of a bronchodilator, but non-qualifying values thereafter. *Id.* The September 9, 2010 pulmonary function study produced non-qualifying values before the administration of a bronchodilator.[5] *Id.* Finally, the June 6, 2011 pulmonary function study produced qualifying values, both before and after the administration of a bronchodilator. Employer's Exhibit 1. After noting that "two of the four tests qualified pre-bronchodilator, [and that] one of the three tests qualified post-bronchodilator," the administrative law judge found that the pulmonary function study evidence "tilt[ed] toward a finding of total disability." Decision and Order at 5.

In finding that the pulmonary function study evidence "tilt[ed] toward a finding of total disability," the administrative law judge failed to make a specific finding regarding whether the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Consequently, the administrative law judge's analysis does not

[3] The administrative law judge found that a fifth pulmonary function study, conducted on April 8, 2010, was invalid because it was not accompanied by any tracings. Decision and Order at 4-5; Claimant's Exhibit 1.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[5] Claimant was not administered a bronchodilator during the September 9, 2010 pulmonary function study.

comply with the Administrative Procedure Act (APA), specifically, 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must 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). Therefore, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), and instruct the administrative law judge, on remand, to weigh the qualifying and non-qualifying pulmonary function studies, make a specific finding, and explain his determination regarding whether the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i).

Claimant also contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] The administrative law judge considered the medical opinions of Drs. Barney and Goldstein. The administrative law judge found that the opinions of both doctors were "ambiguous on the issue of total disability," explaining that:

> Although Dr. Barney stated that Claimant has "moderate to severe" shortness of breath, this statement is insufficient to form a conclusion that Claimant is totally disabled under the regulations. Dr. Goldstein's report is equally unclear, stating only that Claimant suffers from a "moderate to severe obstructive defect."

Decision and Order at 6. The administrative law judge, therefore, "decline[d] to give probative weight to either physician," and found that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R.§718.204(b)(2)(iv). Decision and Order at 7.

Claimant argues that the administrative law judge erred in his consideration of the opinions of Drs. Barney and Goldstein. Claimant's Brief at 7-9. We agree. Although the administrative law judge correctly noted that Dr. Barney's statement, that claimant has moderate to severe shortness of breath, is insufficient to support a finding of total disability, the administrative law judge failed to address Dr. Barney's additional opinion that claimant's April 22, 2010 pulmonary function study revealed a "moderate airflow obstruction." Director's Exhibit 9. Employer's physician, Dr. Goldstein, similarly

[6] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 5. Because these findings are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

interpreted claimant's June 6, 2011 pulmonary function study as showing "a moderate to severe obstructive defect with no improvement following bronchodilators." Employer's Exhibit 1. A medical opinion need not be phrased in terms of "total disability" before total disability can be established. *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985). The administrative law judge erred in not comparing the opinions of Drs. Barney and Goldstein, that claimant suffers from a moderate to severe pulmonary impairment, with the exertional requirements of claimant's usual coal mine employment in order to assess whether that impairment renders claimant totally disabled.[7] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-239 (11th Cir. 2004); *Jim Walters Res., Inc. v. Allen*, 995 F.2d 1027, 1029, 18 BLR 2-237, 2-241-43 (11th Cir. 1993). Consequently, we vacate the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration.[8]

If, on remand, the administrative law judge finds that the new pulmonary function or medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (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 the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

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

[7] On remand, the administrative law judge must identify the employment that was claimant's usual coal mine work, and identify the exertional requirements of that employment. Director's Exhibit 5; Hearing Tr. at 21-28, 38-42.

[8] 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 also vacate the administrative law judge's finding that claimant failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

amended Section 411(c)(4) presumption that he is total disabled due to pneumoconiosis.[9] 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. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order denying 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[9] Claimant testified that all twenty-four years of his coal mine employment took place in underground mines. Hearing Transcript at 20-21. Consequently, claimant has established the requisite fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).