BRB No. 12-0093 BLA

ROGER D. ROSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	DATE ISSUED: 11/30/2012
	)	
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 Denying Benefits and the Decision and Order Denying Benefits on Reconsideration of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Jacob L. Triolo (Washington and Lee University School of Law Black Lung Clinic), Lexington, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order Denying Benefits on Reconsideration (2009-BLA-5716) of Administrative Law Judge Richard A. Morgan, rendered on an initial claim filed on December 11, 2002, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (Supp. 2011) (the Act).[1] The relevant procedural history of the case is as follows. On March 1, 2004, the district director found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Therefore, benefits were denied. On November 15, 2004, claimant requested modification of that decision. Administrative Law Judge Edward Terhune Miller issued a Decision and Order denying benefits on June 29, 2007. Judge Miller found that claimant did not establish total disability due to pneumoconiosis and, therefore, did not prove a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Therefore, the request for modification was denied.

On June 24, 2008, claimant again requested modification.[2] The district director issued a Proposed Decision and Order denying benefits on April 14, 2009. Claimant requested a hearing, and the case was assigned to Judge Morgan (the administrative law judge), who issued his Decision and Order Denying Benefits on August 16, 2011. In evaluating claimant's request for modification pursuant to 20 C.F.R. §725.310, the administrative law judge found that claimant did not establish a mistake in a determination of fact or a change in conditions, as the evidence did not establish a totally disabling respiratory or pulmonary impairment.[3] Following a request for reconsideration from claimant, the administrative law judge issued a Decision and Order Denying Benefits on Reconsideration on October 25, 2011, reaffirming his determination that claimant did not establish the prerequisites for modification. Therefore, benefits were denied.[4]

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[1] Amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), do not apply to this case, based on the filing date of the claim.

[2] On July 24, 2007, claimant filed an appeal with the Board of the June 29, 2007 decision, which he withdrew on June 10, 2008.

[3] The administrative law judge also found the existence of both silicosis and clinical pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), and further found that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. However, the administrative law judge determined that those findings did not establish a mistake of fact or a change in conditions because those elements of entitlement had been established previously.

[4] Because the administrative law judge found that claimant failed to establish a totally disabling respiratory or pulmonary impairment, he did not reach the issue of disability causation on the merits.

On appeal, claimant argues that the administrative law judge erred in determining that claimant's arterial blood gas studies (BGSs) and the medical opinions from Drs. Rasmussen and Mullins were insufficient to establish a totally disabling pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[5]

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.[6] 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 pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

To successfully establish a basis for modification, claimant is required to demonstrate a change in conditions or a mistake in a determination of fact in the prior decision.[7] *See* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In considering whether claimant has established a change in conditions, the administrative law judge must consider the evidence submitted with the request for modification, in conjunction with the previously submitted evidence. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

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

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the claimant was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); April 14, 2011 Hearing Transcript at 29.

[7] Claimant has not challenged the administrative law judge's determination that he did not demonstrate a mistake of fact in the denial of his initial request for modification. Accordingly, it is affirmed. *Skrack*, 6 BLR at 1-711.

In evaluating whether claimant established that he is now totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that the record contained eight BGSs administered between 2002 and 2009.[8] A March 26, 2003 BGS administered by Dr. Mullins yielded non-qualifying values both at rest and with exercise.[9] Director's Exhibit 9. An April 16, 2004 study administered by Dr. Walker yielded non-qualifying values, but did not indicate whether the values were measured at rest or during exercise.[10] Director's Exhibit 23. A July 1, 2004 study was performed by Dr. Grinnan, who measured only the exercise values, and obtained non-qualifying results. Director's Exhibit 38. Drs. Zaldivar and Crisalli administered BGSs on February 9, 2005 and August 1, 2005, respectively. Director's Exhibits 29, 40. Both studies were performed at rest, and both yielded non-qualifying values. Dr. Rasmussen administered studies on September 21, 2005 and June 23, 2008, which produced non-qualifying values at rest and qualifying exercise values. Director's Exhibit 41; Claimant's Exhibit 3. Finally, Dr. Repsher administered a February 10, 2009 study at rest that yielded non-qualifying values. Employer's Exhibit 1. Thus, the eight studies considered by the administrative law judge produced six non-qualifying resting BGSs, two non-qualifying exercise BGSs, one non-qualifying uncategorized BGS, and two qualifying exercise BGSs.

In evaluating the BGS evidence, the administrative law judge stated:

> [O]nly Dr. Rasmussen's two post-exercise [BGSs], of 9/21/05 and 6/23/08, had "qualifying" values. Dr. Mullin[s's] 2003 exercise [BGS], the only

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[8] A June 14, 2002 study administered by Dr. Dedhia was submitted by employer as a treatment record in the prior modification proceedings. However, in his June 29, 2007 Decision and Order, Judge Miller determined the June 14, 2002 study to be nonconforming because there was no indication of the altitude of the testing location. June 29, 2007 Decision and Order at 14. Administrative Law Judge Morgan (the administrative law judge) did not address the June 14, 2002 study.

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

[10] It appears that the administrative law judge treated this as a resting study, based on his assertion that Dr. Mullins's 2003 arterial blood gas study (BGS) was the only exercise BGS, other than those administered by Dr. Rasmussen. Decision and Order at 23. However, Dr. Walker's treatment record does not state whether the study was performed at rest or during exercise. *See* Director's Exhibit 23.

> other exercise [BGS],[11] had a "non-qualifying" value. Dr. Crisalli found that Dr. Mullin[s's] 2003 exercise [BGS], the only other exercise [BGS], demonstrated normal oxygen transfer. While Dr. Crisalli did not perform an exercise [BGS] because of the miner's [coronary artery disease], Plavix medicine and right knee, Dr. Rasmussen did less than two months later. Dr. Repsher pointed out that [BGSs] are far from perfect and the regulations state they do not establish the degree of disability. Given that only Dr. Rasmussen's exercise tests had "qualifying" values, I do not find total disability established by [BGSs] alone.

Decision and Order at 23.

The administrative law judge next addressed the results of the tests measuring claimant's DLCO,[12] and stated:

> Drs. Rasmussen, Zaldivar and Crisalli found the miner had no diffusion impairment. Dr. Repsher wrote that Dr. Walker's 4/16/04 DLCO was normal. While Dr. Rasmussen played down the accuracy or effectiveness of the DLCO test for the obese, the "normal" DLCO results played a role in the board-certified pulmonologists' opinions and [DLCO] is an acceptable measure of pulmonary impairment which must be considered. Dr. Grinnan conducted a DLCO with results similar to Dr. Crisalli's, but did not comment specifically on it. Thus, the DLCOs do not reflect any significant pulmonary impairment. Drs. Mullins, Grinnan, Repsher, Zaldivar and Crisalli noted no oxygen transfer impairment as had Dr. Rasmussen, although only [sic] Dr. Mullins was the only other physician to conduct an exercise [BGS].

Decision and Order at 23.

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[11] Dr. Grinnan's July 1, 2004 study was also a non-qualifying exercise study, but was not specifically mentioned by the administrative law judge. *See* Director's Exhibit 38.

[12] The DLCO, or diffusing capacity of the lung for carbon monoxide, is measured by calculating the difference between the amount of carbon monoxide inhaled and the amount exhaled after the breath is held for a specified period. David C. Dugdale, III, MD, and David Zieve, MD, *Lung Diffusion Testing*, MEDLINEPLUS: A SERVICE OF THE U.S. NATIONAL LIBRARY OF MEDICINE, NATIONAL INSTITUTES OF HEALTH (Updated Dec. 12, 2011), http://www.nlm.nih.gov/medlineplus/ency/article/003854.htm.

The administrative law judge then evaluated of all of the medical opinion evidence of record pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge focused in particular upon the opinions offered regarding the qualifying exercise BGSs obtained by Dr. Rasmussen on September 21, 2005 and June 23, 2008, and the significance of claimant's normal DLCO results. With respect to the testimony of employer's experts regarding claimant's qualifying exercise BGS results, the administrative law judge noted:

> [T]he claimant argues that medical evidence is required to rebut the results of [a BGS] in order to find it unreliable. That is the case here. I have not accepted the claimant's testimony, as a fact, that Dr. Mullin[s's] [2003 exercise BGS] did not use an in-line catheter, thus making it less than reliable. My concern here is that the miner gave Drs. Zaldivar and Crisalli reasons not to conduct exercise studies, but then exercised for Dr. Rasmussen. That suggests a possible lack of candor with the former.

Decision and Order Denying Benefits on Reconsideration at 4. Regarding the physicians' comments on claimant's DLCO results, the administrative law judge accepted Dr. Repsher's view that the DLCO is "a much better test" than the BGS. Decision and Order at 25. The administrative law judge further stated that "the regulations do not provide that [a BGS] is the very best test to determine total disability." *Id*.

The administrative law judge then rendered findings as to the probative value of the respective physician's opinions. The administrative law judge found that Dr. Crisalli's opinion was based upon the most comprehensive review of the claimant's medical condition, while acknowledging the fact that Dr. Crisalli did not review the 2008 and 2009 testing. Decision and Order at 24. The administrative law judge further noted that Drs. Rasmussen and Mullins were the only physicians who opined that claimant is totally disabled from a respiratory impairment. *Id*. The administrative law judge found Dr. Mullins's opinion "light on documentation and reasoning," because she did not refer to specific evidence of claimant's disability, and her diagnosis of a form of pneumonitis had been called into question. *Id*. The administrative law judge determined that Dr. Rasmussen had not persuasively explained why claimant's DLCO and BGSs did not follow the general pattern of correlation. *Id*. The administrative law judge also discredited Dr. Rasmussen's opinion that claimant's A-a gradient revealed an impairment as Dr. Rasmussen's views were "not in line with the findings of the board-certified pulmonologists . . . ." *Id.* at 25 n.50. The administrative law judge concluded that claimant had not met his burden of establishing the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 25.

Claimant argues that the administrative law judge's findings regarding total disability are not supported by substantial evidence; that in agreeing with employer's experts that a diffusion capacity test is more reliable than an exercise BGS, the administrative law judge has taken a position that contradicts the views of the Department of Labor (DOL); and that the administrative law judge erred in relying upon the opinions of Drs. Crisalli and Zaldivar to find that claimant failed to establish total disability, when neither of those doctors reviewed any post-2005 testing or records. Claimant's arguments have merit.

In considering the BGS evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge stated, "[g]iven that only Dr. Rasmussen's exercise tests had 'qualifying' values, I do not find total disability established by [BGSs] alone." Decision and Order at 23. As claimant contends, in rendering this finding, the administrative law judge left several conflicts in the evidence unresolved and did not provide an adequate explanation for according less weight to the qualifying exercise BGSs, performed on September 21, 2005 and June 23, 2008. Although the administrative law judge noted that it was claimant's position that Dr. Mullins did not use an in-line catheter when obtaining the non-qualifying exercise BGS study on March 26, 2003, he discredited claimant's "testimony" without considering that, in completing the DOL BGS form, Dr. Mullins reported that she used the single stick method. *See* Director's Exhibit 9. As a result, the administrative law judge did not address the deposition testimony in which Dr. Rasmussen explained why using an in-line catheter during an exercise BGS produces more reliable values than the single-stick method. *See* Claimant's Exhibit 4 at 21.

Pursuant to 20 C.F.R. §718.105(b), if the results of a resting BGS study are non-qualifying, the miner must be offered an exercise BGS, unless medically contraindicated. The administrative law judge did not address the weight to be accorded Dr. Repsher's BGS test results, in light of claimant's uncontradicted testimony that Dr. Repsher did not offer him an exercise BGS. In addition, the administrative law judge suggested that claimant strategically declined the exercise BGSs offered by Drs. Zaldivar and Crisalli, but did not provide a rationale for his apparent finding that claimant's demonstrated a "possible lack of candor." Decision and Order Denying Benefits on Reconsideration at 4. Moreover, the administrative law judge's conclusion is not fully supported by the record. As claimant points out on appeal, although Dr. Zaldivar reported that claimant was offered, and declined, exercise due to knee pain, Dr. Crisalli's report appears to contain his own conclusion that exercise was contraindicated, due to claimant's coronary artery disease, use of Plavix and his right knee pain. *See* Brief in Support of Petitioner's Petition for Review at 8 n.1; Director's Exhibits 29, 38.

Claimant is also correct in arguing that the administrative law judge did not properly consider the DLCO evidence. Although claimant's normal DLCO results potentially constitute contrary probative evidence under 20 C.F.R. §718.204(b)(2), the

administrative law judge did not adequately explain his determination that the DLCO is more reliable than a BGS. The administrative law judge stated, "Dr. Repsher testified that [BGS] testing is far from 'perfect' or reliable and that diffusion capacity testing is a much better test. I find this more in accord with the acceptable view as nearly every pulmonologist in this case conducted one." Decision and Order at 25. As claimant contends, however, the administrative law judge did not determine whether Dr. Repsher's opinion is supported by any underlying documentation, nor did he address Dr. Rasmussen's deposition testimony to the contrary. *See* Claimant's Exhibit 4 at 28-29. Furthermore, the administrative law judge's finding that "nearly every pulmonologist" performed a DLCO does not prove that they considered it superior to a BGS, as several pulmonologists also performed a BGS. Decision and Order at 25.

Finally, as claimant alleges, the administrative law judge did not provide a rational explanation for the probative weight he assigned each relevant medical opinion. The administrative law judge stated, "I find Dr. Crisalli's opinion to be the most comprehensive review of the miner's medical condition although he did not see the 2008 and 2009 testing." Decision and Order at 24. The administrative law judge's finding is irrational as he credits, as the most comprehensive review, a review that omitted consideration of the most recent testing, which was addressed by other doctors. In addition, the administrative law judge did not address the fact that Dr. Crisalli questioned the validity of the qualifying exercise study performed by Dr. Rasmussen on September 21, 2005, based upon his misapprehension that the non-qualifying BGS performed by Dr. Mullins was administered on March 26, 2005 when, in fact, it was administered two years earlier on March 26, 2003. *See* June 29, 2007 Decision and Order at 11-12; Director's Exhibit 9.

Claimant is also correct in asserting that the administrative law judge mischaracterized Dr. Rasmussen's opinion when he stated that the physician did not explain why the results of claimant's qualifying exercise BGS and normal DLCO were not in correlation, as employer's experts maintained they should be. Dr. Rasmussen addressed this subject in his deposition. *See* Claimant's Exhibit 4 at 30. Similarly, the administrative law judge failed to provide a clear rationale for his determination not to credit Dr. Rasmussen's diagnosis of a totally disabling impairment based in part on Dr. Rasmussen's view that the A-a gradient on claimant's exercise BGS is consistent with a finding of impairment.

As discussed above, the administrative law judge's credibility determinations do not satisfy the requirements of the Administrative Procedure Act (APA):[13] he did not

[13] 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. . . ." 5

consider all of the relevant evidence under 20 C.F.R. §718.204(b)(2)(ii), (iv); he mischaracterized certain evidence; he failed to resolve all conflicts in the evidence; and he did not provide adequate explanations for his findings of fact and conclusions of law. *See Wojtowicz*, 12 BLR at 1-165. Therefore, we vacate the administrative law judge's determination that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(ii), (iv), and we vacate the denial of benefits. *Id*.

On remand, the administrative law judge must first reconsider whether claimant has established total disability at 20 C.F.R. §718.204(b)(2)(ii), based on the BGS evidence alone. When weighing the BGS evidence, the administrative law judge must address claimant's argument that the BGS conducted by Dr. Repsher is entitled to little weight because Dr. Repsher did not perform an exercise study as required under 20 C.F.R. §718.105(b). In addition, the administrative law judge must reconsider the reliability of Dr. Mullins's non-qualifying exercise BGS in light of her use of the single-stick method to draw a blood sample. The administrative law judge is also required to reconsider his determination that the qualifying exercise BGSs obtained by Dr. Rasmussen were tainted by claimant's alleged refusal to exercise for Drs. Zaldivar and Crisalli.

The administrative law judge must then reconsider whether total disability has been demonstrated at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge is required to first determine whether each medical opinion is reasoned and documented, based upon an accurate understanding of the contents of each opinion. *See Consol. Coal Co. v. Crisp*. 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). If the administrative law judge determines that total disability has been demonstrated under one or more of the subsections, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record, and reach a determination as to whether claimant satisfied his burden to establish a totally disabling respiratory impairment. *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). In rendering his findings on remand under 20 C.F.R. §718.204(b)(2), the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the Decision and Order Denying Benefits and the Decision and Order Denying Benefits 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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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