BRB No. 09-0490 BLA

JAMES E. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENCOAL MINING, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 05/27/2010
	)	
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 of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 (07-BLA-6026) of Administrative Law Judge Alan L. Bergstrom rendered on a 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). Claimant's prior application for benefits, filed on January 13, 2003, was finally denied on July 22, 2005, because claimant failed to establish any element of entitlement. Director's Exhibit 3. On August 25, 2006, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 5.

In a Decision and Order dated March 9, 2009, the administrative law judge credited claimant with twenty-four years of coal mine employment,[1] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis arising out of coal mine employment, based on both the x-ray and medical opinion evidence, pursuant to 20 C.F.R. §§718.202(a)(1), (4); 718.203(b). Additionally, the administrative law judge found that the new evidence established that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge therefore found that, as claimant established each element of entitlement previously adjudicated against him, he established both a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d), and his entitlement to benefits. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge failed to apply the proper legal standard under 20 C.F.R. §725.309. Employer also asserts that the administrative law judge erred in weighing the new evidence relevant to the existence of pneumoconiosis, total disability, and disability causation, pursuant to 20 C.F.R. §§718.202(a)(1), (4); 718.204(b), (c), and, therefore, erred in finding that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Employer further asserts that the administrative law judge failed to consider all of the evidence on the merits, including that submitted with the prior claims, prior to awarding benefits in this subsequent claim, as required by 20 C.F.R. §725.309(d). Claimant responds in support of the administrative law judge's award of benefits. The

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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, 1-202 (1989)(*en banc*).

Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief relevant to the merits of entitlement.

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director, employer, and claimant have responded.

The Director notes that Section 1556 reinstated a rebuttable presumption of total disability due to pneumoconiosis that is potentially applicable to claims such as this one.[2] Director's Brief at 1-2. The Director further states that if the award of benefits cannot be affirmed, the case must be remanded for the administrative law judge to address whether claimant has established total disability due to pneumoconiosis under the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4). The Director states that, if the Section 411(c)(4) presumption is considered on remand, the administrative law judge should allow for the submission of additional evidence by employer, and from claimant in response to employer's new evidence. Director's Brief at 3. Employer filed a supplemental brief reiterating its contentions on appeal. Employer agrees with the Director that Section 1556 affects this case, and requests that the case be remanded to afford employer the opportunity to reopen the hearing record to present evidence responsive to the Section 411(c)(4) amendments, and for proper consideration of all relevant medical evidence. Employer's Supplemental Brief at 4, 7. Claimant filed a supplemental brief, urging affirmance of the award of benefits. Claimant agrees with employer and the Director that Section 1556 applies to this case, but asserts that a remand is not required, as claimant has already established all elements of entitlement. Claimant's Supplemental Brief at 2.

Based upon the parties' responses, and our review, we conclude that this case is affected by Section 1556. As will be discussed below, we cannot affirm the

[2] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 2. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). As the Director, Office of Workers' Compensation Programs, notes, claimant filed his claim after January 1, 2005, and the administrative law judge accepted the parties' stipulation to twenty-four years of coal mine employment.

administrative law judge's award of benefits. Because we must remand this case for the administrative law judge to reconsider whether claimant has established total disability, we will also instruct the administrative law judge to consider the claim in light of the amendments to the Act.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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(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 any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Employer initially contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established pursuant to 20 C.F.R. §725.309(d), without performing a qualitative comparison of the old and new evidence. Employer's Brief at 9-11, *citing Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003), *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We disagree.

The precedent of the United States Court of Appeals for the Sixth Circuit cited by employer construed the prior version of 20 C.F.R. §725.309, which is not applicable in this claim filed after January 19, 2001, the effective date of the amendments to that regulation. *See* 20 C.F.R. §725.2(c). Under the revised version of 20 C.F.R. §725.309, claimant no longer has the burden of proving a "material change in conditions." Rather, claimant must show that one of the applicable conditions of entitlement has changed since the date upon which the prior denial became final by submitting new evidence that establishes an element of entitlement upon which the prior denial was based. *See* 20

C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3. Therefore, we reject employer's argument that the administrative law judge was required to conduct a qualitative comparison of the old and new evidence under 20 C.F.R. §725.309(d).

Turning to the administrative law judge's evaluation of the new evidence, we first address the dispositive issue in this case, as it relates to the recent amendments to the Act, *i.e.*, whether claimant established that he has a totally disabling respiratory impairment, entitling him to the benefit of the Section 411(c)(4) presumption. Employer asserts that the administrative law judge erred in his consideration of the new medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer contends that the administrative law judge erred by improperly shifting the burden of proof to employer, and erred in discrediting the opinion of Dr. Fino, and in crediting the opinion of Dr. Baker. Employer's Brief at 18-22. Employer's arguments have merit.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new opinions of Drs. Baker, Fino, and Westerfield. The administrative law judge noted that Dr. Baker listed claimant's last coal mine work as "electrician, bossed 10 years" and opined that claimant has a class 3 pulmonary impairment, with an FEV1 between 40% and 59% of predicted. Decision and Order at 26; Director's Exhibit 17. The administrative law judge further noted Dr. Baker's statement that a class 3 impairment would be a 25-50% impairment of the whole person, based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. The administrative law judge further noted Dr. Baker's conclusion that claimant would "not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust free environment." Decision and Order at 26; Director's Exhibit 17. Following his summary of Dr. Baker's opinion, the administrative law judge stated:

> In view of the foregoing the Claimant has established that he is unable to perform his usual coal mine work due to the Class 3 pulmonary impairment. Accordingly, the respondent bears the burden to establish that the Claimant can either perform his past coal mine employment or comparable work that uses skills acquired and/or the abilities demonstrated during his coal mine employment.

Decision and Order at 27. The administrative law judge then considered the opinions of

Drs. Fino[3] and Westerfield,[4] found them to be not credible, and concluded that claimant has established that he is totally disabled. *Id.*

Initially, we agree with employer that the administrative law judge improperly shifted the burden of proof to employer to establish that claimant is not disabled once claimant submitted Dr. Baker's opinion that claimant is totally disabled. Contrary to the administrative law judge's analysis, it is claimant's burden to establish the existence of a totally disabling respiratory impairment by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994). Therefore, we vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We further agree with employer that the administrative law judge did not provide a valid reason for discounting Dr. Fino's opinion that claimant does not have a totally disabling respiratory impairment. The administrative law judge discounted Dr. Fino's opinion because he found that Dr. Fino based his conclusion on a mistaken belief that claimant does not have pneumoconiosis,[5] and on pulmonary function study values that Dr. Fino improperly "manipulated" using criteria outside the applicable quality standard regulations. Decision and Order at 27.

As employer asserts, Dr. Fino's opinion as to the existence of pneumoconiosis[6] is not relevant to the inquiry at 20 C.F.R. §718.204(b)(2)(iv), which is whether the evidence

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[3] Dr. Fino opined that claimant "retains the physiologic capacity from a respiratory standpoint to perform all of the requirements of his last job," even assuming it required sustained heavy labor. Director's Exhibit 41.

[4] Dr. Westerfield opined that the results of claimant's pulmonary function studies "suggest[] that [claimant] is disabled from his pulmonary condition." Employer's Exhibit 2.

[5] The administrative law judge had discredited Dr. Fino's negative x-ray reading because Dr. Fino rated the x-ray as film quality 3. Decision and Order at 20.

[6] To the extent that Dr. Fino's x-ray reading may remain as relevant evidence to the issues the administrative law judge considers on remand, we further agree with employer that it was error for the administrative law judge to discount Dr. Fino's negative x-ray reading based on the physician's finding that the October 9, 2006 x-ray film was quality 3. The applicable quality standard requires only that a chest x-ray be of suitable quality for the proper classification of pneumoconiosis, 20 C.F.R. §718.102(a); *see Auxier v. Director, OWCP*, 8 BLR 1-109, 1-111 (1985); *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1233 (1984); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256, 1-258 (1983).

establishes the existence of a totally disabling respiratory or pulmonary impairment, regardless of its cause. *See generally Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990). In addition, Dr. Fino specifically stated that claimant retains the respiratory capacity for his usual coal mine work because "there is no evidence of ventilatory impairment as there is no objective data to show such impairment." Director's Exhibit 41. Moreover, as employer asserts, the administrative law judge mischaracterized Dr. Fino's opinion when he found that the physician relied on "manipulated" pulmonary function study results. Employer's Brief at 21. While Dr. Fino explained that the American Thoracic Society published new guidelines on reference values and interpretation of pulmonary function testing, Dr. Fino specifically stated that the spirometry values summarized in his March 14, 2007 medical report "do not reflect the new reference values." Director's Exhibit 41. For the foregoing reasons, we must vacate the administrative law judge's determination to discredit Dr. Fino's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Hess v. Clinchfield Coal Co*., 7 BLR 1-295, 1-297 (1984).

In considering, on remand, the new medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must first determine the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.*, 7 BLR 1-469 (1984). The administrative law judge must then consider the documentation and reasoning underlying the medical opinions, and explain whether the medical opinions, when considered in light of the exertional requirements of claimant's usual coal mine employment, establish the existence of a totally disabling respiratory impairment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge must explain his findings in accordance 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). by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[7] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In light of our determination to vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), we additionally vacate his findings that the new evidence establishes total disability at 20 C.F.R. §§718.204(b)(2), 725.309(d). After considering the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), on remand, the administrative law

[7] As employer asserts, the administrative law judge did not explain his basis for finding that Dr. Baker's determination that claimant has a class 3 pulmonary impairment supports Dr. Baker's conclusion that claimant cannot perform his usual coal mine work. Decision and Order at 26-27; Employer's Brief at 19-20; Director's Exhibit 17.

judge must then weigh all relevant new evidence together under 20 C.F.R. §718.204(b)(2) to determine whether total disability is established, and must explain his credibility determinations. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Because we have vacated the administrative law judge's finding of total disability, we further vacate his finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Application of Section 411(c)(4):

Because this case was filed after January 1, 2005, and claimant was credited with twenty-four years of coal mine employment, the administrative law judge, on remand, must consider whether the new evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411 (c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Finally, in light of our determination to remand this case for further findings relevant to the Section 411(c)(4) presumption, and for the submission of additional evidence by the parties to address the change in law, we must also vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (4); 718.203(b); 725.309(d). Therefore, we decline to address, as premature, employer's remaining arguments relevant to these findings.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated, and the case is remanded 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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BETTY JEAN HALL
Administrative Appeals Judge