BRB No. 11-0562 BLA

ERMAL VANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED: 05/30/2012
Employer-Respondent	)	
	)	
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 Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Order Granting Reconsideration and the Decision and Order on Remand Denying Benefits (2008-BLA-5630) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] filed on October 1, 2007, pursuant to the

[1] Claimant's first claim for benefits, filed on October 23, 2000, was denied by the district director on January 29, 2001, because claimant did not establish that he was

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). This case is before the Board for the second time. In its prior Decision and Order, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.204(b)(2), and 725.309(d), and the denial of benefits. *Vance v. Hobet Mining, Inc.*, BRB Nos. 09-0487 BLA, 09-0487 BLA-A, slip op. at 4, 8-9 (June 23, 2010) (unpub.). The Board remanded the case to the administrative law judge for reconsideration and instructed him to determine whether claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and, if necessary, whether employer rebutted the presumption.[2] *Id.* at 8.

On remand, the administrative law judge initially determined that claimant worked in an underground coal mine, or in substantially similar conditions, for at least twenty-two years. The administrative law judge further found, however, that claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge concluded that, because claimant did not establish that he has a totally disabling respiratory or pulmonary impairment, he did not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4). Accordingly, the administrative law judge denied benefits. Claimant then filed a Motion for Reconsideration in which he asserted that, because his final brief and his arguments were not sent to the proper address, the administrative law judge did not consider them before he issued his Decision and Order. The administrative law judge granted claimant's motion, but reaffirmed the denial of benefits.

On appeal, claimant contends that the administrative law judge erred in determining that he did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and, therefore, did not establish invocation of the amended Section 411(c)(4) presumption.

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totally disabled. Director's Exhibit 1. Claimant took no further action until filing his subsequent claim.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were adopted. Relevant to this claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling impairment, *see* 20 C.F.R. §718.204(b), are established.

Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.[3]

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.[4] 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 pursuant to 20 C.F.R. Part 718, 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. When 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 total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed Dr. Ranavaya's previously submitted medical opinion and the newly submitted medical opinions of Drs. Rasmussen, Zaldivar, Hippensteel and Renn. Dr. Ranavaya examined claimant on December 5, 2000, and found that claimant has a mild pulmonary impairment which, in and of itself, would not prevent him from performing his usual coal mine employment. Director's Exhibit 1. Dr. Rasmussen examined claimant on

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[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that this claim was filed after January 1, 2005, that claimant had at least twenty-two years of underground coal mine employment or coal mine employment in substantially similar conditions, and 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, 1-711 (1983).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

November 20, 2007, and determined that claimant is totally disabled based on a significant reduction in his single breath diffusing capacity, with a mild airway obstruction consistent with chronic obstructive pulmonary disease (COPD)/emphysema due to smoking and coal dust exposure. Director's Exhibit 11; Claimant's Exhibit 3. Dr. Zaldivar examined claimant on March 19, 2008 and diagnosed COPD in the form of mild airway obstruction due solely to smoking. Employer's Exhibits 1, 6, 8. Dr. Zaldivar indicated that claimant's diffusion impairment may be totally disabling if claimant had to perform very heavy labor. Employer's Exhibits 6 at 33, 8 at 55. Dr. Hippensteel reviewed the medical evidence and concluded that claimant has bullous emphysema, unrelated to coal dust exposure, and that claimant has no pulmonary impairment from any cause. Employer's Exhibits 4, 5, 7. Dr. Renn reviewed the diffusion capacity testing performed on November 20, 2007 and determined that it demonstrated the presence of a moderate diffusion impairment. Director's Exhibit 12.

The administrative law judge initially summarized the physicians' respective qualifications and stated that he "rank[ed] Drs. Zaldivar and Rasmussen nearly equally among the most qualified of those presenting evidence in this case, noting that the latter lacks [B]oard-certification in pulmonary diseases." Decision and Order on Remand at 9. The administrative law judge found that "Drs. Ranavaya and Hippensteel are not as well qualified and thus their opinions carry slightly less weight." *Id*. The administrative law judge then determined, based on claimant's testimony and the *Dictionary of Occupational Titles* (DOT), that claimant's last coal mine work as an electrician required medium manual labor. *Id*. at 10. The administrative law judge found that the November 20, 2007 diffusion capacity test reflected a mild-to-moderate impairment and concluded:

> The miner's prior coal mine work did not require "heavy" labor, much less "very heavy" labor. Neither Dr. Zaldivar, Dr. Hippensteel, nor Dr. Renn found the miner totally disabled. His objective tests, as noted above, have non-qualifying values. Although he disagreed with Dr. Hippensteel's opinion that the miner had no sufficient pulmonary impairment from any cause to perform his coal mine work, even Dr. Rasmussen agreed with Dr. Zaldivar's opinion that the diffusion impairment would not interfere with his work as a mechanic but may [prevent him from] performing "heavy" labor. Thus, I find the miner has not established total respiratory disability.

Id. at 12.

Claimant argues that the administrative law judge erred in determining that his work as an electrician required only medium manual labor and that the medical opinions of record do not support a finding of total disability at 20 C.F.R. §718.204(b)(2). Claimant maintains that, because the Board did not disturb the finding in the administrative law judge's initial Decision and Order that claimant's coal mine work

required heavy manual labor, this finding now constitutes the law of the case. Claimant further contends that his hearing testimony establishes that, as a regular part of his job, he lifted electrical motors, torque units and ballasts, weighing between 20 and 100 pounds, which approximates the occasional lifting of 50 to 100 pounds described in the DOT definition of heavy work. With respect to the administrative law judge's consideration of Dr. Rasmussen's opinion, claimant argues that the administrative law judge erred in characterizing his diagnosis of a totally disabling impairment as speculative.

Employer responds and asserts that the law of the case doctrine should not be applied in this case because the Board's instruction, that the administrative law judge reconsider his determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), "reopen[ed]" the issue of the exertional demands of claimant's work. Employer's Response Brief at 5. Employer also argues that the administrative law judge is not required to rely upon the physicians' characterizations of the exertional requirements of claimant's job as an electrician, but can render his own determination in his role as a fact-finder. Employer further contends that, because the physicians did not consider claimant totally disabled from performing even heavy manual labor, the administrative law judge's finding of medium exertion is, at worst, harmless error, as he rationally found that claimant's pulmonary impairment, if any, was not due to his coal mine dust exposure.

We concur with employer that the Board's decision to vacate the administrative law judge's finding that claimant established total disability, and the instruction to reconsider the issue on remand, reopened the inquiry into the exertional requirements of claimant's usual coal mine work, thereby precluding the application of the law of the case doctrine. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (en banc); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). There is merit, however, in claimant's argument that the administrative law judge did not properly address claimant's testimony regarding the nature of his duties as an electrician, in conjunction with the DOT classification of different levels of work.

Claimant testified that, as an electrician, he regularly lifted "electrical motors, torque units" and "ballasts" weighing "between 20 and 100 pounds." Hearing Transcript at 9-10. The DOT states that "medium work" involves "exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects." *See* Decision and Order on Remand at 10 n.7, *quoting Dictionary of Occupational Titles*, Section 824.261-010. "Heavy work" is described as "exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." *Id.* "Very heavy work" is described as "exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of

20 pounds of force constantly to move objects." *Id*. Based on the DOT definition of medium work as requiring *occasional* exertion of no more than 50 pounds of force, there is a conflict between the administrative law judge's conclusion that this definition applied to claimant's work as an electrician, and claimant's testimony that he *regularly* lifted between 20 and 100 pounds.

Because the administrative law judge did not resolve this conflict, his finding does not comport with the Administrative Procedure Act (APA), 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).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 165 (1989). Contrary to employer's assertion, this error is not harmless, as Drs. Zaldivar and Rasmussen both indicated that claimant would be totally disabled if he were required to perform "very heavy" and "heavy" work, respectively. Employer's Exhibits 6 at 33, 8 at 55; Claimant's Exhibit 3 at 40-41. Accordingly, we must vacate the administrative law judge's determination that claimant's job as an electrician required medium work. We must also vacate the administrative law judge's finding that the medical opinions of record were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), as he relied upon his assessment of claimant's exertional requirements when weighing the medical opinions.

In addition, claimant's contention that the administrative law judge erroneously discounted Dr. Rasmussen's opinion on the ground that his opinion on the issue of total disability was speculative has merit.[6] Dr. Rasmussen diagnosed a significant reduction in

[5] 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).

[6] We reject claimant's argument that the administrative law judge erred in giving less weight to Dr. Rasmussen's opinion because he is not a Board-certified pulmonologist. The administrative law judge noted this fact, but did not rely upon it in resolving the conflicts among the medical opinions of record on the issue of total disability. Decision and Order on Remand at 9, 11, 12. On remand, when weighing the medical opinions of record, the administrative law judge may consider the qualifications of the respective physicians, but must also consider the credibility of the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Mining Co. v. Director, OWCP* [Looney], F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 at 2, 4, 7 (4th Cir. May

claimant's single breath diffusing capacity, "which is usually associated with significant impairment in oxygen transfer during exercise," and concluded that claimant is totally disabled from performing his usual coal mine work. Director's Exhibit 11. The administrative law judge determined that, because Dr. Rasmussen did not obtain an exercise blood gas study to confirm his diagnosis, due to claimant's arthritis, his conclusion that claimant is totally disabled is speculative. Decision and Order on Remand at 11. However, the administrative law judge did not address Dr. Rasmussen's testimony that "the diffusing capacity, standing alone, is a valid measure of impairment" and that "many places don't bother with exercise, they rely on the diffusing capacity … ." Claimant's Exhibit 3 at 53. Accordingly, we must vacate the administrative law judge's finding with respect to Dr. Rasmussen's diagnosis of a totally disabling impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In light of the foregoing, we remand this case to the administrative law judge for reconsideration of his findings under 20 C.F.R. §§718.204(b)(2)(iv) and 725.309(d). On remand, the administrative law judge must first reconsider the evidence relevant to the exertional requirements of claimant's job as an electrician, render a finding, and set forth the underlying rationale. *See Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). Once the administrative law judge has determined the level of exertion required in claimant's usual coal mine work, he must determine whether the newly submitted medical opinions are sufficient to prove that the "mild-to-moderate diffusion capacity impairment" that he found established, is totally disabling.[7] Decision and Order on Remand at 12. In this regard, we note that, contrary to the administrative law judge's statement, claimant is not required to demonstrate that his "symptoms render him unable to walk, climb, lift or carry," to prove that he is totally disabled. Decision and Order on Remand at 10. Rather, under the terms of 20 C.F.R. §718.204(b)(1), "a miner shall be considered totally disabled if the miner has a

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15, 2012); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[7] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the diffusion capacity test "reflect[ed] a mild-to-moderate impairment in diffusing capacity." *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 12. Because Dr. Ranavaya's medical opinion was submitted and considered in conjunction with the denial of claimant's initial claim for benefits, it is not relevant to the issue of whether claimant has established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner . . . [f]rom performing his or her usual coal mine work" or comparable and gainful employment. 20 C.F.R. §718.204(b)(1)(i), (ii).

When assessing the probative value of the newly submitted medical opinions on the issue of total disability, the administrative law judge should be mindful that the extent to which a physician's understanding of a miner's work duties accords with the administrative law judge's finding is a relevant factor in considering the weight to which his or her opinion is entitled.[8] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that "information regarding the miner's exertional work requirements mandates careful consideration in some cases, such as where the physician must determine whether an impairment of a certain degree prevents the miner from performing his usual coal mine work." *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-38 (4th Cir. 1997).

If the administrative law judge determines on remand that claimant has established total disability at 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 to determine whether claimant has proven that he is totally disabled under 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *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 finds that claimant has established total disability and a change in an applicable condition of entitlement, he must consider the merits of entitlement, based upon a weighing of all of the evidence of record. 20 C.F.R. §725.309(d); *see White*, 23 BLR at 1-3. The administrative law judge should first determine whether claimant has proven that he is totally disabled at 20 C.F.R. §718.204(b)(2). If the administrative law judge concludes that total disability has been established, he must then consider whether claimant has invoked the amended Section 411(c)(4) presumption, and if so, he must shift the burden of proof to employer to rebut the presumption.[9] In the

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[8] Dr. Rasmussen testified that, as a mine electrician, claimant fueled equipment, worked on electrical and mechanical equipment and lifted electrical motors, torque units, and ballasts, with most items weighing between 20 and 100 pounds. Claimant's Exhibit 3 at 38-40. Dr. Rasmussen further stated that this work would have involved "heavy" manual labor. *Id*. at 38. Dr. Zaldivar reported that claimant lifted and carried 80 pounds routinely. Employer's Exhibit 1. Dr. Hippensteel testified that the work requirements of a mine electrician are usually considered "heavy" manual labor. Employer's Exhibit 5 at 31.

[9] Claimant contends that the opinions of Drs. Zaldivar and Hippensteel are insufficient to rebut the amended Section 411(c)(4) presumption, as their opinions

event that the administrative law judge finds that claimant has failed to establish total disability on the merits, 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).

Accordingly, the administrative law judge's Order Granting Reconsideration and Decision and Order on Remand Denying Benefits are 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.

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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

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regarding the existence of pneumoconiosis and total disability due to pneumoconiosis are in conflict with the preamble to the amended regulations and the Act. In light of the fact that the administrative law judge did not render any findings on this issue, we cannot address claimant's argument, as it is would require us to engage in the initial consideration of evidence, which we are not empowered to do. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).