**U.S. Department of Labor**

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

BRB No. 18-0223 BLA

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| JESSE D. TAYLOR | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| THE MARION COUNTY COAL COMPANY/MURRAY ENERGY CORPORATION | ) | DATE ISSUED: 03/15/2019 |
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| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

David K. Liberati (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-BLA-05787) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 7, 2014.[1]

Based on the parties' stipulation, the administrative law judge credited claimant with thirty-three years of underground coal mine employment.[2] The administrative law judge found that new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c) and did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge further found that new evidence establishes the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) which establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309, but the evidence does not establish that claimant has legal pneumoconiosis.[4] Because claimant did not establish total disability, the administrative law judge denied benefits.

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[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. Administrative Law Judge Richard A. Morgan denied claimant's most recent prior claim, filed on February 20, 2001, on September 20, 2004, finding that claimant established pneumoconiosis in both its clinical and legal forms, but did not establish he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 3 (unpaginated exhibit) (2004 Decision and Order at 23, 25).

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 12; Hearing Transcript at 13. 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); Director's Exhibit 9.

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

[4] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions

On appeal, claimant argues that the administrative law judge erred in finding that the new medical opinions do not establish total disability and, therefore, erred in finding that he did not invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where 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 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability.[5] 20 C.F.R. §725.309(c)(3), (4).

**Total Disability**

A miner is considered totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work

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characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] Because the pneumoconiosis element was decided in claimant's favor in his last claim, Director's Exhibit 3, it was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(c)(3). Therefore, we do not address the administrative law judge's discussion of whether new evidence established pneumoconiosis as a change in an applicable condition of entitlement. Decision and Order at 21-29.

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 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 considered two new pulmonary function studies administered on August 11, 2014 and February 25, 2015, and two new blood gas studies administered on the same dates. Director's Exhibits 27, 31. Because all the studies were non-qualifying,[6] he found they do not establish total disability at 20 C.F.R. §718.204(b)(2)(i),(ii). Decision and Order at 31. The administrative law judge further found there is no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* We affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that claimant's usual coal mine work as a longwall mechanic required heavy labor, Decision and Order at 5, 31, and considered the medical opinions of Drs. Rasmussen, Zaldivar, and Forehand. Director's Exhibits 14, 27, 30. Dr. Rasmussen examined claimant on behalf of the Department of Labor (DOL) on August 11, 2014 and diagnosed a "moderate impairment in oxygen transfer" on the exercise blood gas study and opined that as a result, claimant lacks "the pulmonary capacity to perform his regular coal mine job."[7] Director's Exhibit 14 at 3.

Dr. Zaldivar examined claimant on behalf of employer on February 25, 2015 and reviewed claimant's hospitalization and treatment records and Dr. Rasmussen's report, and prepared a report dated March 16, 2015. Director's Exhibit 27. Dr. Zaldivar noted that the resting blood gas study he administered was "normal," and that he did not administer an exercise study because claimant is taking blood thinners. Director's Exhibit 27 at 12, 16. He opined that the exercise hypoxemia Dr. Rasmussen detected is due to damage to

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

[7] Dr. Rasmussen noted his understanding that claimant's last job required heavy and sometimes very heavy manual labor. Director's Exhibit 14 at 2.

claimant's lungs caused by pulmonary emboli for which claimant was previously treated.[8] *Id*. at 12. Noting that claimant's "hypoxemia may clear . . . as the blood clots heal," Dr. Zaldivar opined that "[f]rom the pulmonary standpoint, [claimant] may not be impaired at this time, but a stress test would be needed" to determine whether he still has hypoxemia with exercise. *Id*. Dr. Zaldivar therefore concluded that "the amount of work [claimant] is able to do . . . is undetermined."[9] *Id*. He reiterated that any disabling hypoxemia claimant may have is due to "vascular bed damage" from pulmonary emboli unrelated to coal mine employment. *Id*.

Thereafter, a DOL claims examiner requested that Dr. Rasmussen review claimant's medical records and Dr. Zaldivar's report and submit a supplemental report indicating whether Dr. Zaldivar's report caused him to change any of his conclusions. Director's Exhibit 29. Because of Dr. Rasmussen's death, Dr. Forehand prepared the supplemental report. Director's Exhibit 30. Dr. Forehand primarily addressed his disagreement with Dr. Zaldivar's conclusion that coal mine dust did not contribute to any disabling blood gas impairment that may be present. Director's Exhibit 30 at 2-4. Dr. Forehand, however, indicated his "shared opinion with Dr. Rasmussen" that claimant has a totally disabling respiratory impairment. *Id*. at 4.

The record also contains the medical report of Dr. Gaziano, who reviewed the medical evidence on behalf of claimant.[10] Claimant's Exhibit 1. Dr. Gaziano opined that claimant has a "moderate impairment of lung function[,] with which he would be unable to do his usual coal mine work." Claimant's Exhibit 1 at 3.

The administrative law judge noted that Drs. Rasmussen and Forehand opined that claimant is totally disabled "although the [blood gas studies] and [pulmonary function studies] were non-qualifying." Decision and Order at 32. He further noted that Dr.

[8] Dr. Rasmussen had identified claimant's history of pulmonary emboli as a risk factor in claimant's blood gas impairment and opined that "it is likely that both his coal mine dust exposure and his pulmonary emboli are . . . contributing causes of his disabling lung disease." Director's Exhibit 14 at 4.

[9] Dr. Zaldivar noted claimant's description that as a mechanic he had to walk at least two miles carrying tool belts weighing fifteen to twenty pounds and lift and carry from forty to one hundred pounds. Director's Exhibit 27 at 1.

[10] Claimant's Exhibit 1 was admitted into the record at the June 14, 2017 hearing. Hearing Transcript at 7-8. Claimant designated Dr. Gaziano's report as one of his affirmative medical reports under 20 C.F.R. §725.414(a)(2)(i). Claimant's Evidence Summary at 5.

Zaldivar "diagnosed no total disability" based on a non-qualifying pulmonary function study and blood gas study. *Id*. Additionally, he found that claimant's treatment records contained no reliable pulmonary function studies or reasoned diagnoses of total disability. He noted that despite claimant's "testimony that he is unable to do anything," a physician at West Virginia University Hospital noted in 2014 that claimant informed him he was active working on his farm. *Id*. The administrative law judge concluded "claimant has not met his burden of proof in establishing total disability." *Id*.

Claimant argues that substantial evidence does not support the administrative law judge's finding, pointing to the opinions of Drs. Gaziano and Rasmussen that he has a blood gas impairment which prevents him from performing his usual coal mine work. Claimant's Brief at 3,7. Claimant's argument has merit.

The administrative law judge did not consider Dr. Gaziano's opinion that claimant is unable to perform his usual coal mine work. Claimant's Exhibit 1. Thus, the administrative law judge did not consider all relevant evidence regarding total disability before making his finding. *See* 30 U.S.C. §923(b); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991). Additionally, the administrative law judge has not adequately explained the basis for his conclusion that the medical opinions did not establish claimant is unable to perform his usual coal mine work. His decision therefore does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11]

The administrative law judge appears to have discredited the opinions of Drs. Rasmussen and Forehand and credited that of Dr. Zaldivar because claimant's pulmonary function studies and blood gas studies are non-qualifying. Decision and Order at 32. Contrary to the administrative law judge's apparent analysis, a physician may offer a reasoned medical opinion diagnosing total disability, even though the objective studies underlying his or her report are non-qualifying for total disability. The regulations provide that a miner may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000).

[11] 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).

Therefore, we must vacate the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case to the administrative law judge for further consideration of the medical opinions. We also vacate, therefore, the administrative law judge's findings that claimant failed to establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309(c) and did not invoke the Section 411(c)(4) presumption.

On remand, when addressing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must consider Dr. Gaziano's opinion along with those of Drs. Rasmussen, Forehand, and Zaldivar to determine whether they establish that claimant is unable to perform his usual coal mine work. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991); *Walker*, 927 F.2d at 183-84. The administrative law judge should consider the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *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). The administrative law judge must set forth the bases for his findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If the administrative law judge finds that the medical opinions establish total disability under 20 C.F.R. §718.204(b)(2)(iv), he must then weigh all the evidence supportive of a finding of total disability against the contrary probative evidence of record and determine whether claimant has established total disability at 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198.

If claimant is unable to establish total disability, he will not have established a change in the applicable condition of entitlement, and benefits must be denied. 20 C.F.R. §725.309(c). However, if the administrative law judge finds that claimant establishes total disability, he will have established a change in the applicable condition of entitlement and invoked the Section 411(c)(4) presumption. The burden will then shift to employer to establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 (4th Cir. 2015).

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 consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge