BRB No. 11-0167 BLA

JOSEPH PALUMBO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/30/2011
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Christopher J. Szewczyk, Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (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.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05049) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on March 28, 2006, pursuant to 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).[1] This case is before the Board for a third

[1] Claimant filed an initial claim for benefits on August 9, 1995, which was denied by the district director because claimant submitted no proof that he had been a miner. Director's Exhibit 1. Claimant filed a second claim on March 8, 2002, which was denied by Administrative Law Judge Robert D. Kaplan on October 28, 2003. Director's Exhibit 2. Judge Kaplan found that, while claimant established that he had been a miner, he

time. The procedural history of the current subsequent claim is as follows. In a Decision and Order issued on September 24, 2007, Administrative Law Judge Janice K. Bullard found that claimant failed to establish, based on the newly submitted evidence, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant appealed and the Board vacated the denial of benefits, based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant had not received a complete pulmonary evaluation, as required by 20 C.F.R. §725.406.[2] *J.P.* [*Palumbo*] *v. Director, OWCP*, BRB No. 08-0499 BLA, slip op. at 3-4 (Feb. 25, 2009) (unpub.).

On remand, claimant was re-examined by Dr. Levinson, at the request of the Department of Labor (DOL), on July 30, 2009. Director's Exhibit 40. Thereafter, the district director issued a Proposed Decision and Order denying benefits on September 4, 2009. Director's Exhibit 41. Claimant requested a hearing, which was held on April 27, 2010 before Judge Odegard (the administrative law judge). In a Decision and Order issued on October 20, 2010, which is the subject of this appeal, the administrative law judge credited claimant with at least fourteen years of coal mine employment and adjudicated the claim under the regulations at 20 C.F.R. Part 718. The administrative law judge accepted the parties' stipulation that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a), 718.203 and, therefore, she found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, however, the administrative law judge determined that the evidence failed to prove that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that he provided sufficient hearing testimony to establish that he is totally disabled. The Director responds, asserting that the Board should affirm the denial of benefits because claimant does not specifically challenge the weight accorded to the medical evidence. The Director indicates that the administrative

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failed to prove the existence of pneumoconiosis and that he was totally disabled. *Id*. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *J.P.* [*Palumbo*] *v. Director, OWCP*, BRB No. 04-0207 BLA (Nov. 10, 2004) (unpub.). Claimant took no further action until he filed the current subsequent claim.

[2] Dr. Levinson examined claimant, at the request of the Department of Labor, on May 3, 2006. Director's Exhibit 16. Although Dr. Levinson diagnosed pneumoconiosis and a mild respiratory impairment, he did not address the requisite issue of whether claimant was totally disabled. *Id*.

law judge mischaracterized the pulmonary function study evidence, but asserts that this error is harmless and that substantial evidence supports her conclusion that claimant is not totally disabled.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement.[4] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Initially, we reject claimant's argument that the administrative law judge erred by not finding that claimant established total disability, based on claimant's testimony at the hearing that he is unable to perform his usual coal mine work from a respiratory or pulmonary standpoint.[5] In a living miner's claim, " a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony." 20

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

[4] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established at least fourteen years of coal mine employment and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on the parties' stipulation that claimant suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1993).

[5] Claimant's counsel argues that, "perhaps most relevantly, [claimant] testified that his symptoms have progressed since his hearing in July of 2003 in that it is more difficult to breathe and to recuperate from any physical exertion. . . . [and] that not only would he be unable to perform any of his past coal mine work, but also that he could not perform any work comparable thereto due to his existing breathing impairment." Claimant's Brief in Support of Petition for Review at [6-7] (unpaginated).

C.F.R. §718.204(d). Thus, claimant's hearing testimony alone is insufficient to prove that he is totally disabled. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

However, based on our review of the administrative law judge's Decision and Order and the Director's brief, we conclude that the administrative law judge's denial of benefits must be vacated, as she did not consider all of the relevant evidence on the issue of total disability.

The administrative law judge described the record as containing only one pulmonary function study, dated September 2, 2009. Decision and Order at 5-6. The administrative law judge found that both the pre-bronchodilator and post-bronchodilator values of the September 2, 2009 study were non-qualifying for total disability.[6] *Id*. The administrative law judge also noted that Dr. Spagnolo invalidated this test. *Id*. Thus, the administrative law judge concluded that claimant was unable to establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that claimant was unable to establish total disability, as the one arterial blood gas study of record, dated July 30, 2009, was non-qualifying.[7] Decision and Order at 7. Finally, the administrative law judge found that the one medical opinion of record, by Dr. Levinson, was that claimant does not have a totally disabling respiratory impairment.[8] *Id*. The administrative law judge therefore found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9] *Id*. at 8.

[6] A "qualifying" pulmonary function test yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" test yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

[8] The administrative law judge noted that Dr. Levinson examined claimant in 2006 and 2009. She indicated that she gave most weight to "the most recent examinations." Decision and Order at 7-8.

[9] The administrative law judge did not address whether claimant was able to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

The Director correctly points out on appeal that the administrative law judge erred in concluding that there was only one pulmonary function study performed in conjunction with Dr. Levinson's recent examination of claimant. The record shows that Dr. Levinson re-examined claimant on July 30, 2009, at which time he obtained a chest x-ray, a pulmonary function study and an arterial blood gas study. Director's Exhibit 40. In a report dated August 22, 2009, Dr. Spagnolo reviewed the July 30, 2009 pulmonary function study, at the request of DOL, and indicated that the *pre-bronchodilator* results were invalid due to "inconsistent effort." *Id*. A second pulmonary function study was conducted by Dr. Levinson on September 2, 2009.[10] *Id*. The record does not contain a review of the results of the September 2, 2009 study. *Id*.

In weighing the pulmonary function study evidence, although the administrative law judge correctly determined that the September 2, 2009 study did not produce qualifying values for total disability, she did not address the results of the July 30, 2009 study, which show qualifying values for total disability after claimant was administered a bronchodilator. Decision and Order at 6; Director's Exhibit 40. She also mistakenly found that Dr. Spagnolo's invalidation report pertained to the September 2, 2009 study, rather than the July 30, 2009 study. *Id*.

The Director asserts on appeal that claimant has not been prejudiced by the administrative law judge's failure to consider the July 30, 2009 pulmonary function study. Director's Brief at 5 n.4. The Director reasons that because Dr. Spagnolo invalidated the pre-bronchodilator values of the July 30, 2009 test, "his report arguably must be taken to mean that the much lower [qualifying] post-bronchodilator results obtained at the same time are unreliable as well." *Id*. Similarly, the Director reasons that, because Dr. Levinson specifically relied upon the pre-bronchodilator results to support his opinion, the doctor must have discredited the post-bronchodilator results. The Director also maintains that, because "both sets of results from the more recent [September 2, 2009] test were non-qualifying" and the latest testing is more indicative of claimant's respiratory status, "there is no reason to give any credence to the *qualifying* post-bronchodilator results of the July 2009 test." *Id*. (emphasis added).

[10] When weighing the September 2, 2009 pulmonary function study, the administrative law judge erroneously referenced Dr. Spagnolo's review and discussion of the pre-bronchodilator results of the July 30, 3009 pulmonary function study. *See* Decision and Order at 6; Director's Exhibit 40. Dr. Spagnolo, however, did not review or offer an opinion on the results of the September 2, 2009 pulmonary function study.

The Director's argument on appeal is a request for the Board to weigh the evidence and render factual findings, which we are not empowered to do. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). When an administrative law judge fails to consider relevant evidence, which conflicts with credited evidence, the proper course for the Board is to remand the case to the administrative law judge, rather than to assume that consideration of the evidence would not alter the administrative law judge's judgment. *Id.*; *see also Anderson Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge failed to consider the July 30, 2009 pulmonary function study, we vacate her findings at 20 C.F.R. §718.204(b)(2)(i), and her determination that claimant failed to establish total disability.

The administrative law judge's denial of benefits is vacated and the case is remanded for further consideration of whether the evidence has established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b).[11] *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991) (*en banc*). In that regard, the administrative law judge must consider that "if a wide range of factors . . . support[s] a finding of total disability, then even the mere absence of a satisfactory report . . . may not doom [claimant's] claim. *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1332, 10 BLR 2-220, 2-244 (3d Cir. 1987). As claimant argues, the factors in this case include claimant's current condition, as described in his testimony, Dr. Levinson's finding of a pulmonary impairment and evidence of claimant's last coal mine employment. *See Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80, 12 BLR 2-192, 2-197 (3d Cir. 1989); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Claimant's Brief in Support of Petition for Review at [6-7] (unpaginated). In addition, the administrative law judge should determine whether Dr. Levinson's statement describing the severity of claimant's impairment reflects a documented and reasoned opinion of no total disability, taking into consideration the exertional requirements of claimant's usual coal mine employment: "the pulmonary impairment in and of itself does not appear to be of a degree to disable from coal mine work."[12] Director's Exhibit 40; *see Gonzales*, 869 F.2d at 779-80, 12 BLR at 2-197; *Mangifest*, 826 F.2d at 1327, 10 BLR at 2-233; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). If the administrative law judge concludes that the evidence establishes that claimant is totally disabled, she should then

[11] The administrative law judge must render specific findings at 20 C.F.R. §718.204(b)(2)(iii), which she failed to include in her opinion.

[12] Dr. Levinson indicated that he was not provided a copy of Form CM-911a, which was completed by claimant and describes his employment history. Director's Exhibit 40.

determine whether pneumoconiosis is a substantially contributing cause of that total disability pursuant to 20 C.F.R. §718.204(c).

Furthermore, relevant to this living 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), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under amended 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)).

We instruct the administrative law judge, on remand, to consider whether claimant is entitled to the presumption at amended Section 411(c)(4). In so doing, the administrative law judge must make a specific finding as to whether claimant has the requisite number of years of qualifying coal mine employment and also reconsider whether claimant has established a totally disabling respiratory or pulmonary impairment. In addressing the issue of total disability, relevant to invocation of the presumption, the administrative law judge is instructed to reweigh the evidence, as discussed *supra*. If claimant is able to invoke the amended Section 411(c)(4) presumption, the administrative law judge must also consider whether the presumption is rebutted by the record evidence.[13] Alternatively, if claimant is unable to invoke the presumption for failure to establish the requisite years of qualifying coal mine employment, but is determined to be totally disabled, the administrative law judge should determine whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[13] The administrative law judge must consider whether to 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 2-1, 2-7-11 (6th Cir. 1990).

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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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only:

_____
ROY P. SMITH
Administrative Appeals Judge