BRB No. 10-0376 BLA

BILLY SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	
	)	DATE ISSUED: 03/28/2011
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 on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Award of Benefits (2005-BLA-5890) of Administrative Law Judge Larry S. Merck rendered on a subsequent claim filed on April 22, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).[1] In the initial Decision and Order

[1] Claimant filed prior claims for benefits on October 22, 1993 and October 13, 2000, which were denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant also filed a claim in February 2002, which he subsequently withdrew. Claimant took no further action with

with respect to the subsequent claim, Administrative Law Judge Thomas F. Phalen, Jr., credited claimant with thirty-two years of coal mine employment and determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b) and, thus, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Based on his review of all of the record evidence, Judge Phalen found that the evidence was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Upon consideration of employer's appeal, the Board vacated Judge Phalen's decision to strike evidence under the evidentiary limitations set forth in 20 C.F.R. §725.414, and remanded the case to him for reconsideration of the admissibility of the treatment records relevant to claimant's smoking history and to render a specific finding as to the length of claimant's smoking history. *B.S.* [*Sexton*] *v. Golden Oak Mining Co.*, BRB No. 07-0927 BLA, slip op. at 8 (Sept. 30, 2008)(unpub.). The Board also vacated Judge Phalen's finding at 20 C.F.R. §718.204(b)(2)(i) and instructed him to determine whether the pulmonary function study dated September 9, 2004, is a valid and qualifying test, sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i). *Id*. at 6. Moreover, the Board vacated Judge Phalen's finding that the opinions of Drs. Baker and Dahhan, which were based, in part, on the September 9, 2004 pulmonary function study, were sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id*. The Board vacated, therefore, Judge Phalen's determination that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The Board further held that, because Judge Phalen's consideration of the evidence relevant to the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis was based, in part, on his weighing of the pulmonary function study evidence, he was required to reconsider his findings on the merits at 20 C.F.R. §§718.202(a)(4) and 718.204(c). *Id*. at 8-10.

On remand, the case was reassigned to Judge Merck (the administrative law judge), who found that the credible evidence established that claimant had a smoking history of one-half pack per day from 1984 to 1995, totaling a five-to-six pack-year smoking history. Decision and Order on Remand at 12. The administrative law judge also considered the five newly submitted pulmonary function studies under 20 C.F.R.

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respect to the denial of his 2000 claim until he filed the current subsequent claim on April 22, 2004. Director's Exhibit 3. The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005.

§718.204(b)(2)(i) and found that four of the studies were invalid or unreliable. *Id*. at 7. However, the administrative law judge determined that Dr. Alam's May 26, 2004 pulmonary function study was reliable and sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*. In addition, the administrative law judge found that the newly submitted medical opinion of Dr. Baker was sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 10. Based on his findings at 20 C.F.R. §718.204(b)(2)(i), (iv), the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id*. Upon considering all of the record evidence, the administrative law judge found that claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *Id*. at 20, 22. Accordingly, the administrative law judge awarded benefits. *Id*. at 22.

On appeal, employer challenges the administrative law judge's finding of a five-to-six pack-year smoking history. Employer also contends that the administrative law judge erred in relying on the May 26, 2004 pulmonary function study, and Dr. Baker's medical opinion, to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Consequently, employer further argues that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Regarding the administrative law judge's findings on the merits, employer maintains that the administrative law judge did not properly weigh the evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal. Employer has filed a reply, reiterating its contentions.

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.[2] 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).

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

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

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., Inc.*, 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). In this case, the miner's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment, total disability, or total disability due to pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least one of the requisite elements of entitlement in order to require the administrative law judge to review his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

As an initial matter, we reject employer's argument that, in addressing the evidence relevant to claimant's smoking history, the administrative law judge did not resolve the conflicts in the evidence and did not provide an adequate explanation of his findings as required by 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) and 30 U.S.C. §932(a).[3] Employer's contentions lack merit. A review of the Decision and Order on Remand – Awarding Benefits reveals that the administrative law judge followed the Board's instructions and provided a thorough explanation of how the relevant evidence supports his finding that claimant has a five-to-six pack-year smoking history. The administrative law judge noted that, with the exception of the February 5, 2004 treatment notes, the evidence indicated that claimant's use of cigarettes began in the mid-1980s and ended in the mid-1990s. Decision and Order on Remand at 12; *see* Director's Exhibit 25. Concluding that the February 5, 2004 treatment notes, which indicated that claimant smoked for approximately twelve years and currently smokes three-quarters of a pack per day, could not be reconciled with the remaining evidence of record, the administrative law judge permissibly gave it less weight for purposes of determining claimant's smoking history. Therefore, based on the claimant's testimony at the hearing, and a review of the smoking histories in the physicians' reports, the administrative law judge rationally determined that claimant had a five-to-six pack-year smoking history. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Accordingly, the administrative law judge's finding is affirmed.

In considering the newly submitted evidence relevant to total disability, the administrative law judge reviewed five pulmonary function studies dated May 24, 2004,

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[3] The Administrative Procedure Act 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. . . . ." 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).

May 25, 2004, May 26, 2004, July 29, 2004 and September 9, 2004. Decision and Order on Remand at 5-7; Director's Exhibits 11, 25, 27. The administrative law judge found that the studies dated May 24, 2004, May 25, 2004, July 29, 2004 and September 9, 2004, were invalid or unreliable. Decision and Order on Remand at 5-7; Director's Exhibits 11, 25, 27.

In contrast, the administrative law judge found that the May 26, 2004 pulmonary function study, which was performed in the course of Dr. Alam's treatment of claimant, was "reliable and acceptable under the regulations" and supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[4] Decision and Order at 7; Director's Exhibit 25. This study produced qualifying results,[5] both before and after bronchodilators were administered, but only included two flow-volume loops.[6] Director's Exhibit 25. The comments associated with the study stated, "spirometry data is [sic] acceptable and reproducible . . . very difficult test for [claimant] . . . good effort although [claimant] became dizzy, but wanted to continue testing." *Id*. In assessing the reliability of the study, the administrative law judge stated:

> Dr. Alam, who signed the report and reviewed the results, is Board-certified in Pulmonary Medicine and Critical Care Medicine, and is a diplomat of the American Board of Internal Medicine. Claimant put forth good effort during the test. Although only one flow[-]volume loop is included for [c]laimant's pre-bronchodilator test and one for his post-bronchodilator test, Dr. Alam determined that the spirometry data was "acceptable and

[4] The administrative law judge noted that the quality standards at 20 C.F.R. Part 718 are applicable to evidence developed "in connection with a claim for benefits." Decision and Order on Remand at 6, *quoting* 20 C.F.R. §718.101(b). The administrative law judge further noted that the Department of Labor has explained that, although the quality standards do not apply to evidence developed during treatment, "the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue." Decision and Order on Remand at 7, *quoting* 65 Fed. Reg. 79,928 (Dec. 20, 2000).

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

[6] Pursuant to 20 C.F.R. §718.103(b), "[a]ll pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings" of the flow-volume loops. 20 C.F.R. §718.103(b).

> reproducible." Therefore, I am persuaded that the test is reliable for purposes of establishing total disability.

Decision and Order on Remand at 7.

Employer contends that the administrative law judge was precluded from relying on the May 26, 2004 pulmonary function study to find total disability established at 20 C.F.R. §718.204(b)(2)(i), as the study did not conform to the quality standards set forth in 20 C.F.R. §718.103. Employer argues that, although the administrative law judge acknowledged that only one flow-volume loop was recorded for both the pre-bronchodilator study and the post-bronchodilator study, the administrative law judge did not address the fact that the study only recorded the results of one effort, not the three required under the regulations. In addition, employer contends that the administrative law judge did not consider Dr. Dahhan's opinion, that the May 26, 2004 pulmonary function study was invalid due to poor effort. Employer's contentions have merit, in part.

Although the quality standards for pulmonary function studies do not apply to tests that are performed in the course of treatment, an administrative law judge is required to determine whether this evidence is reliable. 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,928 (Dec. 20, 2000). When using the quality standards as guidelines in assessing reliability, "pulmonary function studies which fail to conform to [the quality standards set forth at 20 C.F.R. §718.103] may not be precluded from consideration on this basis alone." *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). In addition, the party challenging an objective study, because it does not conform to the quality standards, must demonstrate how this defect or omission renders the study unreliable. *See Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring). We hold that employer has not met its burden in this case. The administrative law judge acknowledged that the May 26, 2004 pulmonary function study contained only one tracing for each test and acted within his discretion as fact-finder in relying on Dr. Alam's assessment that the study is technically "acceptable and reproducible," based on his qualifications as a Board certified pulmonologist. *Orek*, 10 BLR at 1-54. Accordingly, the administrative law judge was not required to reject the results of the May 26, 2004 pulmonary function study on the ground that it was nonconforming. *DeFore*, 12 BLR at 1-29.

