BRB No. 13-0437 BLA

CHRIS NEWSOME	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXCEL MINING, LIMITED LIABILITY CORPORATION	)	DATE ISSUED: 03/14/2014
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-06281) of Administrative Law Judge Thomas M. Burke with respect to a claim filed on August 20, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for a second time. In its previous decision, the Board affirmed, as unchallenged, the findings of Administrative Law Judge Richard A. Morgan that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3) or total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Newsome v. Excel Mining, LLC*, BRB No. 09-0418 BLA, slip op. at 2 n.1 (Mar. 18, 2010). At 20 C.F.R. §718.204(b)(2)(iv), the Board affirmed the

administrative law judge's discrediting of the opinions of Drs. Ranavaya, Broudy and Dahhan, as they did not consider the exertional requirements of claimant's previous coal mine employment. *Id*. at 4-5. However, the Board granted the request by claimant and the Director, Office of Workers' Compensation Programs (the Director), to remand the case to the district director for a supplemental opinion by Dr. Ranavaya, who had examined claimant at the request of the Department of Labor. *Id*. at 6-7.

After the case was remanded to the district director, Dr. Ranavaya submitted a supplemental opinion on December 7, 2010. Director's Exhibit 55. The district director issued a Proposed Order on January 24, 2011, in which he determined that claimant established entitlement to benefits. Director's Exhibit 56. At employer's request, the case was transferred to the Office of Administrative Law Judges and then assigned to Administrative Law Judge Thomas M. Burke (the administrative law judge) for a hearing. Director's Exhibit 60.

In his Decision and Order, the administrative law judge found, based on employer's stipulations, that claimant had thirty years of coal mine employment and that the x-ray evidence was sufficient to establish the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge further determined, however, that claimant did not prove that he is totally disabled under 20 C.F.R. §718.204(b)(2)(i)-(iii). Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave little weight to Dr. Ranavaya's opinion diagnosing a totally disabling impairment, as not well-documented and based on fewer objective tests than the contrary opinions of Drs. Broudy and Dahhan. The administrative law judge concluded, therefore, that claimant did not establish total disability and denied benefits accordingly.

On appeal, claimant argues that Dr. Ranavaya's opinion is sufficient to establish total disability. Claimant also asserts that the opinions of Drs. Broudy and Dahhan are entitled to less weight on this issue, based on the Board's previous holdings, and their failure to evaluate claimant's respiratory impairment in light of the exertional requirements of his previous coal mine work. Therefore, claimant contends that he invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1]

[1] 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

Employer responds, urging affirmance of the denial of benefits. The Director has not filed a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and 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).

In his supplemental report, dated December 3, 2010, Dr. Ranavaya indicated that the chronic bronchitis and chronic obstructive pulmonary disease that he diagnosed constituted legal pneumoconiosis, as these conditions were related to claimant's twenty-nine year history of underground coal mining. Director's Exhibit 55. Dr. Ranavaya also explained that claimant's previous work as an electrician and maintenance person in the coal mines required "a medium physical demand level of exertion," and that the moderate respiratory impairment that he observed on the pulmonary function studies that he obtained on November 13, 2007, would prevent claimant from performing this work. *Id*. Dr. Ranavaya further stated that he had based his initial diagnosis of a totally disabling respiratory impairment on a review of the exertional requirements of claimant's usual coal mine work, but he did not report this on the medical examination form. *Id*.

The administrative law judge initially noted that the Board affirmed Judge Morgan's finding that Dr. Ranavaya's November 13, 2007 report was entitled to less weight because Dr. Ranavaya did not consider the exertional requirements of claimant's previous coal mine employment. Decision and Order on Remand at 10. Therefore, the administrative law judge focused on Dr. Ranavaya's December 3, 2010 supplemental report and his November 28, 2012 deposition testimony. *Id*. The administrative law judge found that Dr. Ranavaya's opinion was not supported by the underlying objective evidence, as the November 13, 2007 pulmonary function studies on which he relied were nonqualifying, and that Dr. Ranavaya did not explain "why he considered those nonqualifying [pulmonary function studies] to show that [c]laimant lacked the pulmonary

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. 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).

capacity to perform his last coal mine employment."[4] *Id*. at 11. The administrative law judge also gave less weight to Dr. Ranavaya's opinion because he relied exclusively on the information that he obtained in 2007, while Drs. Broudy and Dahhan relied on more recent evidence to determine that claimant is not totally disabled. *Id*.

Claimant argues that, contrary to the administrative law judge's finding, Dr. Ranavaya's opinion constituted substantial evidence of total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant maintains that Dr. Ranavaya relied on the exertional requirements of claimant's previous coal mine employment to conclude that his moderate respiratory impairment would prevent him from performing such work. Claimant notes that Judge Morgan's decision to discredit the opinions of Drs. Broudy and Dahhan, that claimant has a mild respiratory impairment that would not prevent him from performing his previous coal mine employment, was affirmed by the Board. Claimant further contends that, because Dr. Broudy did not submit a new report subsequent to Judge Morgan's decision and Dr. Dahhan did not discuss the exertional requirements of claimant's usual coal mine work in his supplemental opinion, their opinions are entitled to little weight on the issue of total disability. In addition, claimant alleges that, as Dr. Ranavaya's opinion is sufficient to establish total disability, the administrative law judge should have found that he invoked the amended Section 411(c)(4) presumption and considered whether employer rebutted it.

Claimant's arguments have merit. In making his findings concerning total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge treated the qualifying nature, and recency, of the objective studies as the determining factors as to whether the physicians' diagnoses were documented and reasoned. However, as claimant has noted, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the regulations explicitly provide that a physician may base a reasoned medical judgment that a miner is totally disabled on nonqualifying test results, and that a physician should demonstrate knowledge of the exertional requirements of a miner's usual coal mine employment in assessing whether a respiratory impairment precludes the performance of a miner's usual duties. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996). Thus, the fact that the November 13, 2007 pulmonary function study obtained by Dr. Ranavaya was nonqualifying did not, by itself, provide a basis for discrediting Dr. Ranavaya's opinion.

[4] A qualifying pulmonary function study yields results that are equal to, or less than, the values set out in the table at 20 C.F.R. Part 718, Appendix B. A nonqualifying study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

In addition, contrary to the administrative law judge's finding, Dr. Ranavaya determined that claimant's previous work as an electrician and maintenance worker required "a medium physical demand level of exertion" and explained that:

> Based on the moderate pulmonary impairment as documented by the [v]entilatory studies of November 13, 2007, I conclude that this claimant will not be able to perform any job at the physical demand level of medium exertion including his last coal mining job as a[n] electrician and maintenance man on a sustained basis on at least an 8 hour per day shift.

Director's Exhibit 55. Furthermore, Dr. Ranavaya testified at his November 28, 2012 deposition that, based on the information that he received from claimant, and the Dictionary of Occupational Titles, he found that claimant's previous coal mine employment "at least required a physical exertion demand level of maybe into heavy." Claimant's Exhibit 1 at 13. Dr. Ranavaya concluded:

> I have no problem accepting the notion that [claimant] in his last coal mining employment was required at least to have a sustained medium physical demand level of exertion for which he lacks the pulmonary capacity to engage in that kind of a physical demand level of exertion on a sustained basis.

Id. at 20.

Claimant is also correct in maintaining that the administrative law judge did not adequately explain, in accordance with the Administrative Procedure Act (APA),[5] his decision to give more weight to the opinions of Drs. Broudy and Dahhan. The administrative law judge noted that both physicians diagnosed a mild respiratory impairment, but he did not address the significance of the fact that, in finding that claimant could perform his previous job duties, these physicians did not discuss the exertional requirements of claimant's previous coal mine employment.[6] *Wojtowicz v.*

[5] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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 30 U.S.C. §932(a).

