BRB No. 07-0136 BLA

K.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVISTAR	)	
	)	DATE ISSUED: 10/30/2007
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

H. Kent Hendrickson (Rice, Hendrickson & Williams), Harlan, Kentucky for employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Employer appeals the Decision and Order – Awarding Benefits (2004-BLA-6636) of Administrative Law Judge Richard K. Malamphy with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited

claimant with at least twenty years of coal mine employment and noted that the claim before him was a subsequent claim under 20 C.F.R. §725.309(d).[1] The administrative law judge found that the claim was timely filed pursuant to 20 C.F.R. §725.308(a). The administrative law judge further determined that the newly submitted medical opinion evidence was sufficient to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Based upon this finding, the administrative law judge determined that claimant established a change in an applicable element of entitlement under Section 725.309(d). With respect to the merits of entitlement, the administrative law judge found that claimant established that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge erred in determining that claimant worked as a miner for over twenty years and that the subsequent claim was timely filed. Employer further contends that the administrative law judge did not properly weigh the medical opinion evidence under Section 718.204(b)(2)(iv). Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded with respect to the length of coal mine employment and timeliness issues. The Director concurs with employer's allegations of error regarding the administrative law judge's consideration of the length and nature of claimant's coal mine employment, but requests that the Board reject employer's arguments concerning the timeliness of the subsequent claim. Employer has replied and reiterates the positions set forth in its Brief in Support of the Petition for Review.[2]

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[1] Claimant filed an application for benefits on June 30, 1976. Director's Exhibit 1 at 226. On June 6, 1985, Administrative Law Judge Peter McC. Giesey dismissed the claim because neither claimant nor a representative appeared at the hearing or responded to a subsequent Order to Show Cause. *Id* at 151. Claimant filed a second claim on June 16, 1992. Director's Exhibit 1 at 351. On May 24, 1995, Administrative Law Judge Charles P. Rippey issued a Decision and Order in which he found that claimant established the existence of pneumoconiosis, but failed to prove that he was totally disabled. Accordingly, benefits were denied. Director's Exhibit 1 at 31. The Board affirmed the denial of benefits in a Decision and Order issued on January 16, 1996. *[K.C.] v. Navistar*, BRB No. 95-1585 BLA (Jan. 16, 1996)(unpub.). Claimant took no further action until filing a third application for benefits on September 23, 2003. Director's Exhibit 2.

[2] We affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as the parties have not challenged this finding on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address the issue of claimant's coal mine employment. At the hearing, employer's counsel initially stipulated that claimant worked "in excess of twenty years" as a miner. Hearing Transcript at 7. Claimant subsequently testified that he worked as a federal mine inspector from 1972 to 1975, when he was seriously injured in a mine accident. *Id*. at 13-14. Claimant further stated that he did not work again until 1996. *Id*. at 14. Claimant indicated that at that time, he took a desk job in the "ventilation office" in Pikeville, Kentucky, where he worked until his retirement in 2003. *Id*. at 14, 21.

Based upon claimant's testimony, counsel for employer withdrew the stipulation to more than twenty years of coal mine employment and stated that employer was willing to stipulate to in excess of ten years. *Id.* at 22, 24. The administrative law judge indicated at the hearing that he accepted the latter stipulation, but in his Decision and Order, he credited claimant with more than twenty years of coal mine employment, "as stipulated by the parties." *Id*. at 24; Decision and Order at 3 (unpaginated). The administrative law judge also noted that claimant's last period of employment was from 1996 until 2003, when he worked in "the ventilation department." Decision and Order at 4 (unpaginated).

Employer argues that because the administrative law judge erroneously ignored the withdrawal of its stipulation to more than twenty years of coal mine employment, the administrative law judge erred in finding that claimant last worked at a desk job. Employer maintains that this error, in turn, affected the administrative law judge's consideration of whether Drs. Baker and Nash had an accurate understanding of the exertional requirements of claimant's usual coal mine employment such that they provided reasoned medical opinions sufficient to trigger the running of the three year limitations period set forth in Section 725.308(a). The Director has responded and agrees with employer's contentions regarding the withdrawal of its stipulation and the administrative law judge's finding as to claimant's last job as a miner. The Director asserts that the latter error is significant because it caused the administrative law judge to determine, incorrectly, that the law of the United States Court of Appeals for the Sixth Circuit should be applied as to whether claimant's 2003 claim was timely filed pursuant to Section 725.308.

The material issue raised by the parties is not whether the administrative law judge should have credited claimant with ten years of coal mine employment, rather than twenty, but whether the administrative law judge misidentified the location and nature of claimant's last coal mine employment. Regarding the location of claimant's last coal mine employment, documents in the record indicate that all of the work that claimant performed in and around coal mines occurred in Kentucky, Tennessee, and Ohio, all of which are within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.[3] Director's Exhibit 1 at 224, 344. The administrative law judge acted properly, therefore, in applying the law of the Sixth Circuit, and we will also apply this law to determine whether the administrative law judge correctly found that claimant's 2003 claim was timely filed under Section 725.308(a). *Shupe v. Director,* OWCP, 12 BLR 1-200 (1989)(*en banc*).

In determining that claimant's subsequent claim was timely filed in this case, the administrative law judge stated that:

> …Judge Rippey pointed out in his decision that, while Drs. Baker and Nash stated the miner was totally disabled, they did not take into consideration the fact that the Claimant was a mine inspector, rather than a laborer, during his last period of coal mine employment. Thus, the opinions of Drs. Baker and Nash with respect to the Claimant's total disability were not "medically supported." Therefore, 20 C.F.R. §725.308(a) does not hinder the outcome of this case.

