BRB No. 11-0638 BLA

JERRY RAY WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/30/2012
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Larry S. Merck, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Paul L. Edenfield (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (2010-BLA-5665) of Administrative Law Judge Larry S. Merck awarding benefits 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 subsequent claim filed on May 14, 2009.[1] The administrative law judge credited

[1] Claimant initially filed a claim for benefits on May 16, 1991. Director's Exhibit 1. The district director denied the claim on November 5, 1991, because claimant did not establish any of the elements of entitlement. *Id.* Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3.

claimant with 20.16 years of coal mine employment, with at least fifteen years underground, and found that the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d).

Considering the claim on its merits, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner 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)). If the presumption is invoked, the burden of proof shifts to the Director to rebut the presumption. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, BLR (6th Cir. 2011).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment,[2] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant invoked the rebuttable presumption. The administrative law judge further found that the Director did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, the Director argues that the administrative law judge erred in his evaluation of the pulmonary function study and medical opinion evidence in finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Claimant responds, urging affirmance of the administrative law judge's award of benefits.[3]

[2] The record reflects 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 (1989) (en banc).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of 20.16 years of coal mine employment, with at least fifteen years underground, and his findings that the evidence does not establish total disability pursuant to 20 C.F.R.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living 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 did not establish any element of entitlement. Consequently, claimant had to submit new evidence establishing at least one of the elements of entitlement in order to obtain review of the merits of his 2009 claim. 20 C.F.R. §725.309(d)(2), (3).

The Director contends that the administrative law judge failed to resolve the conflicts regarding the validity of two pulmonary function studies performed by Dr. Alam, which, in turn, affected the administrative law judge's weighing of Dr. Alam's medical opinion. Director's Brief at 306.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of Dr. Alam's pulmonary function studies, dated July 2, 2009 and August 31, 2009, together with a pulmonary function study performed by Dr. Westerfield, dated March 2, 2010. Decision and Order at 8-10. The administrative law judge permissibly found that, while qualifying,[4] Dr. Westerfield's March 2, 2010 pulmonary function study results were entitled to little probative weight, based on Dr. Westerfield's uncontradicted

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§718.204(b)(2)(ii)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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).

opinion that the results were invalid. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); Decision and Order at 9; Director's Exhibit 18. The administrative law judge further found that, while both of Dr Alam's pulmonary function studies also produced qualifying results, there was conflicting medical evidence as to the validity of those results. Decision and Order at 8-9. Dr. Alam found both studies to be valid, while Dr. Gaziano found the July 2, 2009 study to be invalid, and Dr. Mettu found the August 31, 2009 study to be invalid. Director's Exhibit 13 at 7, 18. Each reviewing physician concluded that claimant provided poor effort and cooperation, and had difficulty understanding directions.[5] *Id.* The administrative law judge concluded that because "the qualified physicians disagree regarding the reliability" of the July 2, 2009 and August 31, 1009 pulmonary function studies, these studies were "inconclusive on the issue of total disability."[6] Decision and Order at 9. Therefore, the administrative law judge concluded that the pulmonary function study evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9-10.

As the Director correctly asserts, the administrative law judge did not resolve the conflict between Dr. Alam's opinion and the opinions of Drs. Gaziano and Mettu regarding the reliability of the July 2, 2009 and August 31, 2009 pulmonary function studies. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). An administrative law judge must consider a reviewing doctor's opinion that a claimant performed a pulmonary function study with poor effort and that the study is therefore invalid and unreliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Furthermore, such a physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an administrative law judge's decision to reject the results of the study. *Siegel v. Director*, OWCP, 8 BLR 1-156 (1985). In this case, the administrative law judge did not provide a sufficient credibility determination as to the conflicting physicians' opinions regarding whether the July 2, 2009 and August 31, 2009 pulmonary function studies were valid. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Therefore, we vacate the administrative law judge's finding

[5] In a letter dated October 13, 2009, and in his deposition, Dr. Alam refuted the opinions of Drs. Gaziano and Mettu, and explained his reasons for concluding that the pulmonary function studies were valid. Director's Exhibits 16, 17.

[6] The record reflects that Dr. Alam is Board-certified in Internal Medicine, Critical Care, and Pulmonary Medicine. Director's Exhibit 13. Dr. Gaziano is Board-certified in Internal Medicine, Critical Care, and Chest Diseases. Director's Exhibit 13. Dr. Mettu is Board-certified in Internal Medicine, Sleep Medicine, and Pulmonary Disease. Director's Exhibit 13.

pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the matter to the administrative law judge to resolve the conflicting opinions concerning the validity of the July 2, 2009 and August 31, 2009 pulmonary function studies, and to determine whether the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

We further find merit in the Director's contention that the administrative law judge's evaluation of the pulmonary function studies affected his weighing of the medical opinions. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Skinner, Westerfield, and Alam. The administrative law judge found that Dr. Skinner, the miner's treating physician, did not address whether claimant has a totally disabling respiratory impairment.[7] Thus, the administrative law judge properly found that his opinion is not probative on the issue of total disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283-85 (6th Cir. 2005); Decision and Order at 15.

Dr. Westerfield opined that claimant has "little or no [respiratory] impairment."[8] Director's Exhibit 18. In contrast, Dr. Alam opined that claimant suffers from a totally disabling respiratory impairment.[9] Director's Exhibits 13, 15, 17. Weighing these

[7] Dr. Skinner opined that claimant has severe coronary artery disease, previous bypass surgery stenting, chronic systolic congestive heart failure, mild mitral regurgitation, mild aortic insufficiency, and black lung disease. Dr. Skinner concluded that "[b]ecause of his intrinsic lung disease which just put a strain on his heart, it worsens his cardiac condition. As a result of this problem, he has chronic problems of being short of breath with dyspnea on exertion." Decision and Order at 14-15; Director's Exhibit 19.

[8] Regarding the degree of claimant's respiratory impairment, Dr. Westerfield stated:

> Respiratory impairment cannot be assessed due to [claimant] being unable to perform [pulmonary function] testing. I do note that FVC is at least 3.69 making his value 96% predicted and arterial blood gases are in the normal range. It is my opinion that [claimant] has little or no respiratory impairment. If he has a pulmonary impairment it is certainly not disabling.

Director's Exhibit 18.

[9] Dr. Alam stated that claimant "has severe pulmonary impairment because of FEV1 of 31% predicted, chronic bronchitis causing him to have severe shortness of breath with exertion, [and an x-ray] suggestive of severe cardiomegaly which is causing him to have dyspnea" and concluded that claimant is "disabled from a pulmonary point of view." Director's Exhibit 13.

medical opinions, the administrative law judge rationally found Dr. Westerfield's opinion to be internally inconsistent and unreasoned, because "Dr. Westerfield does not explain, after concluding that the [March 2, 2010 pulmonary function study] is invalid and therefore unreliable to assess Claimant's pulmonary impairment, why he then relied upon a portion of the [pulmonary function study] to determine that Claimant 'has little or no respiratory impairment,' while disregarding the rest of the [March 2, 2010 pulmonary function study] results." *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6 (6th Cir. 1983); Decision and Order at 13-14; Director's Exhibit 18.

In contrast, the administrative law judge found that Dr. Alam's opinion, that claimant is totally disabled from a respiratory impairment, was well-reasoned and well-documented and entitled to "full probative weight" because it is based on "objective medical evidence, including Claimant's physical examination, his symptoms, and his [pulmonary function study results]. Decision and Order at 12, 15; Director's Exhibit 13. As the Director correctly asserts, however, the administrative law judge failed to explain his determination to credit Dr. Alam's opinion, which is based largely on the July 2, 2009 and August 31, 2009 pulmonary function study results, in light of his earlier finding that these results are inconclusive and do not support a finding of total disability. Director's Brief at 3-4. Thus, the administrative law judge's decision 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). We must therefore also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). In determining, on remand, whether Dr. Alam's medical opinion establishes total disability, the administrative law judge should address the explanations for the physician's conclusions, the documentation underlying his medical judgment, and the sophistication of, and bases for, his diagnoses. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6 (6th Cir. 1983).

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 the administrative law judge finds, on remand, that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant will have again invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. As the Director has conceded that he cannot establish rebuttal of the presumption, the administrative law judge must then award benefits. 30 U.S.C. 921(c)(4); Director's Brief at 6-7.

Accordingly, the Decision and Order awarding 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.

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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