BRB No. 12-0454 BLA

KENNETH R. VANCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/08/2013
	)	
MOUNTAINEER COAL DEVELOPMENT COMPANY	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Barry H. Joyner (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 (2011-BLA-5197) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves claimant's second request for

modification of the denial of a subsequent claim filed on March 25, 2002,[1] and is before the Board for the second time.[2]

In addressing claimant's second timely request for modification, the administrative law judge credited claimant with twenty-nine years of coal mine employment,[3] and reconsidered the subsequent claim record. The administrative law judge found that the medical evidence developed since the denial of the prior claim did not establish the existence of a totally disabling respiratory or pulmonary impairment and, thus, did not establish a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). The administrative law judge, therefore, found that claimant did not establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence submitted since the denial of the prior claim did not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, has filed a response, asserting that claimant's argument has

[1] The recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, since it involves a miner's claim filed before January 1, 2005.

[2] The present claim is claimant's fourth application for benefits. The district director denied claimant's most recent prior claim on March 23, 2001, because claimant did not establish the existence of a totally disabling pulmonary or respiratory impairment. Director's Exhibit 3. Claimant filed his current claim on March 25, 2002, more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 5. Administrative Law Judge Richard A. Morgan initially denied benefits, because the new evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 55. Claimant thereafter requested modification, which Judge Morgan denied, finding that claimant did not establish total disability. Director's Exhibits 56, 80. On appeal, the Board affirmed Judge Morgan's finding that the new evidence did not establish total disability. *Vance v. Mountaineer Coal Dev. Co.*, BRB No. 09-0414 BLA (Nov. 18, 2009) (unpub.). Claimant filed the current modification request on March 7, 2010. Director's Exhibit 87.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. 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 (1989) (en banc).

merit, and requesting that the Board remand this matter to the administrative law judge for further consideration. Employer has not filed a response brief.[4]

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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 claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing the existence of a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §725.309(d)(2),(3).

In considering a request for modification of the denial of a subsequent claim, which was denied based upon a failure to establish a change in an applicable condition of entitlement, an administrative law judge must determine whether the evidence developed in the subsequent claim, including any evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §§725.309(d), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). The administrative law judge must also consider whether there was a mistake in a determination of fact with regard to the denial of claimant's subsequent claim. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Claimant asserts that the administrative law judge erred in his evaluation of the medical opinions submitted on modification. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rao, Baker, Ranavaya, and

[4] Because the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Zaldivar. Dr. Rao, claimant's treating physician, and Dr. Baker opined that claimant suffers from a totally disabling pulmonary impairment. Director's Exhibits 52, 72, 87; Claimant's Exhibits 1, 2. In contrast, Drs. Ranavaya and Zaldivar concluded that claimant is not totally disabled due to a respiratory or pulmonary impairment. Director's Exhibits 11, 32.

The administrative law judge gave little weight to Dr. Rao's opinion, in view of the doctor's express reliance on the results of a January 12, 2010 pulmonary function study, which the administrative law judge found to be invalid.[5] Decision and Order at 8; Claimant's Exhibit 1. The administrative law judge further found Dr. Rao's opinion to be poorly reasoned and documented, because the physician did not offer any objective evidence, other than the invalid January 12, 2010 study, to support his conclusion that claimant suffers from a totally disabling respiratory or pulmonary impairment.[6] Decision and Order at 8-9. The administrative law judge also accorded little weight to Dr. Baker's total disability opinion, finding that it "is entirely predicated on his interpretation of" the results of the invalid January 12, 2010 pulmonary function study. Decision and Order at 9. Additionally, the administrative law judge found the opinions of Drs. Ranavaya and Zaldivar did not support claimant's case, as these physicians concluded that claimant does not have a totally disabling respiratory or pulmonary impairment. Decision and Order at 8, 10. Therefore, the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and denied benefits on modification.

Claimant contends that the administrative law judge erred in discounting the opinion of Dr. Baker, that claimant has a totally disabling respiratory or pulmonary impairment. We agree. The administrative law judge's sole basis for according little weight to Dr. Baker's opinion, was that the doctor's opinion was "entirely predicated on his interpretation of" the results of the invalid January 12, 2010 pulmonary function study. Decision and Order at 9. However, as claimant and the Director assert, contrary to the administrative law judge's finding, Dr. Baker's opinion was not "entirely predicated" on the January 12, 2010 study. Claimant's Brief at 12; Director's Brief at 4. Dr. Baker testified that, as early as 2008, he believed that claimant had a "moderate

[5] The administrative law judge found that the January 12, 2010 pulmonary function study was invalid, based on the administering technician's notation that claimant provided "poor effort" and coughed "throughout [the] test." Decision and Order at 7; Director's Exhibit 87. Because this finding is uncontested, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Claimant does not challenge the administrative law judge's discrediting of the opinion of Dr. Rao. Therefore, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

impairment" that "would prohibit him from doing the work of a coal miner." Claimant's Exhibit 2 at 16. In reaching this conclusion, Dr. Baker relied on a September 23, 2008 pulmonary function study that he administered, which, while non-qualifying,[7] Dr. Baker interpreted as reflecting a "moderate obstructive ventilatory defect."[8] Director's Exhibit 72. Dr. Baker opined that this defect is totally disabling, as claimant would be unable to return to his prior coal mine work as an electrician, which Dr. Baker testified would entail "extremely heavy exertional requirements." Claimant's Exhibit 2 at 7-8. As Dr. Baker did not rely solely on the invalid January 12, 2010 pulmonary function study to conclude that claimant is totally disabled, but also relied on an earlier study, the validity of which is undisputed, and on claimant's work history, family history, medical history, and a physical examination, the administrative law judge's characterization of Dr. Baker's opinion is not supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); Claimant's Exhibit 2 at 5. Because the administrative law judge's mischaracterization of Dr. Baker's opinion affected his weighing of the new medical opinion evidence on the issue of total disability, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In light of the above error, we vacate the administrative law judge's finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). On remand, when considering whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.[9] *Hicks*, 138

[7] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] Dr. Baker concluded that, while technically non-qualifying, the September 23, 2008 pulmonary function study supported a finding of total disability, noting that the results "are only a few hundredths of a point [above disability levels]." Claimant's Exhibit 2 at 17. Dr. Baker further explained that because claimant's usual coal mine work involved heavy physical exertion and other known causes of bronchospasms, he "would not be able to do the work of a miner." *Id.*

[9] If the administrative law judge, on remand, finds that the new medical evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant

F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, the administrative law judge must determine whether the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). If the administrative law judge finds that the evidence establishes a change in the applicable condition of entitlement under 20 C.F.R. §725.309, he then must consider claimant's 2002 claim on the merits, based on a weighing of all of the evidence of record. *See White*, 23 BLR at 1-3.

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has established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See 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).

Accordingly, the administrative law judge's Decision and Order denying 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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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