[6] In his February 12, 2008 opinion, Dr. Broudy diagnosed a mild respiratory impairment and indicated that "the impairment is mild and certainly not disabling." Director's Exhibit 34. Dr. Dahhan, in his supplemental October 14, 2011 opinion, noted a mild reduction in claimant's FVC and FEV1 values, but found that claimant "retains the

Duquesne Light Co., 12 BLR 1-162 (1989); *see Newsome*, slip op. at 5; Director's Exhibit 39. Because the administrative law judge did not apply the appropriate standards when considering the medical opinions of Drs. Ranavaya, Broudy and Dahhan, and did not adequately explain his findings, we must vacate the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[7]

On remand, the administrative law judge must reconsider the opinions of Drs. Ranavaya, Broudy and Dahhan pursuant to 20 C.F.R. §718.204(b)(2)(iv). In so doing, the administrative law judge must identify claimant's usual coal mine work and determine the exertional requirements of that work.[8] He must then assess whether, in light of these exertional requirements, Dr. Ranavaya rendered a reasoned and documented diagnosis of total disability. The administrative law judge must also reconsider the opinions of Drs. Broudy and Dahhan to determine whether they sufficiently explained their determinations that claimant did not have a totally disabling respiratory impairment, given the exertional requirements of his previous coal mine work.

When weighing the medical opinion evidence on remand, the administrative law judge cannot discredit a physician's diagnosis of total disability solely because he relied

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physiological capacity to return to his previous coal mining work or a job of comparable physical demands." Employer's Exhibit 1. Neither of Dr. Dahhan's reports contains a description of the physical requirements of claimant's usual coal mine work. *Id*.

[7] However, we note that, contrary to claimant's assertions, the administrative law judge is not bound by Judge Morgan's prior credibility determinations, or the Board's affirmance of them. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997); *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

[8] On Form CM-911a, entitled "Coal Mine Employment History," claimant identified his usual coal mine jobs as "electrician" and "maintenance." Director's Exhibit 3. On Form CM-913, entitled "Description of Coal Mine Work and Other Employment," claimant indicated that as an electrician and repairman, he "worked on track motors and . . . blew dust out of starter boxes and around belt heads, also power boxes." Director's Exhibit 4. Claimant also stated that he worked on equipment, calibrated sensors on belt lines and "was on production shift where they run coal for 29 years." *Id*. Further claimant provided that his employment required him to sit for an hour a day, stand for seven hours a day, load and unload tools twice a day, lift thirty to sixty-five pounds a few times during the day, and carry forty pounds seventy feet once a day. *Id*.

on a nonqualifying objective study; nor can he summarily conclude that the nonqualifying or inconclusive objective studies outweigh the diagnoses of total disability. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *see also Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984)(The determination of the significance of a test is a medical assessment for the doctor, rather than the administrative law judge). Test results that exceed the applicable table values may document a diagnosis of a totally disabling respiratory or pulmonary impairment if the physician provides a reasoned explanation of his or her diagnosis. *See Marsiglio*, 8 BLR at 1-192. The administrative law judge must also address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *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). Finally, the administrative law judge is required to set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

In the event that the administrative law judge finds that total disability has been established under 20 C.F.R. §718.204(b)(2)(iv), he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *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 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

If the administrative law judge finds total disability established, he must consider whether claimant has invoked the presumption at amended Section 411(c)(4) by proving that he has at least fifteen years of underground coal mine employment or employment in conditions substantially similar to those underground.[9] If the administrative law judge finds that the presumption is invoked, he must then consider whether employer has rebutted the presumption.

[9] The administrative law judge accepted employer's stipulation that claimant had thirty years of coal mine employment, and noted claimant's testimony that all of his work was underground, but the administrative law judge did not render a finding as to whether claimant's coal mine employment was qualifying under the terms of amended Section 411(c)(4). *See* Decision and Order on Remand at 2.

Accordingly, the administrative law judge's Decision and Order Denying 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge