BRB No. 09-0645 BLA

JAMES R. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	
	)	
	)	DATE ISSUED: 05/27/2010
Employer-Petitioner	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Harlan, Kentucky, for claimant.

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

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (07-BLA-6082) of Administrative Law Judge Alice M. Craft 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). The administrative law judge accepted the parties' stipulation to at least twenty-eight years of coal mine employment,[1] and found that the evidence established simple, clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but that the x-ray and biopsy evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant established total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief in this appeal.

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 and employer have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. Specifically, the Director notes that, although Section 1556 reinstated a rebuttable presumption of total disability due to pneumoconiosis that is potentially applicable to claims such as this one,[2] the administrative law judge awarded benefits pursuant to the pre-amendment version of the Act, which required claimant to establish all elements of the claim by a preponderance of

[1] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

[2] Relevant to this living miner's claim, Section 1556 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 Supplemental Brief at 1. 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 notes, claimant filed his claim after January 1, 2005, and the administrative law judge accepted the parties' stipulation to twenty-eight years of coal mine employment.

the evidence. Therefore, the Director concludes, if the Board affirms the administrative law judge's award of benefits, the reinstated presumption need not be considered. Director's Supplemental Brief at 2. The Director further states, however, 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. 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 the employer, and from claimant in response to employer's new evidence. *Id*.

Employer filed a supplemental brief reiterating its contentions on appeal. Employer agrees with the Director's position that, if the case is remanded, the record should be reopened for employer to submit additional evidence. Employer further notes that, if the case is remanded, employer will seek to withdraw its stipulation to twenty-eight years of coal mine employment, since claimant bears the burden to establish at least fifteen years of qualifying coal mine employment. Employer's Supplemental Brief at 7.

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 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, on remand, to consider this case 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

20 C.F.R. §718.204(b)(2)(ii), (iv): Total Disability

Employer initially asserts that the administrative law judge erred in her evaluation of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). Specifically, employer asserts that the administrative law judge failed to state a reason for crediting the

qualifying[3] exercise study over the two, non-qualifying resting blood gas studies of record.[4] We agree.

In considering the blood gas study evidence, the administrative law judge stated:

> As to the arterial blood gas studies, the Claimant did not demonstrate qualifying values at rest, but he did demonstrate qualifying values with exercise. I find that the Claimant has established that he is disabled based on the exercise blood gas study administered by Dr. Rasmussen on January 22, 2007.

Decision and Order at 15. As employer states, the administrative law judge did not explain her basis for crediting the qualifying exercise study over the non-qualifying resting studies at 20 C.F.R. §718.204(b)(2)(ii). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Consequently, we must vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(ii), and remand this case for the administrative law judge to explain her weighing of the blood gas study evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Specifically, the administrative law judge must weigh the resting and exercise blood gas study evidence together, and explain her reasons for crediting one study over another. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

We reject, however, employer's assertion that the administrative law judge erred in failing to consider the blood gas study values that Dr. Rasmussen obtained at the baseline of exercise and during claimant's post-exercise recovery period under 20 C.F.R. §718.204(b)(2)(ii). Employer's Brief at 7. The applicable quality standard provides that the exercise blood gas study is based on the sample taken "during exercise." 20 C.F.R. §718.105(b).

Employer also asserts that the administrative law judge erred in her consideration of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). Specifically,

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[3] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendix C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[4] The record contains blood gas studies dated October 12, 2006 and January 22, 2007. On October 12, 2006, Dr. Jarboe conducted a resting blood gas study, the results of which were non-qualifying. Employer's Exhibit 1. On January 22, 2007, Dr. Rasmussen conducted both a resting and an exercise blood gas study; only the exercise study produced qualifying results. Director's Exhibit 12.

employer contends that the administrative law judge erred in failing to accord greater weight to Dr. Jarboe's opinion in light of his superior qualifications, and in crediting Dr. Rasmussen's diagnosis of total disability because it was premised on a misdiagnosis of complicated pneumoconiosis. Employer's Brief at 9-13. Employer's argument has merit, in part.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen and Jarboe. Based on the results of claimant's diffusion capacity and exercise blood gas studies,[5] Dr. Rasmussen opined that claimant "does not retain the pulmonary capacity to perform his last regular coal mine job, which required heavy and very heavy manual labor." Director's Exhibit 12-39. By contrast, although Dr. Jarboe diagnosed a mild to moderate impairment based on claimant's resting blood gas study, he opined that claimant retained the respiratory capacity to do his last coal mining job, because his pulmonary function studies were normal, his diffusion capacity was "only mildly reduced" after being corrected for lung volume, and his resting blood gas study was above the federal standards for disability. Employer's Exhibit 1. Because both physicians based their opinions on relevant histories, physical examination, and objective testing, and because their opinions were consistent with the evidence available to them, the administrative law judge found that both opinions were reasoned and documented. However, the administrative law judge further found Dr. Rasmussen's opinion to be better reasoned and documented. The administrative law judge stated:

> [Dr. Jarboe] did not conduct an exercise study, and he did not state the reason in his report. The Claimant's pCO2 at rest was 34.4, and his PO2, 66.7. These are close to qualifying values. In addition, unlike Dr. Rasmussen, Dr. Jarboe did not address the exertion required by the job the Claimant performed in the mines. For these reasons, I find his opinion was neither as well documented, nor as well reasoned, as Dr. Rasmussen's.
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> [Dr. Rasmussen's] testing was more complete than Dr. Jarboe's, and the arterial blood gas values he obtained upon exercise were qualifying, and showed marked impairment during exercise. In reaching his opinion, Dr. Rasmussen specifically took account of the exertional requirements of the Claimant's job in the mines. I find that Dr. Rasmussen's opinion is better documented and reasoned than Dr. Jarboe's. I find that the Claimant has established that he is disabled based on Dr. Rasmussen's opinion.

[5] Dr. Rasmussen stated that claimant's diffusion capacity was "markedly reduced to 41% of predicted," and that his exercise blood gas study, which produced qualifying results, showed a "marked impairment in oxygen transfer during moderate exercise." Director's Exhibit 12-39.

Decision and Order at 15.

Employer contends that the administrative law judge erred in failing to accord greater weight to Dr. Jarboe's opinion based on his "superior qualifications." Employer's Brief at 11. We disagree. The administrative law judge found Dr. Rasmussen's opinion to be "better documented and reasoned than Dr. Jarboe's," because his testing was "more complete" and he took into account the exertional requirements of claimant's coal mine job.[6] Employer does not challenge this credibility determination. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 15. Therefore, we reject employer's contention that the administrative law judge erred in failing to accord Dr. Jarboe's opinion additional weight based on the physician's qualifications. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-20 (2003).

We find merit, however, in employer's assertion that the administrative law judge erred in finding Dr. Rasmussen's total disability diagnosis to be well-reasoned for the reasons provided. Because the administrative law judge did not address the significance of the non-qualifying blood gas study evidence under 20 C.F.R. §718.204(b)(2)(ii) or (iv), the administrative law judge's finding that Dr. Rasmussen based his total disability opinion, in part, on the qualifying exercise blood gas study is not a valid reason for crediting Dr. Rasmussen's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, as employer states, the administrative law judge did not consider whether Dr. Rasmussen's opinion was well-reasoned, in light of Dr. Rasmussen's belief that claimant has complicated pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.304. Employer's Brief at 12-13. Because the administrative law judge did not address the entirety of Dr. Rasmussen's opinion in light of its underlying reasoning and the record as a whole, we must vacate the administrative law judge's determination to credit Dr. Rasmussen's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

The administrative law judge, on remand, must reconsider the probative value of Dr. Rasmussen's opinion at 20 C.F.R. §718.204(b)(2)(iv). In so doing, the administrative law judge must address whether Dr. Rasmussen's opinion is undermined by his diagnosis of complicated pneumoconiosis, in light of her finding that claimant did not establish

[6] The administrative law judge found that claimant's last coal mine job, as a roof bolter, required heavy manual labor. Decision and Order at 3. Employer does not challenge this finding.

complicated pneumoconiosis at 20 C.F.R. §718.304.[7] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Hess*, 7 BLR at 1-297.

In light of our determination to vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(ii), (iv), we additionally vacate her findings that the preponderance of all the relevant evidence establishes total disability at 20 C.F.R. §718.204(b). On remand, after considering the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) and Dr. Rasmussen's opinion at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must then weigh all relevant evidence together under 20 C.F.R. §718.204(b)(2), and explain her credibility determinations. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Because we have vacated the administrative law judge's finding of total disability, we vacate her 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-eight years of coal mine employment, the administrative law judge, on remand, must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). In so doing, the administrative law judge must consider employer's request to withdraw its stipulation to twenty-eight years of coal mine employment. Employer's Supplemental Brief at 7. If the administrative law judge, on remand, 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

[7] We reject employer's assertion that the administrative law judge erred in relying on the web site of the American Board of Medical Specialties (ABMS), found at http://www.abms.org, to find that Dr. Rasmussen is Board-certified in internal medicine. Employer's Brief at 12 n.1; Decision and Order at 5 n.1. At the formal hearing, employer specifically stated that it had "no objection" to the administrative law judge's proposal to take judicial notice of the physicians' qualifications as listed on the ABMS web site. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*); Hearing Transcript at 8.

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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded for further consideration 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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JUDITH S. BOGGS
Administrative Appeals Judge