

BRB No. 10-0378 BLA

MILLARD GILLIAM )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 STERLING MINING COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 ) DATE ISSUED: 03/25/2011  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (04-BLA-6315) of Administrative Law Judge Alice M. Craft rendered on a subsequent claim filed 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)) (the Act). This case is before the Board for the second time.<sup>1</sup> Initially, the administrative law judge credited claimant with 8.68 years of coal mine employment,<sup>2</sup> and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment, and that claimant, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). On the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge failed to validly explain her weighing of the new blood gas study and medical opinion evidence when she found total disability established. The Board therefore vacated the administrative law judge's findings that claimant established total disability and a change in an applicable condition of entitlement under Sections 718.204(b)(2), 725.309(d), and remanded the case for her to reconsider those issues. *M.G. [Gilliam] v. Sterling Mining Co.*, BRB No. 07-0651 BLA, slip op. at 9 (Apr. 28, 2008)(unpub.). In light of its disposition of the case, the Board declined to address employer's challenges to the administrative law judge's findings, on the merits, of pneumoconiosis and total disability. *Gilliam*, slip op. at 9 n.12.

On remand, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis,<sup>3</sup> in the form of a moderate impairment in oxygen transfer, and moderate loss of lung function, due, in part, to coal

---

<sup>1</sup> The Board set forth the complete procedural history of this case in its prior decision. *M.G. [Gilliam] v. Sterling Mining Co.*, BRB No. 07-0651 BLA (Apr. 28, 2008)(unpub.). Claimant filed this claim, his third, on May 7, 2003. Director's Exhibit 4. His previous claim was finally denied because claimant did not establish any element of entitlement.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

<sup>3</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

mine dust exposure under Section 718.202(a)(4). The administrative law judge further found that the new evidence established that claimant is totally disabled by a respiratory or pulmonary impairment under Section 718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Weighing all the evidence of record, on the merits, the administrative law judge found that claimant established legal pneumoconiosis and that he is totally disabled due to legal pneumoconiosis pursuant to Sections 718.202(a), 718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in her analysis of the new medical opinion evidence when she found total disability established under Section 718.204(b)(2)(iv). Employer argues further that the administrative law judge erred in her analysis of the medical opinion evidence when she found legal pneumoconiosis established, and found that claimant's total disability is due to legal pneumoconiosis, under Sections 718.202(a)(4) and 718.204(c). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief in this appeal. The Director correctly notes, however, that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for claims filed after January 1, 2005 that were pending on or after March 23, 2010, does not apply to this claim, because it was filed before January 1, 2005.

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'Keefe 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. If a miner files an application 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 was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis and that he was totally disabled. Director's Exhibits 1, 2. Consequently, claimant had to submit new evidence

establishing either element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

### **Change in an Applicable Condition of Entitlement**

Relevant to 20 C.F.R. §718.204(b)(2)(iv),<sup>4</sup> the administrative law judge considered three new medical opinions. Dr. Dahhan opined that claimant retains the pulmonary capacity to continue his previous coal mine employment or a job of comparable physical demand.<sup>5</sup> Employer's Exhibit 3. By contrast, Drs. Forehand and Rasmussen opined that, based on his abnormal exercise blood gas study results, claimant lacks the pulmonary capacity to perform his usual coal mine employment as an auger operator. Director's Exhibit 14; Claimant's Exhibit 2.

The administrative law judge found that each medical opinion was reasoned and documented. Specifically, the administrative law judge found that Dr. Forehand based his opinion on a qualifying<sup>6</sup> exercise blood gas study, which Dr. Forehand explained, indicated that claimant did not have the pulmonary capacity to continue his last coal mine job. The administrative law judge further found that Dr. Rasmussen based his opinion on an abnormal exercise blood gas study that was nearly qualifying,<sup>7</sup> and "explained his conclusion in terms of the exertional requirements of the [c]laimant's last job." Decision and Order on Remand at 27. Additionally, the administrative law judge found that Dr. Dahhan based his opinion on normal blood gas studies. Weighing the conflicting opinions, the administrative law judge found that Dr. Dahhan's opinion was outweighed by those of Drs. Forehand and Rasmussen, because the exercise blood gas study on which

---

<sup>4</sup> The administrative law judge found that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

<sup>5</sup> The administrative law judge found that claimant last worked in coal mine employment as an auger operator. Decision and Order on Remand at 4. Employer does not challenge this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>6</sup> A "qualifying" 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, Appendix C. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

<sup>7</sup> The administrative law judge found the results of Dr. Rasmussen's exercise blood gas study to be nearly qualifying because a PO2 value of 60 or less would have been qualifying under the Appendix C chart, and Dr. Rasmussen obtained a PO2 value of 61. Decision and Order on Remand at 25; Claimant's Exhibit 2.

Dr. Dahhan relied differed unexplainedly from the results obtained by Drs. Forehand and Rasmussen:

[Dr. Dahhan's] test results were anomalous, in that five months before, Dr. Forehand had obtained a qualifying test, and one month later, Dr. Rasmussen obtained a nearly qualifying test. The similarity between the results achieved by Drs. Forehand and Rasmussen, and the fact that Dr. Dahhan's very different results are unexplained, lead me to conclude that Dr. Dahhan's opinion is outweighed by those of Drs. Forehand and Rasmussen.

Decision and Order on Remand at 27-28. The administrative law judge therefore found that the new opinions of Drs. Forehand and Rasmussen established total disability.

Employer first asserts that the administrative law judge erred in finding Dr. Rasmussen's opinion to be well-reasoned and documented. Specifically, employer contends that, in finding that Dr. Rasmussen considered the exertional demands of claimant's work, the administrative law judge erred in failing to "consider whether the doctor's assessment was accurate." Employer's Brief at 11. We disagree. Dr. Rasmussen opined that claimant's abnormal exercise blood gas study indicated that he lacks the pulmonary capacity to perform his job as an auger operator, which Dr. Rasmussen stated involved "considerable heavy and some very heavy manual labor."<sup>8</sup> Claimant's Exhibit 2. Employer does not point to any evidence of record contradicting Dr. Rasmussen's characterization of claimant's usual coal mine employment. Because the administrative law judge's permissible credibility determination is supported by substantial evidence, it is affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

We additionally reject employer's assertion that the administrative law judge erred in finding Dr. Forehand's opinion to be reasoned. Contrary to employer's assertion, the administrative law judge accurately observed that Dr. Forehand's opinion is supported by the qualifying exercise blood gas study on which he relied. Decision and Order on Remand at 27; Director's Exhibits 14-15. Although employer contends that qualifying tests may not support a finding of disability where the demands of a claimant's last job were light, the record in this case reflects that claimant's last coal mine employment involved heavy manual labor. Claimant's Exhibit 2. We therefore affirm the

---

<sup>8</sup> Specifically, Dr. Rasmussen reported that claimant's job as an auger operator involved "heavy lifting of auger parts. He lifted rock and broke rock. He shoveled. He loaded holes with shot carrying 50# bags 75-80 feet sometimes uphill. Thus, he did considerable heavy and some very heavy manual labor." Claimant's Exhibit 2 at 2.

administrative law judge's permissible credibility determination regarding Dr. Forehand's opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

Employer argues that the administrative law judge erred in finding Dr. Dahhan's opinion outweighed by those of Drs. Forehand and Rasmussen. Specifically, employer asserts that the administrative law judge erred in discounting Dr. Dahhan's opinion on the ground that his exercise blood gas study was anomalous. We disagree. The administrative law judge explained that the exercise blood gas studies taken shortly before and after Dr. Dahhan's study demonstrated a significant abnormality in claimant's blood oxygenation, and there was no explanation for Dr. Dahhan's "starkly different" test results. Decision and Order on Remand at 25, 27-28. Substantial evidence supports these findings. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Contrary to employer's assertion, therefore, the administrative law judge acted within her discretion in finding Dr. Dahhan's opinion outweighed by those of Drs. Forehand and Rasmussen. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). We therefore affirm the administrative law judge's finding of total disability at Section 718.204(b)(2)(iv).

Weighing like and unlike evidence together, the administrative law judge determined that claimant's non-qualifying pulmonary function studies did not contradict his abnormal exercise blood gas studies, because the two types of tests measure different aspects of lung function. The administrative law judge therefore found that the preponderance of the new blood gas study and medical opinion evidence established total disability. *Id.* at 28. As substantial evidence supports the administrative law judge's finding under Section 718.204(b)(2), we affirm her finding of total disability, and of a change in an applicable condition of entitlement under Section 725.309(d).<sup>9</sup>

## **The Merits of Entitlement**

### **Pneumoconiosis**

---

<sup>9</sup> We also affirm the administrative law judge's finding, on the merits, that claimant established the existence of a totally disabling pulmonary or respiratory impairment under Section 718.204(b)(2). Employer does not challenge the administrative law judge's determination that the new evidence regarding total disability was entitled to greater weight than the previously submitted evidence. Decision and Order on Remand at 25, 28; *see Skrack*, 6 BLR at 1-711.

Relevant to Section 718.202(a)(4),<sup>10</sup> the administrative law judge considered the medical opinions of Drs. Forehand, Rasmussen, and Dahhan, in conjunction with the previously submitted opinions.<sup>11</sup> Dr. Forehand diagnosed “coal workers’ pneumoconiosis” based on claimant’s history, a positive x-ray reading, physical examination, and blood gas study. Director’s Exhibit 14. Dr. Rasmussen diagnosed claimant with a moderate impairment in oxygen transfer based on his exercise blood gas study, due to both smoking and coal mine dust exposure. Claimant’s Exhibit 2. In contrast, Dr. Dahhan opined that claimant has no objective evidence of any pulmonary impairment related to, or aggravated by, coal mine dust inhalation. Employer’s Exhibit 3.

The administrative law judge found that Dr. Forehand did not distinguish between clinical and legal pneumoconiosis, and that his opinion as to the cause of claimant’s impairment was undermined by his reliance on an understated smoking history of ten pack-years, “half what I have found.”<sup>12</sup> Decision and Order on Remand at 25. Finding that Dr. Forehand’s diagnosis of pneumoconiosis was nevertheless “supported by the evidence available to him,” the administrative law judge determined that Dr. Forehand’s opinion was “documented and reasoned, and . . . entitled to some weight. . . .” Decision and Order on Remand at 24. The administrative law judge further found that Dr. Rasmussen’s opinion was documented and reasoned, and gave it “probative weight.” *Id.* at 25. Although Dr. Rasmussen considered a smoking history of only twelve to thirteen pack-years, the administrative law judge found that “the difference is not so great as to decrease the reliability of his opinion, as it was still a significant history of smoking which Dr. Rasmussen factored in his opinion.” *Id.* The administrative law judge found that Dr. Dahhan’s opinion was well reasoned and documented and entitled to probative weight, because he considered a ten-year coal mine employment history and a twenty pack-year smoking history, and he based his opinion on the evidence available to him. *Id.* at 24.

---

<sup>10</sup> The administrative law judge found that the chest x-ray evidence did not establish pneumoconiosis under 20 C.F.R. §718.202(a)(1), and that there was no biopsy or autopsy evidence, or any evidence of complicated pneumoconiosis, under 20 C.F.R. §718.202(a)(2),(3).

<sup>11</sup> The administrative law judge found that the new medical opinions merited greater weight than those previously submitted, because they better represented claimant’s current condition. Decision and Order on Remand at 25. Employer does not challenge that finding. *See Skrack*, 6 BLR at 1-711.

<sup>12</sup> The administrative law judge found that the record established a twenty to twenty-five pack-year smoking history. Decision and Order on Remand at 4.

Weighing the conflicting opinions, the administrative law judge found that Dr. Dahhan's opinion was entitled to less weight because he relied on an anomalous exercise blood gas study to conclude that claimant has no impairment. In contrast, the administrative law judge found that the opinions of Drs. Forehand and Rasmussen were "in better accord with the overall weight of the medical evidence of record." Decision and Order on Remand at 25. Finding Dr. Rasmussen's opinion to be the best explained, the administrative law judge found that Dr. Rasmussen's opinion, as supported by Dr. Forehand's opinion, established the existence of legal pneumoconiosis under Section 718.202(a)(4).

Employer asserts that the administrative law judge did not adequately explain her credibility determinations pursuant to Section 718.202(a)(4). We agree. As employer states, it is unclear how the administrative law judge found Dr. Forehand's opinion supportive of legal pneumoconiosis, given her finding that Dr. Forehand did not distinguish between clinical and legal pneumoconiosis and that his diagnosis of "coal workers' pneumoconiosis" was based, in part, on a positive x-ray. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Further, the administrative law judge did not explain her finding that the difference between the ten pack-year smoking history on which Dr. Forehand relied, and the twenty to twenty-five pack-year history the administrative law judge found established, did not undercut Dr. Forehand's opinion because Dr. Forehand still relied on a significant smoking history.<sup>13</sup> *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

With respect to Dr. Rasmussen, the administrative law judge did not explain the specific basis for her finding that Dr. Rasmussen's reliance on a smoking history of twelve to thirteen years did not undermine the reliability of his opinion regarding the etiology of claimant's impairment, because Dr. Rasmussen's smoking history was significant, notwithstanding the administrative law judge's findings of twenty to twenty-five years of smoking and 8.68 years of coal mine employment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Further, employer correctly points out that the administrative law judge did not specify the basis for her finding that Dr. Rasmussen's opinion was the "best explained." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz*, 12 BLR at 1-165; Decision and Order on Remand at 25; Employer's Brief at 13-14.

---

<sup>13</sup> The record reflects that Dr. Forehand did not attribute any portion of claimant's impairment to smoking. Director's Exhibit 15.



In light of the foregoing, we vacate the administrative law judge's finding at Section 718.202(a)(4), and remand the case for further consideration of the opinions of Drs. Forehand and Rasmussen. On remand, the administrative law judge must address whether Dr. Forehand diagnosed legal pneumoconiosis, and again consider the probative value of the opinions of Drs. Forehand and Rasmussen, in light of the physicians' understanding of claimant's smoking history. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

### **Total Disability due to Pneumoconiosis**

Employer challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Because we have vacated the administrative law judge's finding of legal pneumoconiosis, we additionally vacate her finding at Section 718.204(c). The administrative law judge must again consider whether claimant established that he is totally disabled due to pneumoconiosis, if reached on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge