BRB No. 11-0455 BLA

ALLEN R. STURGILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
F. TAYLOR MINING CORPORATION	)	DATE ISSUED: 03/23/2012
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Reconsideration and Decision and Order on Reconsideration Granting Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Order Granting Reconsideration and Decision and Order on Reconsideration Granting Benefits (2008-BLA-05244) of Administrative Law Judge Theresa C. Timlin, with respect to a claim filed on October 5, 2006, 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). In her initial Decision and Order, issued on January 6, 2011, the administrative law judge credited claimant with at least eighteen years of coal mine employment, based on the stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, the administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), and, therefore, did not invoke the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Further, the administrative law judge determined that claimant did not establish that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant filed a motion for reconsideration on January 13, 2011, asserting that the administrative law judge improperly weighed the evidence as to total disability. The administrative law judge issued a Decision and Order on Reconsideration Granting Benefits on March 4, 2011, in which she reconsidered the evidence concerning total disability at 20 C.F.R. §718.204(b)(2). The administrative law judge determined that the medical opinion evidence was sufficient to establish this element of entitlement and further found that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge did not properly weigh the medical opinion evidence concerning total disability due to pneumoconiosis. In addition, employer asserts that the administrative law judge impermissibly placed the burden on it to disprove claimant's entitlement to benefits. 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.[2]

[1] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's crediting of claimant with eighteen years of underground coal mine employment and her finding that

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.[3] 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).

I. The Administrative Law Judge's Findings on Reconsideration

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge reiterated her finding that the pulmonary functions studies dated January 31, 2007, May 10, 2007, August 24, 2007, June 17, 2008, and February 10, 2009, were invalid and entitled to no weight. Decision and Order on Reconsideration at 3; Director's Exhibit 14; Employer's Exhibits 1, 3. Regarding the July 19, 2007 pulmonary function study, which had not been invalidated, the administrative law judge stated that she originally determined that it was not probative because "the data indicated that none of the eight trials were acceptable or reproducible." Decision and Order on Reconsideration at 3; Claimant's Exhibit 3. The administrative law judge noted that, although 20 C.F.R. §718.204(b)(2)(i) permits consideration of excessively variable studies, it requires the submission of three acceptable curves. Decision and Order on Reconsideration at 4. The administrative law judge determined that the reviewing physician did not explain the deviation from the quality standards, but only signed and dated the results. *Id*. Consequently, the administrative law judge again found that the July 19, 2007 study was not entitled to "probative weight." *Id*. She determined, therefore, that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge acknowledged claimant's argument, on reconsideration, that the non-qualifying blood gas studies dated August 24, 2007 and June 17, 2008, should be invalidated or given less weight, as he was on supplemental oxygen when the studies were performed.[4] Decision

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claimant established clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4); 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 6. 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).

[4] 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

and Order on Reconsideration at 4; Employer's Exhibits 1, 3. The administrative law judge found that "no physician has explained the significance of performing a blood gas study while on supplemental oxygen, rather than room air" and that the Board, in addressing this issue, has held that an administrative law judge improperly substituted her opinion for that of a medical expert in "hypothesizing as to the potential effect of oxygen on claimant's arterial blood gas study results." *Id*. at 4-5, *quoting J.A.* [*Allison*] *v. Elk Run Coal Co.*, BRB No. 07-0838 BLA (July 24, 2008)(unpub.). The administrative law judge stated, "it is clear that I may not speculate on whether [c]laimant's arterial blood gas study would meet disability criteria if he performed the tests on room air rather than while being administered oxygen." Decision and Order on Reconsideration at 5. The administrative law judge subsequently determined that these more recent studies outweighed the study performed on January 31, 2007, which produced qualifying values after exercise. *Id*.; Director's Exhibit 14. The administrative law judge concluded, therefore, that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge reevaluated the opinions of Drs. Agarwal, Dahhan, and Alam.[5] Decision and Order on Reconsideration at 5. The administrative law judge noted that the United States Court of Appeals for the Sixth Circuit has held that a physician's opinion may not be rejected on the ground that it is based on a non-qualifying pulmonary function study, because "the regulations explicitly provide [that] a doctor can make a reasoned medical judgment that a miner is totally disabled even 'where pulmonary function tests and/or blood-gas studies are medically contraindicated.' 20 C.F.R. §718.204(c)(4)." *Id*., *quoting Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). Accordingly, the administrative law judge determined that the opinions of Drs. Agarwal and Dahhan were entitled to more weight than she had accorded them in her original Decision and Order. Decision and Order on Reconsideration at 5.

In addition, the administrative law judge reevaluated Dr. Alam's treatment notes, in which he stated that claimant "was not a good candidate for multiple pulmonary function tests due to his high risk of syncope [fainting]." Decision and Order on Reconsideration at 6; Claimant's Exhibit 4. The administrative law judge found that,

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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).

[5] The administrative law judge did not consider the opinions of Drs. Myers, Broudy, and Baker, as she found that they did not address the degree of claimant's impairment, because they did not obtain a valid pulmonary function study. Decision and Order on Reconsideration at 5.

although Dr. Alam's note did not rehabilitate claimant's invalid pulmonary function studies, his references to claimant's need for home oxygen and his episodes of syncope supported a finding of total disability. *Id*. Because "the pulmonary function and arterial blood gas studies neither proved nor disproved total disability," the administrative law judge determined that the medical opinion evidence was the most probative and that it was sufficient to establish that claimant was totally disabled under 20 C.F.R. §718.204(b)(2). *Id*.

Consequently, the administrative law judge found that claimant invoked the presumption at amended Section 411(c)(4). *Id*. The administrative law judge further determined that employer failed to rebut the presumption, based on the "undisturbed" findings in her original Decision and Order that claimant suffers from clinical pneumoconiosis and that his pneumoconiosis arose out of his coal mine employment. *Id*. at 6. The administrative law judge then concluded that, because claimant was entitled to the amended Section 411(c)(4) presumption, he established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 7.

II. Arguments on Appeal

Regarding the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(iv), employer asserts that the administrative law judge did not provide an adequate rationale for crediting the opinions of Drs. Agarwal or Dahhan and should have discredited their opinions for failing to consider the exertional requirements of claimant's last coal mine employment. Employer maintains that the administrative law judge erred in determining that, although the pulmonary function studies were invalid, the consistency of the results supported the diagnosis of a disabling impairment. In addition, employer contends that the administrative law judge erred in finding that Dr. Alam's treatment records supported a finding of a totally disabling impairment because there was no evidence to support the physician's statement that claimant suffers from syncope with respiratory exertion.

With respect to the administrative law judge's determination that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), employer argues that the administrative law judge "appears to have ignored Dr. Broudy's report" and "did not provide a sufficient rationale for resolving the conflict posed by . . . the findings of Drs. Broudy and Dahhan." Employer's Brief at 16-17. Employer also contends that, contrary to the administrative law judge's finding, Dr. Agarwal's report is unreasoned and insufficient to meet claimant's burden of proof. Further, employer maintains that the administrative law judge improperly placed the burden of proof on it to disprove claimant's entitlement to benefits.

We reject employer's contention that the administrative law judge erred in determining that the pulmonary function study evidence supported a finding of total disability, as the administrative law judge explicitly found that the pulmonary function studies "neither prove nor disprove total disability." Decision and Order on Reconsideration at 6. In addition, contrary to employer's allegation, the administrative law judge did not ignore Dr. Broudy's report. The administrative law judge rationally determined that Dr. Broudy's report was not relevant to 20 C.F.R. §718.204(b), (c), because the physician stated that he could not provide an opinion as to the degree of claimant's impairment, due to claimant's inability to perform a valid pulmonary function study. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); Decision and Order on Reconsideration at 5; Employer's Exhibit 3. Regarding the administrative law judge's consideration of Dr. Alam's treatment notes, she acted within her discretion as fact-finder in determining that Dr. Alam's references to claimant's use of supplemental oxygen and his risk of syncope "weigh[ed] in favor of total disability."[6] Decision and Order on Reconsideration at 6; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553. Additionally, the administrative law judge did not err in shifting the burden of proof to employer, once she found that claimant invoked the presumption at amended Section 411(c)(4), as this is required by statute.[7] 30 U.S.C. §921(c)(4).

[6] A review of the record indicates that, contrary to employer's statement, claimant was prescribed home oxygen for continuous use, not solely for the treatment of his sleep apnea. Claimant's Exhibit 4. In addition, Dr. Alam did not state that claimant had experienced episodes of syncope during pulmonary function testing. Rather, in a note describing claimant's office visit on August 5, 2008, Dr. Alam indicated that he agreed that claimant "is not a good candidate to do multiple [pulmonary function tests] because [he] has [a] significantly high *risk* for syncope." *Id*. (emphasis added). Dr. Alam also noted that, during this office visit, claimant complained of cough, congestion and "near syncope" and reported that he had experienced significant shortness of breath after pulmonary function testing. *Id*.

[7] Notwithstanding the administrative law judge's appropriate shifting of the burden of proof to employer, when the administrative law judge asserted that employer may rebut the presumption by showing that claimant's *pneumoconiosis* did not arise out of coal mine employment, she misidentified the second method of rebuttal referenced in amended Section 411(c)(4). Decision and Order on Reconsideration at 6. Amended Section 411(c)(4) provides that the presumption can be rebutted by proving that claimant's *total disability* did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

However, employer asserts correctly that the administrative law judge did not provide an adequate rationale for her decision to credit Dr. Dahhan's purported diagnosis of a totally disabling pulmonary impairment. On reconsideration, the administrative law judge determined that Dr. Dahhan's opinion was supportive of a finding of total disability, without acknowledging that Dr. Dahhan expressed his conclusion in equivocal language or explaining her decision that it constituted substantial evidence of total disability. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Morgan v. Whitaker Coal Co.*, BRB No. 98-0908 BLA (July 15, 1999)(unpub.); Decision and Order on Reconsideration at 5. In addition, although the administrative law judge cited the Sixth Circuit's prohibition on rejecting a diagnosis of total disability that is based upon nonqualifying studies, she did not identify the basis for her determination that Dr. Dahhan's opinion regarding the issue of total disability was documented and reasoned. *See* Decision and Order on Reconsideration at Thus, the administrative law judge did not comply with the requirements of 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), 30 U.S.C. §932(a).[8] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer is also correct in maintaining that, when crediting Dr. Agarwal's opinion at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge did not resolve the apparent inconsistency between the physician's reliance on the qualifying post-exercise blood gas study obtained on January 31, 2007, and her decision to give more weight to the recent studies, which were non-qualifying. *See Director, OWCP v. Rowe*, 710 F.2d 241, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); Decision and Order on Reconsideration at 5. Although the administrative law judge noted correctly that it was inappropriate to discredit a diagnosis of a totally disabling impairment solely because the physician relied on a nonqualifying objective study, she did not set forth the rationale underlying her determination that Dr. Agarwal's diagnosis of a totally disabling impairment was adequately documented and reasoned, as is required by the APA. *See Wojtowicz*, 8 BLR at 1-165. Therefore, we vacate the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2), and remand this case for reconsideration of this issue. Because we have vacated the administrative law judge's finding that claimant is totally disabled, we also vacate her finding that claimant invoked the presumption at amended Section 411(c)(4).

[8] 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).

On remand, the administrative law judge must initially reconsider whether claimant has established total disability under 20 C.F.R. §718.204(b)(2)(iv). When weighing the relevant medical opinions, the administrative law judge must determine whether Drs. Dahhan and Agarwal diagnosed a totally disabling respiratory impairment, or provided an assessment of claimant's respiratory impairment which, when compared with the exertional requirements of claimant's usual coal mine work, supports a finding of total disability. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-123-24. If so, the administrative law judge should then determine whether the medical opinions of Drs. Dahhan and Agarwal are reasoned and documented, in light of the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

If the administrative law judge determines that total disability has been established under 20 C.F.R. §718.204(b)(2)(iv), she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence and determine whether claimant has satisfied his burden of proof. *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). If the administrative law judge determines that claimant has failed to establish total disability under 20 C.F.R. §718.204(b)(2), an award of benefits is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(en banc).

In the event that the administrative law judge finds that claimant has established total disability, claimant will have invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[9] The administrative law judge must then consider whether employer has rebutted the presumption by proving that claimant's total disability did not arise out of, or in connection with, employment in a coal mine.[10] 30

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant satisfied the other prerequisites for invocation of amended Section 411(c)(4), as his claim was filed after January 1, 2005, and he had at least fifteen years of underground coal mine employment. *Skrack*, 6 BLR at 1-711; Decision and Order on Reconsideration at 6.

[10] The administrative law judge properly determined that, in light of her finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), which we have affirmed as unchallenged on appeal, employer cannot rebut the presumption by establishing that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order on Reconsideration at 6.

U.S.C. §921(c)(4). The administrative law judge must set forth her findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Order Granting Reconsideration and Decision and Order on Reconsideration Granting Benefits is affirmed in part and vacated in part, and the 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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REGINA C. McGRANERY
Administrative Appeals Judge