**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0378 BLA
and 18-0378 BLA-A

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| LLOYD DAVID MILLS | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MOUNTAINEER COAL DEVELOPMENT | ) | |
| | ) | |
| and | ) | |
| | ) | DATE ISSUED: 06/27/2019 |
| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| Employer/Carrier-Petitioners Cross-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2015-BLA-05227) of Administrative Law Judge Carrie Bland rendered on a subsequent claim[1] filed on September 18, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 31.25 years of coal mine employment with at least fifteen years in underground coal mines or in conditions substantially similar, and found the new evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[2] She further found employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established total disability and, therefore, erred in finding he invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption.[3] Claimant responds in support of the award of benefits. Claimant

[1] This is claimant's second claim for benefits. His prior claim, filed on April 29, 2010, was denied by the district director on February 3, 2011 because, although he established pneumoconiosis, he failed to establish total disability. Director's Exhibit 1; Decision and Order at 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen or more 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has 31.25 years of coal mine employment, at least fifteen years of which were underground or in substantially similar conditions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

has also filed a cross-appeal, arguing that if the Board remands this case it should instruct the administrative law judge to either find employer bound by its stipulation that claimant has twenty-two years of qualifying coal mine employment, or allow claimant to submit additional evidence on the issue.[4] The Director, Office of Workers' Compensation Programs, declined to file a substantive 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.[5] 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).

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(c); *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(c)(3). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, he had to submit new evidence establishing that he is totally disabled.[6] 20 C.F.R. §725.309(c).

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of

[4] Claimant's cross-appeal is moot. By letter dated October 18, 2018, employer withdrew its challenge to the administrative law judge's finding that claimant has sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.

[5] Claimant's coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 19; Decision and Order at 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] The administrative law judge acknowledged claimant established the existence of pneumoconiosis in his prior claim, Decision and Order at 2, but then incorrectly stated claimant could establish a change in an applicable condition of entitlement by establishing pneumoconiosis. *Id*. at 3.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *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). The administrative law judge found that the new pulmonary function studies and medical opinions establish total disability.[7] Decision and Order at 9, 19.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two new pulmonary function studies, dated October 17, 2013 and April 2, 2014. Decision and Order at 9-10. The October 17, 2013 pulmonary function study, conducted by Dr. Gaziano, produced qualifying[8] values before the administration of a bronchodilator; a post-bronchodilator study was not performed. Director's Exhibit 11. The April 2, 2014 pulmonary function study, conducted by Dr. Zaldivar, produced qualifying values both before and after the administration of a bronchodilator. Director's Exhibit 24. Noting the new pulmonary function studies are qualifying, the administrative law judge found that they establish total disability. Decision and Order at 9.

Employer argues the administrative law judge erred by failing to resolve the conflicting evidence regarding whether either pulmonary function study is valid. Employer's Brief at 13-16. Employer's contention has merit.

When considering pulmonary function studies, the administrative law judge must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). An administrative law judge must consider a reviewing doctor's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See*

[7] The administrative law judge found that because none of the blood gas studies is qualifying, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 10, 19. The administrative law judge's contrary statement contained in her discussion of the pulmonary function studies appears to be an oversight. *Id*. at 9. She further found that because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 10.

[8] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

*Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an administrative law judge's decision to credit or reject the results of the study. *Siegel v. Director*, OWCP, 8 BLR 1-156, 1-157 (1985).

The administrative law judge noted Dr. Gaziano's opinion that the October 17, 2013 pulmonary function study is valid. Decision and Order at 11-12; Director's Exhibit 25; Claimant's Exhibit 4. In addition, Dr. Ranavaya reviewed the study on behalf of the Department of Labor and indicated it was acceptable. Decision and Order at 9 n.3; Director's Exhibit 11. Dr. Sood reviewed the October 17, 2013 and April 2, 2014 studies and opined that they meet the American Thoracic Society (ATS) criteria for acceptability and repeatability. Decision and Order at 13; Claimant's Exhibit 3. Drs. Zaldivar and Castle opined that neither pulmonary function study was valid because claimant did not put forth sufficient effort.[9] Decision and Order at 13-17; Director's Exhibit 24; Employer's Exhibits 3, 5, 6. Although the administrative law judge stated that she found both pulmonary function studies valid, Decision and Order at 19, no analysis of that issue appears in her Decision and Order.

Thus, the administrative law judge did not resolve the conflict between the opinions of Drs. Gaziano, Ranavaya, and Sood and those of Drs. Zaldivar and Castle. Because she did not make a finding regarding the validity of the pulmonary function studies, her evaluation of the studies does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires the administrative law judge to set forth her "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). Therefore, we must vacate her finding pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for her to resolve the conflicting opinions concerning the validity of the October 17, 2013 and April 2, 2014 pulmonary function studies and determine whether they are sufficiently reliable to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). She must set forth her findings in detail,

[9] As summarized by the administrative law judge, Dr. Zaldivar initially opined that he suspected claimant performed both studies with submaximal effort, but since the two studies yielded similar values he thought they should be considered technically acceptable unless shown otherwise by other studies. Director's Exhibit 24 (Supplemental Report) at 3. Later, after reviewing additional evidence that included a 2010 pulmonary function study that produced normal results, Dr. Zaldivar concluded that both the October 17, 2013 and April 2, 2014 studies were invalid due to hesitation and inadequate effort. Employer's Exhibit 6 at 15-19. Dr. Castle opined that both studies were invalid due to submaximal and variable effort. Employer's Exhibits 3 at 6, 9; 5 at 19-28.

including the underlying rationale for why she credits certain medical opinions over others. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge must then reconsider the medical opinions of Drs. Gaziano, Sood, Zaldivar, and Castle under 20 C.F.R. §718.204(b)(2)(iv) in light of her findings regarding the pulmonary function studies.[10] The administrative law judge must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

In light of our decision to remand the case to the administrative law judge for reconsideration of the pulmonary function studies and medical opinions, we vacate her finding that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Because we have vacated the administrative law judge's finding of total disability, we also vacate her finding that claimant invoked the Section 411(c)(4) presumption.[11] 30 U.S.C. §921(c)(4).

[10] The administrative law judge discredited the opinions of Drs. Castle and Zaldivar that claimant is not totally disabled, in part, because they opined that the pulmonary function studies are invalid, contrary to her assessment of the studies. Decision and Order at 19.

[11] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, at this time, employer's challenge to the administrative law judge's determination that it failed to rebut the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption and that employer has failed to rebut it, employer may challenge such findings in a future appellate proceeding.

Accordingly, the administrative law judge's 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge