BRB No. 12-0516 BLA

IRVIN C. BENJAMIN (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF ILLINOIS, INCORPORATED	)	
	)	DATE ISSUED: 06/27/2013
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 Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-06016) of Administrative Law Judge Robert B. Rae, rendered 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 claim filed on March 20, 2006. Director's Exhibit 2.

Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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).

The administrative law judge found that claimant had twenty years of surface mine employment that was substantially similar to employment in an underground mine, and thus was qualifying employment for purposes of amended Section 411(c)(4).[1] *See* 30 U.S.C. §921(c)(4). The administrative law judge also found that the evidence established claimant's total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. Finally, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption, and in finding that employer failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits.[2] The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its arguments on appeal.

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).

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

Employer argues that the administrative law judge erred in crediting the miner with enough qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer does not dispute that claimant worked for twenty years at surface mines in Wyoming and Illinois, but contends that the administrative law judge's finding,

[1] Claimant's last coal mine employment was in Illinois. Director's Exhibits 3, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Cheryl Hester, the co-executor of claimant's estate, informed the Board, by letter dated April 2, 2013, that claimant died on May 1, 2012.

that claimant's twenty years were substantially similar to underground employment, is conclusory, without the necessary comparison of the employment conditions described by claimant to the conditions of underground mining. Employer's Brief at 15-17. This argument lacks merit.

To prove that his or her work conditions were substantially similar to those in an underground mine, a surface miner need only provide sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). A claimant satisfies the burden of proof to establish comparability when the claimant produces "sufficient evidence of the surface mining conditions under which he worked." *Leachman*, 855 F.2d at 512-13; *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-7 (1987) (holding that a miner need not demonstrate that surface mine conditions are similar to the "most dusty area of an underground mine"). A claimant's unrebutted testimony can support a finding of substantial similarity. *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

In this case, claimant testified that he never wore a dust mask; that when he worked as a welder in Wyoming, he often had to perform repairs on the tipple crusher, which was underground; that he did not notice a difference in coal dust levels underground and above ground in Wyoming; that in Illinois, he was exposed to the same amount of coal at the tipple, which was above ground, as he had been at the underground tipple crusher in Wyoming; that as a welder in Wyoming, he had to clean coal dust from his lenses every thirty to forty-five minutes, whether he was above ground or below; that as a welder in Illinois, he cleaned coal dust from his lenses at similar intervals; and that when he operated a front-end loader in Illinois, he had to clean the coal dust out of his cab at the end of each shift, and was exposed to no less coal dust than he had been as a welder. Claimant's Exhibit 6 at 7-19.

Based on claimant's description of his working conditions, the administrative law judge concluded that claimant's employment was substantially similar to underground coal mine employment, satisfying the comparability requirement for invocation of the presumption at amended Section 411(c)(4). Decision and Order at 16. Because claimant's uncontroverted testimony provides sufficient specificity regarding dust exposure levels to support the administrative law judge's conclusions, we affirm the administrative law judge's finding of twenty years of qualifying coal mine employment.[3]

[3] We reject employer's argument that the administrative law judge's finding effectively eliminates any standard of comparison and makes any surface mining job substantially similar to underground coal mine employment. Employer's Brief at 16-17.

See Leachman, 855 F.2d at 512; *Summers*, 272 F.3d at 479-80, 22 BLR at 2-275-76 (holding that miner's undisputed testimony that job conditions above and below ground were "pretty much the same" supported finding of substantial similarity); *McGinnis*, 10 BLR at 1-7.

Total Disability

Employer argues that the administrative law judge erred in finding that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Specifically, employer contends that the administrative law judge erred in weighing the arterial blood gas study evidence and the medical opinion evidence. Employer's arguments have merit.

To establish total disability, claimant had to establish that he suffered from a pulmonary or respiratory impairment that prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). The Board defines a miner's "usual coal mine work" as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). Claimant worked as a welder from 1974 to 1991, but then moved to a position operating a front-end loader, in which he continued until he retired from coal mine employment. Director's Exhibit 4; Hearing Transcript at 24-27. Therefore, as the administrative law judge correctly noted, to establish total disability, claimant needed to prove that his impairment prevented him from operating a front-end loader. Decision and Order at 3. The administrative law judge considered claimant's description of his employment as a front-end loader operator and found that it required moderate manual labor. *Id*.

The administrative law judge considered pulmonary function studies, arterial blood gas studies, and medical opinions in determining whether claimant was totally disabled.[4] *See* 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered blood gas studies performed by Drs. Cohen, Repsher, and Tuteur, and found that the weight of the blood gas study evidence supports a finding of total disability. Decision and Order at 5-6. Dr. Cohen's and Dr. Tuteur's

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Contrary to employer's contention, the administrative law judge properly applied the standard set forth by the Seventh Circuit in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), and *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

[4] Because the three pulmonary function studies produced non-qualifying values, the administrative law judge found that they did not support a finding of total disability. Decision and Order at 5, 16; Director's Exhibit 10; Director's Exhibit 25; Employer's Exhibit 4.

studies both produced non-qualifying resting values and qualifying[5] exercise values. *Id*. at 6; Director's Exhibit 10; Employer's Exhibit 4. Dr. Repsher's study also produced a non-qualifying resting value; Dr. Repsher did not perform an exercise study. Decision and Order at 6; Director's Exhibit 25. The administrative law judge gave greater weight to Dr. Cohen's study "because it was verified," and concluded that "the weight of the blood gas studies demonstrates total disability because Claimant demonstrated disability in both exercise studies." Decision and Order at 6.

Next, the administrative law judge considered medical opinions from Drs. Cohen, Repsher, and Tuteur. *See* 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge gave greater weight to the opinions of Drs. Cohen and Tuteur, both of whom, in the administrative law judge's view, opined that claimant had a totally disabling respiratory impairment preventing him from performing his last coal mine employment. Decision and Order at 17; Director's Exhibit 10 at 10; Employer's Exhibit 7 at 55. The administrative law judge gave the greatest weight to Dr. Tuteur's opinion, finding it to be well-reasoned, because Dr. Tuteur considered claimant's history and test results, and consistent with the objective medical data, "because the exercise blood gases demonstrate total disability." Decision and Order at 17. The administrative law judge also gave "greater" weight to Dr. Cohen's opinion, which was based in part on exercise blood gas values, "because it [was] consistent with the objective medical data." Decision and Order at 17; Director's Exhibit 10 at 10. But the administrative law judge stated further that he did not give Dr. Cohen's opinion "maximum" weight, because Dr. Cohen focused on claimant's duties as a welder and had concluded that claimant's coal mine employment required him to perform heavy manual labor, contrary to the administrative law judge's finding that claimant performed only moderate manual labor as a front-end loader operator. Decision and Order at 10, 17; Director's Exhibit 10 at 10. Finally, the administrative law judge gave less weight to Dr. Repsher's opinion that claimant does not have a significant pulmonary impairment that would prevent him from performing his last coal mine employment, finding that Dr. Repsher's conclusion was based on opinions regarding blood gas studies that are contrary to the regulations regarding total disability. Decision and Order at 17; Employer's Exhibit 8 at 75. The administrative law judge found that the weight of the medical opinions supported a finding of total disability. Decision and Order at 17.

Consequently, the administrative law judge found that claimant established that he is totally disabled "because both the medical opinions and arterial blood gases support a

[5] 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).

finding of total disability." Decision and Order at 17. Thus, the administrative law judge also found that claimant invoked the Section 411(c)(4) presumption. *Id*.

Employer argues that the administrative law judge "focused solely on the two qualifying exercise arterial blood gas studies," and therefore erred in finding that the weight of the arterial blood gas study evidence supports total disability. Employer's Brief at 18. This argument has merit. As employer notes, all three of claimant's resting blood gas studies produced non-qualifying values. The administrative law judge concluded that the weight of the blood gas study evidence supports a finding of total disability "because Claimant demonstrated disability in both exercise studies," without explaining why the three non-qualifying resting blood gas values are less probative. Decision and Order at 6. Because the administrative law judge failed to take relevant evidence into account, remand is required.[6] *See* 30 U.S.C. §923(b); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 506-08, 15 BLR 2-116, 2-119-20 (7th Cir. 1991); *Vigil v. Director, OWCP*, 8 BLR 1-99, 1-100-01 (1985). Therefore, we vacate the administrative law judge's finding that the arterial blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and remand the case for further consideration of all relevant evidence.

Employer also argues that the administrative law judge erred in finding that the weight of the medical opinion evidence supported a finding of total disability. We agree with employer that the administrative law judge erred in weighing the opinions of Drs. Tuteur and Cohen.[7]

[6] Even if this finding is based only on Dr. Cohen's arterial blood gas study – to which the administrative law judge assigned more weight "because it was verified" – remand is required, because the same error exists. Decision and Order at 6. Dr. Cohen's study yielded non-qualifying resting values and qualifying exercise values, and the administrative law judge failed to explain why the exercise values were more probative than the resting values. *Id*.

[7] Employer also contends that the administrative law judge erred in discrediting Dr. Repsher's opinion that claimant is not totally disabled, but this argument lacks merit. Employer's Brief at 20-21. During his deposition, Dr. Repsher noted that claimant had qualifying exercise blood gas study values, but dismissed those results, in part, by testifying that a cardiopulmonary stress test, rather than an exercise blood gas study, "is the gold standard and the bottom line" in establishing whether a miner is able to perform his usual coal mine work. Employer's Exhibit 8 at 77. The administrative law judge permissibly discounted Dr. Repsher's reasoning because the regulations provide that qualifying blood gas studies may be sufficient to establish total disability. 20 C.F.R.

Employer contends that, in determining that Dr. Tuteur's opinion supports a finding of total disability, the administrative law judge ignored testimony to the contrary from Dr. Tuteur. Employer's Brief at 19-20. This argument has merit. In summarizing the evidence, the administrative law judge noted that in the first portion of his deposition, in 2008, Dr. Tuteur opined that desaturation would prevent claimant from returning to his coal mine employment. Decision and Order at 15; Employer's Exhibit 7 at 55. The administrative law judge noted further that, when the deposition continued, in 2009, Dr. Tuteur testified that, from a pulmonary standpoint, claimant could perform his job as a front-end loader operator. Decision and Order at 15; Employer's Exhibit 7 at 115-16. Later in the deposition, however, Dr. Tuteur testified that he stood by his earlier opinion that desaturation, caused by emphysema, contributed to claimant's inability to return to his coal mine work. Employer's Exhibit 7 at 138-40. Because of these apparently conflicting statements, the administrative law judge found that "Dr. Tuteur was unclear in his opinion concerning whether [c]laimant was totally disabled . . . ." Decision and Order at 15. When the administrative law judge weighed the medical opinion evidence, however, he wrote only that Dr. Tuteur concluded that "[c]laimant was totally disabled from performing his coal mining job." *Id*. at 17. The administrative law judge found that opinion to be well-reasoned, and gave it "greater weight" in concluding that the medical opinion evidence supports a finding that claimant is totally disabled. *Id*.

The administrative law judge did not comply with the Administrative Procedure Act (APA) when weighing Dr. Tuteur's opinion.[8] He failed to adequately explain his finding that Dr. Tuteur's opinion, which the administrative law judge described as "unclear," was a well-reasoned opinion that claimant was totally disabled by a respiratory or pulmonary impairment. The administrative law judge also failed to resolve the apparent inconsistencies in Dr. Tuteur's testimony, or explain how Dr. Tuteur's opinion supports a finding of total disability, given his testimony that claimant could return to work as a front-end loader. Accordingly, we must vacate the administrative law judge's finding regarding Dr. Tuteur's opinion. On remand, the administrative law judge must reconsider whether Dr. Tuteur's opinion is adequately reasoned and documented to carry claimant's burden of establishing that he was totally disabled pursuant to 20 C.F.R.

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§718.204(b)(2)(ii); Decision and Order at 17. We therefore affirm the administrative law judge's decision to accord Dr. Repsher's opinion regarding total disability less weight.

[8] The Administrative Procedure Act, 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), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

§718.204(b)(2)(iv). *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-70, 22 BLR 2-311, 2-315-19 (7th Cir. 2001). We specifically instruct the administrative law judge to provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also contends that the administrative law judge erred in giving "greater weight," albeit not "maximum weight," to Dr. Cohen's opinion that claimant is totally disabled, pointing out that Dr. Cohen believed that claimant's last coal mine employment was that of a welder and required him to perform "heavy" labor, contrary to the administrative law judge's conclusion that claimant only had to perform "moderate" labor in his work operating a front-end loader. Employer's Brief at 21-22; Director's Exhibit 10 at 8, 10. This argument has merit. In determining whether a claimant is totally disabled, an administrative law judge may not rely on a medical opinion that is based on a misunderstanding of the exertional requirements of a claimant's coal mine employment. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-258-60 (7th Cir. 2005). Therefore, we must vacate the administrative law judge's finding regarding Dr. Cohen's opinion. On remand, the administrative law judge must reconsider whether Dr. Cohen's opinion supports a finding of total disability under Section 718.204(b)(2)(iv), and explain his findings and conclusions in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165. Because the administrative law judge erred in weighing the opinions of Drs. Tuteur and Cohen, we vacate his finding that the medical opinion evidence supports a finding that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In sum, the administrative law judge failed to explain sufficiently his reasons for finding that the arterial blood gas study and medical opinion evidence establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Moreover, in determining whether the evidence as a whole establishes total disability, the administrative law judge failed to weigh the evidence supporting of a finding of total disability against the contrary probative evidence, as he was required to do. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Consequently, we vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2), and remand the case for further consideration of all relevant evidence.

Because we vacate the administrative law judge's finding that total respiratory disability was established at 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer failed to rebut the presumption. If, on remand, the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption, he must then reconsider whether employer has rebutted the presumption 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). In considering this issue, 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. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321-22, 19 BLR 2-192, 2-205-08 (7th Cir. 1995).

Accordingly, the Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge