BRB No. 11-0216 BLA

REGINALD DEAN WALLS	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/22/2011
	)	
	)	
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 on Remand Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2008-BLA-05121) of Administrative Law Judge Robert B. Rae, rendered on a claim filed on January 26, 2007, 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 is before the Board for a second time. In the administrative law judge's initial Decision and Order, issued on December 16, 2008, he credited claimant with over twenty-nine years of coal mine employment and found that the evidence was sufficient to establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge further found that the evidence was sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board determined that, in analyzing the x-ray, blood gas study and medical opinion evidence of record, the administrative law judge did not comply 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). *R.D.W.* [*Walls*] *v. Marfork Coal Co.*, BRB No. 09-0331 BLA, slip op. at 4-7 (Oct. 28, 2009) (unpub.). Accordingly, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1), (4), 718.204(b)(2)(ii), (iv), and the award of benefits, and remanded the case to the administrative law judge with instructions to reconsider the relevant evidence and set forth his findings in detail, including the underlying rationale. *Id*.

Subsequent to the issuance of the Board's decision, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

By Order dated March 30, 2010, the administrative law judge directed the parties to submit position statements addressing the applicability of amended Section 411(c)(4) to this case. In addition, the administrative law judge allowed each party to submit one supplemental report from each physician who had prepared an affirmative medical report. In response, claimant asserted that he meets the criteria for invocation of the amended Section 411(c)(4) presumption. Employer asserted that, although the presumption may affect this case, claimant has not established total respiratory disability. Employer also submitted supplemental medical reports from its experts.

In the administrative law judge's Decision and Order on Remand, issued on November 30, 2010, he determined that the amended Section 411(c)(4) presumption was potentially applicable in this case, as claimant filed his claim after January 1, 2005, the claim was pending on March 23, 2010, and claimant established more than fifteen years

of qualifying coal mine employment. The administrative law judge further found, however, that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R §718.204(b)(2). Consequently, the administrative law judge determined that claimant failed to establish invocation of the amended Section 411(c)(4) presumption. The administrative law judge then addressed the elements of entitlement on the merits and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant maintains that he is entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). In this regard, claimant contends that the administrative law judge erred in finding that the blood gas studies and medical opinions of record were insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal, unless requested to do so by the Board.[1]

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.[2] 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).

Regarding the issue of total disability at 20 C.F.R. §718.204(b)(2)(ii), the record contains resting and exercise blood gas studies conducted by Dr. Rasmussen on April 18, 2007, and a resting study conducted by Dr. Crisalli on July 23, 2007.[3] Director's Exhibit

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or that he is totally disabled under 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 8, 11-14.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Hearing Transcript at 17. 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*).

[3] Dr. Crisalli indicated that "an arterial line will not be inserted for a pulmonary stress test," due to claimant's "inadequate collateral circulation." Employer's Exhibit 1.

10; Employer's Exhibit 1. The resting portion of both studies produced non-qualifying values, while the exercise portion of the April 18, 2007 study produced qualifying values.[4] *Id*.

The administrative law judge reviewed the blood gas studies of record and found:

> The ABG [arterial blood gas] tests performed by Dr. Rasmussen were non-qualifying for the resting portion of the tests, but qualifying for the exercise portion. The resting PCO2 reading was 41 and PO2 was 68. The exercise PCO2 level was 42 and the exercise level was 58, which for this individual [c]laimant was qualifying.
>
> Dr. Robert J. Crisalli, on behalf of the Employer, performed an ABG study on the Claimant, but only at rest. The result of this at rest test was non-qualifying; however, he did not perform exercise testing. After reconsideration, I find that overall the ABG testing does not support a finding that Claimant is totally disabled.

Decision and Order on Remand at 13 (citations omitted). Claimant asserts that the administrative law judge erred in failing to explain how he resolved the conflict between the non-qualifying resting studies and the qualifying exercise study. We agree. As he did in his initial Decision and Order, the administrative law judge has rendered a finding at 20 C.F.R. §718.204(b)(2)(ii), without setting forth the underlying rationale. Because the administrative law judge credited the non-qualifying resting studies over the qualifying exercise study without explanation, his finding does not comport with the APA.[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's determination that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Because the administrative law judge's evaluation of the blood gas study evidence on remand affected his weighing of the medical opinions, we must also vacate the

[4] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C 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)(ii).

[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 on the record." 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).

administrative law judge's finding that the medical opinions were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See* Decision and Order on Remand at 14. In addition, based on our holdings vacating the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(ii) and (iv), we must vacate the administrative law judge's determination that the relevant evidence, when weighed together, is insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id*.

On remand, the administrative law judge must initially resolve the conflict in the blood gas study evidence and render a finding as to whether it is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge must then reconsider whether the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv). In so doing, the administrative law judge should address the documentation and reasoning underlying the medical opinions, along with the physicians' qualifications, and the sophistication of, and bases for, their diagnoses regarding claimant's ability to perform his usual coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

After the administrative law judge renders findings under 20 C.F.R. §718.204(b)(2)(ii) and (iv), he must weigh all of the evidence relevant to 20 C.F.R. §718.204(b)(2) together, to determine if the evidence supportive of a finding of total disability outweighs the contrary probative evidence of record. *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*). If the administrative law judge determines that claimant has established the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b), he must reconsider whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act. Finally, the administrative law judge must set forth the rationale underlying each finding that he renders on remand, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order on Remand 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge