BRB No. 12-0623 BLA

CHARLIE WOODS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY, LLC	)	DATE ISSUED: 06/27/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell 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 (2011-BLA-05122) of Administrative Law Judge Lystra A. Harris with respect to a subsequent claim filed on November 17, 2009, 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

[1] Claimant filed his initial claim on October 22, 2002, which was denied by Administrative Law Judge Daniel A. Sarno, Jr., on July 28, 2006, as claimant did not establish any element of entitlement. Director's Exhibit 1. The Board affirmed the administrative law judge's denial of benefits on April 27, 2007. *Woods v. Coastal Coal*

credited claimant with thirty years of underground coal mine employment and determined that claimant is totally disabled under 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the blood gas studies and medical opinions of record, and in determining that claimant invoked the amended Section 411(c)(4) presumption. In addition, employer asserts that the administrative law judge erred in concluding that employer failed to affirmatively establish that claimant does not have pneumoconiosis or that claimant's disabling respiratory impairment was not due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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).

Co., BRB No. 06-0901 BLA (Apr. 27, 2007)(unpub.). No further action was taken by claimant until he filed the current claim. Director's Exhibit 3.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 4, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

I. Invocation of the Amended Section 411(c)(4) Presumption – Totally Disabling Respiratory Impairment at 20 C.F.R. §718.204(b)(2)

Relevant to 20 C.F.R. §718.204(b)(2)(ii), the blood gas study performed by Dr. Rasmussen on March 15, 2010 was qualifying at rest but non-qualifying after exercise.[5] Director's Exhibit 10. The blood gas study performed by Dr. Jarboe on June 22, 2010 was non-qualifying at rest and values were not taken post-exercise. Director's Exhibit 12. The administrative law judge noted that Dr. Rasmussen's resting blood gas study was the only qualifying test but concluded that, because "only one test is needed to establish disability under this provision[,]" claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 7.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that both Drs. Rasmussen and Jarboe concluded that claimant has a totally disabling respiratory impairment. Decision and Order at 8-9; Director's Exhibits 10, 12. The administrative law judge concluded, therefore, that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9.

The administrative law judge further stated, "considering the evidence in its entirety, I find that the [c]laimant has established, by a preponderance of the evidence, that he is totally disabled due to a respiratory or pulmonary condition." *Id*. Consequently, the administrative law judge determined that claimant invoked the presumption at amended Section 411(c)(4) that his disabling respiratory impairment is due to pneumoconiosis. *Id*. at 9.

Employer argues the administrative law judge erred in finding that a single qualifying study was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). In addition, employer asserts that the administrative law judge did not consider all of the blood gas study evidence in the record, as the March 15, 2010 study included multiple results and only one of these was qualifying. Employer further contends that, in considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge did not address the exertional requirements of claimant's usual coal mine employment, especially as the evidence indicates that claimant's last coal mine job did not involve heavy manual labor, contrary to the opinions of Drs. Rasmussen and Jarboe. Employer also maintains that a

[5] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

preponderance of the evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2).[6]

Employer's allegations have merit, in part. In finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge erred in relying on the single qualifying at-rest study without explaining, in compliance with the Administrative Procedure Act (APA),[7] why she assigned more weight to this study. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984). Therefore, we vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). However, we reject employer's allegation that the administrative law judge should have considered all of the results of the March 15, 2010 study. The "other results" that employer is referring to consists of measurements of claimant's baseline, exercise draws during various stages, and post-exercise recovery. Employer's Brief at 15; *see* Director's Exhibits 10-35, 10-36, 10-38. These values are not recognized as providing a basis for a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii), which identifies the relevant values as those listed in Appendix C to Part 718. Appendix C sets forth tables of qualifying pO2 and pCO2 values and does not include the "other results" to which employer refers. Accordingly, when the administrative law judge reconsiders the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) on remand, he need only address the resting and exercise pO2 and pCO2 values reported by Dr. Rasmussen on the March 15, 2010 study.

There is also merit to employer's assertion that, in evaluating the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge did not adequately consider whether the diagnoses of a totally disabling respiratory impairment rendered by Drs. Rasmussen and Jarboe were based on an accurate understanding of the exertional requirements of the miner's usual coal mine employment.[8] Pursuant to 20 C.F.R.

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[6] Employer also states that the administrative law judge "did not give any valid reason for discounting the medical opinion of Dr. Dahhan." Employer's Brief at 12. However, Dr. Dahhan did not submit a medical opinion in connection with the current claim or claimant's previous claim.

[7] The Administrative Procedure Act 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), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[8] Dr. Rasmussen stated, "[m]ost of [claimant's] time was spent as a repairman and electrician, which was his last job. In addition to doing that, . . . he operated equipment, but he carried heavy tools . . . and did heavy lifting . . . . Altogether he did considerable

§718.204(b)(1), the administrative law judge must determine the exertional requirements of claimant's usual coal mine work and consider them in conjunction with the medical reports assessing disability.[9] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). In the present case, the administrative law judge did not render a finding as to the nature of the miner's usual coal mine work, nor did she consider whether Drs. Rasmussen and Jarboe were aware of the degree of exertion that this job required of the miner.[10] Therefore, we vacate the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

Further, in determining that claimant established total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge did not weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine whether claimant has established total disability by a preponderance of the evidence.[11] *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). Consequently, we vacate the administrative law judge's finding that claimant established a totally disabling

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heavy manual labor." Director's Exhibit 10. Dr. Rasmussen concluded that claimant "is not capable of performing heavy manual labor on a regular basis." *Id.* Dr. Jarboe found that claimant's "last job was as a welder, which he performed for five years" and noted that claimant said "that he had to do heavy lifting and climbing." Director's Exhibit 12. Dr. Jarboe determined that claimant "no longer retains the functional respiratory capacity to do his previous coal mining job or one of similar physical demand in a dust-free environment." *Id.*

[9] A miner's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[10] At the hearing, claimant testified that he operated a shuttle car for most of his coal mine employment. Hearing Transcript at 13. During his deposition, claimant stated that his last job with employer was on "the belt line," which entailed walking along the belts, shoveling coal as needed, and ensuring that the belts were working properly. Director's Exhibit 17-5. In claimant's initial claim, Judge Sarno determined that "[w]hether [c]laimant's last usual coal mine job was as a beltman or crusher operator, I found that it entailed only limited physical exertion." Director's Exhibit 1.

[11] The four pulmonary function studies of record were nonqualifying. Director's Exhibits 10, 12.

respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), and her determination that claimant therefore invoked the presumption at amended Section 411(c)(4).

On remand, the administrative law judge must explain, in compliance with the APA, her weighing of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). In addition, the administrative law judge must identify claimant's usual coal mine work and determine the exertional requirements of that work. She must then assess whether, in light of these exertional requirements, the medical opinions of Drs. Rasmussen and Jarboe contain reasoned and documented diagnoses of total disability. The administrative law judge must then consider the evidence as a whole, including all contrary probative evidence, at 20 C.F.R. §718.204(b)(2) to determine whether claimant established the existence of a totally disabling respiratory or pulmonary impairment. *See Fields*, 10 BLR at 1-20-21; *Shedlock*, 9 BLR at 1-198.

If the administrative law judge finds that claimant has established total disability at 20 C.F.R. §718.204(b)(2), she may reinstate her finding that claimant invoked the amended Section 411(c)(4) presumption. Because this is a subsequent claim and claimant's prior claim was denied because he failed to establish any elements of entitlement, a finding of total disability on remand would also establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). If claimant is unable to establish total disability, an essential element of entitlement, then the administrative law judge must deny benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

II. Rebuttal of the Presumption

In the interest of judicial economy, and to avoid the repetition of any error on remand, we will address employer's contentions concerning the administrative law judge's finding that employer did not establish rebuttal of the amended Section 411(c)(4) presumption. The administrative law judge determined that the medical opinion of Dr. Jarboe was entitled to little weight on the issues of the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, as Dr. Jarboe did not adequately explain why coal dust exposure was not a contributing cause of claimant's disabling impairment. Decision and Order at 13-14. In contrast, the administrative law judge found that Dr. Rasmussen's diagnoses of legal pneumoconiosis and total disability due to legal pneumoconiosis were well-reasoned. *Id*. The administrative concluded, therefore, that employer failed to rebut the amended Section 411(c)(4) presumption. *Id*. at 14.

Employer argues that Dr. Rasmussen's diagnosis of legal pneumoconiosis, is not reasoned and documented, as Dr. Rasmussen did not adequately explain why claimant's impairment was not due solely to his cigarette smoking. In addition, employer contends

that the administrative law judge did not resolve the conflict in the evidence concerning claimant's smoking history. Employer also asserts that the administrative law judge erred in finding that, in terms of qualifications, Dr. Rasmussen's opinion is entitled to weight similar to that accorded to Dr. Jarboe, who is a Board-certified pulmonologist, based on Dr. Rasmussen's many years of experience in evaluating miners with pneumoconiosis. Employer states that Dr. Jarboe, contrary to the administrative law judge's finding, sufficiently explained why coal dust exposure did not contribute to claimant's impairment. Regarding the issue of total disability causation, employer maintains that the administrative law judge made errors similar to those she made when addressing the existence of legal pneumoconiosis.

We reject employer's allegations of error regarding the administrative law judge's finding that Dr. Jarboe's opinion on the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis was entitled to little weight. The administrative law judge acted within her discretion in determining that Dr. Jarboe did not adequately explain why claimant's thirty years of coal dust exposure, in combination with smoking, did not cause claimant's impairment.[12] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). We also find no merit in employer's suggestion that the omission of a definitive finding regarding the length of claimant's smoking history rendered the administrative law judge's credibility finding regarding Dr. Jarboe's opinion irrational. Although the administrative law judge did not set forth a specific finding as to claimant's smoking history, she noted that claimant "acknowledged smoking at least forty-five years," discussed the smoking histories recorded by Drs. Rasmussen and Jarboe, and rationally determined that "the evidence supports the conclusion that the [c]laimant's very significant smoking history contributed to his lung disease."[13] Decision and Order at 3, 8, 13; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). As the administrative law

[12] Dr. Jarboe stated that claimant's "striking" elevation of residual volume, severe reduction in diffusion capacity, and severe emphysema were not typically found in miners with pneumoconiosis. Director's Exhibit 12. The administrative law judge stated, "[w]hile the evidence supports the conclusion that the [c]laimant's very significant smoking history contributed to his lung disease, Dr. Jarboe fails to explain why coal dust exposure could not also have contributed." Decision and Order at 13.

[13] Dr. Rasmussen reported that claimant was a current smoker who had smoked one pack of cigarettes per day for forty-six years as of the date of his examination on March 15, 2010. Director's Exhibit 10. Dr. Jarboe indicated that claimant smoked one to one-and-a-half packs of cigarettes per day for forty-six years and was still smoking as of the date of his examination on July 22, 2010. Director's Exhibit 12.

judge permissibly gave less weight to Dr. Jarboe's opinion – the only evidence rebutting the presumption that claimant has legal pneumoconiosis and is totally disabled by it – we need not address employer's arguments concerning the administrative law judge's crediting of Dr. Rasmussen's opinion. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Rose v. Clinchfield Coal Company*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Therefore, should the administrative law judge again find on remand that claimant has invoked the presumption at amended Section 411(c)(4) by establishing total disability pursuant to 20 C.F.R. §718.204(b)(2), she may reinstate her determination that employer did not rebut the presumption and further reinstate her award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings 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