Employer correctly argues, however, that the administrative law judge erred in relying on the qualifying results of the May 26, 2004 pulmonary function study without considering Dr. Dahhan's opinion, that the "[s]pirometry from Dr. Alam's office showed invalid studies due to poor effort." Employer's Brief at 12. A reviewing doctor's opinion, that a ventilatory study is unreliable, as it is based on less than optimal effort, must be considered by the adjudicator, and a consulting physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for its rejection. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*,

7 BLR 1-771 (1985). Because the administrative law judge did not resolve the conflict between the opinions of Drs. Alam and Dahhan regarding the adequacy of claimant's effort on the May 26, 2004 pulmonary function study, we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i) and remand the case to the administrative law judge for reconsideration of this study. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Because the administrative law judge's finding regarding the validity of the May 26, 2004 pulmonary function study may affect the weight given to the conflicting physicians' opinions on total disability, we also vacate the administrative law judge's finding that the medical opinions of record established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). We must also vacate, therefore, the administrative law judge's determination that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).

In addition, we agree with employer's contention that the administrative law judge's reliance on Dr. Baker's opinion, that claimant has a totally disabling respiratory impairment, to find that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv), was flawed. As employer asserts, the administrative law judge's determination regarding the extent to which Dr. Baker based his opinion on the invalid September 9, 2004 pulmonary function study, as well as on his own studies, is inconsistent. Employer's Brief at 13. In our previous decision, we vacated Judge Phalen's finding, that the opinion of Dr. Baker was sufficient to establish total disability, because the validity of the September 9, 2004 study had yet to be properly resolved under 20 C.F.R. §718.204(b)(2)(i). *Sexton*, BRB No. 07-0927 BLA, slip op. at 6. On remand, the administrative law judge determined that the September 9, 2004 pulmonary function study was invalid, but concluded that Dr. Baker's opinion was "well-reasoned and well-documented." Decision and Order on Remand at 9. In so finding, the administrative law judge stated:

> Although Dr. Baker discussed the [pulmonary function test] results from September 9, 2004, I do not find that his opinion relied on those results. Instead, I find that he took into consideration his own [pulmonary function test] and [arterial blood gas] test results, his physical examination of [c]laimant including diminished breath sounds and dyspnea, and his own assessment of [c]laimant's effort during the testing.

Id.

As employer argues, the administrative law judge did not explain how Dr. Baker's reliance on his own invalid pulmonary function study, obtained on May 25, 2004, rather than the invalid September 9, 2004 pulmonary function study, supports his opinion

regarding disability, as the opinion is based on invalid studies in either case. The administrative law judge's crediting of Dr. Baker's opinion does not accord, therefore, with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that Dr. Baker's opinion is sufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge must reconsider, pursuant to 20 C.F.R. §718.204(b)(2)(iv), whether Dr. Baker's opinion diagnosing total disability is adequately reasoned and documented and must set forth his findings in detail, including the underlying rationale.

Finally, because we have vacated the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv), we also vacate the administrative law judge's determination, on the merits, that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c).[7] As suggested by employer, in considering whether claimant satisfied his burden under 20 C.F.R. §§718.202(a)(4) and 718.204(c) on remand, the administrative law judge must resolve the conflict in the medical opinion evidence regarding the extent to which smoking contributed to the miner's respiratory condition. In this regard, the administrative law judge should consider whether each physician had an accurate understanding of the miner's smoking and work histories. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

[7] The definition of legal pneumoconiosis includes "any . . . impairment . . . arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The phrase, "arising out of coal mine employment" denotes "any . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Thus, evidence pertaining to the existence of a respiratory or pulmonary impairment is relevant to the issue of whether claimant has established the existence of legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of 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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JUDITH S. BOGGS
Administrative Appeals Judge