BRB No. 11-0584 BLA-A

ROBERT L. GLOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KEN AMERICAN RESOURCES	)	
	)	DATE ISSUED: 05/15/2012
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 - Denial of Benefits and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Felicia A. Snyder (Allen Kopet & Associates), Lexington, Kentucky, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits and Order on Reconsideration (08-BLA-05092) of Administrative Law Judge Daniel F. Solomon 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). This case involves a claim filed on February 23, 2004.[1] In a Decision and Order dated September 18, 2009, the administrative law judge credited claimant with at least twenty-three years of coal mine employment,[2] and found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), moved for reconsideration, asserting that the administrative law judge improperly weighed the pulmonary function study and medical opinion evidence as to total disability. In an Order dated March 14, 2011, the administrative law judge granted reconsideration, but again determined that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[3] Employer responds in support of the administrative law judge's denial of benefits. The Director responds, requesting that the Board vacate the administrative law judge's denial of benefits, and remand this case for further evaluation of the pulmonary function studies and medical opinions relevant to total disability.[4] Employer filed a reply to the Director's response brief, and claimant filed a reply to employer's response brief.

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[1] Because claimant filed his claim before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a), (c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Director initially appealed the administrative law judge's Order on Reconsideration to the Board, but subsequently withdrew his appeal in favor of filing a response brief. Contrary to employer's argument, despite the withdrawal of his appeal, the Director has standing, as party-in-interest, to ensure the proper enforcement of the

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).

Claimant and the Director contend that the administrative law judge erred in finding that the pulmonary function study evidence does not support the existence of a totally disabling respiratory impairment. Claimant's Brief at 2, 4-5; Director's Brief at 2-4. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the pulmonary function studies dated May 17, 2004 and June 10, 2008, performed by Drs. Simpao and Baker, respectively, are both valid and qualifying.[5] Order on Reconsideration at 1. Regarding the May 29, 2008 pulmonary function study, performed by Dr. Pandit, the administrative law judge correctly noted that, contrary to his initial finding, this study is also qualifying. Order on Reconsideration at 1. The administrative law judge then noted that the most recent study, performed on January 15, 2009 by Dr. Selby, is not qualifying. Finding that "the most recent testing is more reliable," the administrative law judge concluded that claimant failed to establish that he has a greater degree of impairment than that demonstrated by the January 15, 2009 pulmonary function study. Order on Reconsideration at 2.

Claimant contends, and the Director agrees, that the administrative law judge mechanically applied the most recent evidence rule to find that Dr. Selby's January 15, 2009 non-qualifying pulmonary function study is more reliable than the three qualifying pulmonary function studies performed on May 17, 2004, May 29, 2008, and June 10,

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Act and the lawful administration of the Black Lung program. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Reed v. Director, OWCP*, 10 BLR 1-67 (1987); Employer's Reply Brief at 2.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

2008. Claimant's Brief at 2, 4-5; Director's Brief at 2-4. We agree. The United States Court of Appeals for the Sixth Circuit has held that it is rational to credit more recent evidence, solely on the basis of recency, only if that evidence shows that the miner's condition has progressed or worsened. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993)(a case involving x-rays), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*; see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993)(applying *Adkins* to medical opinions). The court reasoned that, because pneumoconiosis is a progressive disease and claimants cannot get better, it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved. *Woodward*, 991 F.2d at 319, 17 BLR at 2-84 (holding that "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier")*; see Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991)(questioning the practice of ascribing greatest weight to the highest results among valid pulmonary function studies). Consequently, as the administrative law judge failed to provide a valid reason for according controlling weight to the non-qualifying January 15, 2009 pulmonary function study, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further evaluation of the pulmonary function study evidence. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On remand, the administrative law judge must resolve the conflict as to the degree of respiratory impairment substantiated by the pulmonary function study evidence, based on a weighing and independent evaluation of the conflicting evidence, without regard to its chronological relationship.

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that claimant's last coal mine work required that he move curtains weighing approximately one-hundred pounds from one location to another. The administrative law judge further found that the curtains were awkward to move and had to be rolled up, and relocating them required claimant to walk underground about three miles a day, while carrying tools weighing approximately fifty-five pounds, in addition to any equipment on his person.[6] Order on Reconsideration at 2; Hearing Tr. at 14.

[6] The administrative law judge found that claimant also worked as a mechanic, a belt crew man, a pump man on the belt crew, a pinning machine operator, a shop foreman, a welder, and a surface miner. 2009 Decision and Order at 2. As a pumper he lifted and dragged hoses weighing in excess of two-hundred pounds. As a welder he was required to carry oxygen bottles, and as a surface miner he was required to climb up to ninety-eight steps, lift up to one hundred and seventy-five pounds, and walk two and a half miles. 2009 Decision and Order at 2.

In considering whether the medical opinion evidence established claimant's total disability for coal mine work, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Simpao, Baker, Rasmussen, and Selby. Drs. Simpao, Baker, and Rasmussen opined that claimant suffers from a totally disabling respiratory impairment.[7] Director's Exhibits 13, 33; Claimant's Exhibits 2, 7. In contrast, Dr. Selby opined that claimant retains the respiratory capacity to perform any and all duties required of him in his prior coal mine employment.[8] Employer's Exhibits 2A, 2B. The administrative law judge reiterated that he found the most recent, January 15, 2009, pulmonary function study results, indicating that claimant has a mild respiratory impairment, to be the most probative, and therefore found that the medical opinion evidence did not establish total disability:

> I accept that a mild restriction and mild obstruction may be competent to preclude Claimant's former work. However, I again find that claimant relies on evaluations by Drs. Simpao, Baker and Rasmussen based on a "moderate" impairment. I find that the more recent testing substantiates that the dispositive evidence shows claimant has less than a "severe" impairment. The Claimant bears the burden to show that the claimant is totally disabled. The Claimant did not provide evidence that a condition as seen in January, 2009 would preclude mining work. . . . Therefore I find that the Claimant has failed to provide a reasoned opinion as to disability.

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[7] Dr. Simpao opined that claimant's May 17, 2004 pulmonary function testing revealed a moderate degree of both restrictive and obstructive airway disease, and concluded that claimant is totally disabled, due to his respiratory status, from performing work on the belt crew. Director's Exhibit 33, at 11. Dr. Baker stated that pulmonary function testing performed on June 10, 2008 revealed a moderate obstructive ventilatory defect and a mild to moderate restrictive defect, equating to a "class III pulmonary impairment," and opined that claimant "could not do the work of a coal miner nor comfortable [*sic*] work in a dusty environment." Claimant's Exhibit 2 at 3. Dr. Rasmussen reviewed the pulmonary function testing performed by Drs. Simpao and Baker, and concluded that claimant has a significant ventilatory impairment with moderate restriction and at least minimal obstruction, which is both chronic and disabling. Claimant's Exhibit 7.

[8] Dr. Selby based his disability assessment on the results of a January 15, 2009 pulmonary function study that Dr. Selby interpreted as showing mild obstruction and mild restriction. Dr. Selby stated that the mild reduction in pulmonary function testing would not prevent claimant from performing any of the coal mine duties formerly required of him. Employer's Exhibit 2B at 4.

Order on Reconsideration at 2-3.

As the administrative law judge based his evaluation of the medical opinions on his weighing of the pulmonary function studies, which we have vacated, we must also vacate his findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, after reconsidering the pulmonary function study evidence, the administrative law judge must consider the documentation and reasoning underlying the medical opinions, and determine whether the medical opinions, when considered in light of the objective testing and the exertional requirements of claimant's usual coal mine employment, establish the existence of a totally disabling respiratory impairment. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *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). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Claimant also asserts that substantial evidence does not support the administrative law judge's finding that Dr. Baker's opinion is merely a caution against further dust exposure, and is not supportive of a finding of total disability. Claimant's Brief at 8. The administrative law judge summarized Dr. Baker's opinion as stating that "claimant could not do work as a coal miner in [a] dusty environment." Order on Reconsideration at 2. Claimant contends that, contrary to the administrative law judge's conclusion, Dr. Baker stated both that claimant has a totally disabling respiratory impairment *and* that he should not be further exposed to coal mine dust. Claimant's Brief at 8. In support, claimant points to Dr. Baker's statement, in his June 10, 2008 report, that claimant "could not do the work of a coal miner *nor* comfortable [*sic*] work in a dusty environment."[9] Claimant's Exhibit 2 at 3 (emphasis added). Further, when asked whether claimant could work in a dust-free environment, Dr. Baker testified that "just on the basis of his pulmonary function alone, he could do some occupation that was sedentary without exposure to dust, odors, fumes, changes in heat, humidity and temperature . . . ." Deposition of Dr. Baker at 25. On remand, the administrative law judge must consider the entirety of Dr. Baker's opinion, as expressed in his written report and his deposition

[9] Dr. Baker obviously intended to write "comparable," not "comfortable." A miner is considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents the miner from performing his or her usual coal mine work, or work requiring "comparable" skills or abilities. 20 C.F.R. §718.204(b)(1)(i), (ii).

testimony, in determining whether Dr. Baker's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

If, on remand, the administrative law judge finds that the medical evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *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 claimant establishes total disability, the administrative law judge must determine whether claimant has established the existence of pneumoconiosis, and that his total disability is due to the disease, pursuant to 20 C.F.R. §§718.202(a); 718.204(c).

[10] Review of the record reveals that, in his June 10, 2008 report, Dr. Baker stated that claimant could not perform the work of a coal miner "[o]n the basis of class III pulmonary impairment," which he described as a "25 to 50% impairment of the whole person." Claimant's Exhibit 2 at 3. In his March 2, 2009 deposition, when asked whether claimant retained the pulmonary capacity to work in a coal mine or in a dust-free environment, Dr. Baker testified that claimant "should not be working in the coal mines . . . that would require that degree of exertion . . . [b]ecause of his obstructive airway disease . . . his arterial blood gas abnormalities, his clinical symptoms *and* the fact these could all worsen with further exposure. Deposition of Dr. Baker at 14 (emphasis added). Further, when asked whether his opinion that claimant could perform only "some sedentary occupation" was based upon claimant's pulmonary impairment, Dr. Baker responded in the affirmative. Deposition of Dr. Baker at 28.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits and Order on Reconsideration 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