Decision and Order at 2 (unpaginated). The Director asserts that the administrative law judge erred in treating claimant's work as a federal mine inspector as coal mine employment. Employer contends that "the significance of [the] error in the length of coal mine employment is the ALJ's resulting inference that [c]laimant's usual coal mine work was his desk job with the federal government." Employer's Brief at 5-6 (unpaginated). Employer also argues that the administrative law judge did not properly consider the opinions of Drs. Baker and Nash, as they were, in fact, aware that claimant was last employed as a mine inspector, when they reported that claimant was totally disabled due to pneumoconiosis.

[3] The Director, Office of Workers' Compensation Programs, asserts that this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because claimant last worked as a miner in Illinois for International Harvester (IH), employer's predecessor. Although claimant's Social Security Administration records indicate that IH's corporate offices were located in Illinois during his tenure with the company, as employer has indicated, claimant reported that his work for IH took place at a mine in Kentucky. Director's Exhibit 1 at 13, 224.

These allegations of error ignore a central component of the timeliness analysis that the administrative law judge also neglected to address. In *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that under Section 725.308:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale* [*v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits.

264 F.3d at 607, 22 BLR 2-298 (emphasis in original). In the present case, subsequent to the denial of his 1992 claim, claimant returned to employment and began working at the ventilation department in Pikeville, Kentucky. The administrative law judge did not consider, however, whether this job constituted the work of a miner such that the three-year limitations period set forth in Section 725.308 began running anew, thereby rendering the medical opinions of Drs. Baker and Nash irrelevant to the issue of whether claimant's 2003 subsequent claim was timely filed. Because the administrative law judge did not address the significance of claimant's return to work, we must vacate his determination that the 2003 claim was timely filed and remand the case to the administrative law judge so that he can render a finding on this issue. In so doing, the administrative law judge must also reconsider his determination as to the length of claimant's coal mine employment in light of the evidence of record and employer's statement at the hearing regarding its stipulation as to the duration of claimant's tenure as a miner.

If the administrative law judge finds that the job that claimant began performing in 1996 was not the work of a miner under 20 C.F.R. 725.101(a)(19), the disposition of the timeliness issue would concern the nature of claimant's last coal mine employment as of 1992 and the interpretation of the opinions of Drs. Baker and Nash. *See Kirk*, 264 F.3d at 607, 22 BLR 2-298. To avoid any repetition of error on remand, we will address the arguments that the Director and employer have raised with respect to the administrative law judge's consideration of these items. Regarding the nature of claimant's last coal mine employment as of 1992, the Director argues that the administrative law judge erred in treating claimant's work as a federal mine inspector as coal mine employment. Without addressing this specific issue, the Sixth Circuit has held that duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. The function requirement mandates that the duties

performed be integral to the extraction or preparation of coal. The Board has held that the work of a federal mine inspector constitutes coal mine employment under the terms of the Act, because it meets the situs and function requirements. *Bartley v. Director, OWCP*, 12 BLR 1-89 (1988); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981). Thus, we reject the Director's argument that the administrative law judge erred in determining that claimant's usual coal mine employment as of 1992 was as a federal mine inspector.

Employer maintains that the administrative law judge erred determining that claimant's last coal mine work was a desk job. Employer also contends that the administrative law judge mischaracterized the opinions of Drs. Baker and Nash. Employer's first allegation of error is without merit, as it is apparent from the administrative law judge's discussion of the timeliness issue that he accurately identified the job of a mine inspector as claimant's usual coal mine employment as of 1992 – the year in which Drs. Baker and Nash examined claimant and submitted their reports. Decision and Order at 2 (unpaginated).

Employer is correct, however, in contending that the administrative law judge did not properly weigh the opinions of Drs. Baker and Nash. Dr. Baker examined claimant on February 9, 1994 and noted that claimant had worked as a roof bolter, mine inspector, and foreman. Director's Exhibit 1 at 239. Dr. Baker diagnosed coal workers' pneumoconiosis, chronic obstructive airway disease, and chronic bronchitis. *Id*. at 241. The physician stated that claimant "would have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions." *Id*. at 242. Dr. Nash examined claimant on May 22, 1992, and set forth the same occupational history as that recorded by Dr. Baker. Director's Exhibit 1 at 314. Dr. Nash opined that claimant had coal workers' pneumoconiosis and chronic obstructive lung disease. *Id*. at 316. Dr. Nash indicated that claimant was "totally and permanently disabled for all work, especially heavy work in a dusty environment like the coal mines." *Id*.

As indicated above, the administrative law judge adopted Judge Rippey's decision to discredit the opinions of Drs. Baker and Nash because they stated that claimant could not perform heavy work or sustained manual labor without taking into account that his most recent coal mine employment was as a mine inspector. Decision and Order at 2 (unpaginated). As employer suggests, the administrative law judge did not comply with the requirements of Section 725.308(a) by independently assessing whether Drs. Baker and Nash provided reasoned diagnoses of total disability. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Moreover, the administrative law judge mischaracterized these opinions when he indicated that the physicians were not aware that claimant's last job was that of a mine inspector. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Thus, if the administrative law judge determines on remand that the timeliness of the 2003 claim must be assessed in the context of claimant's last coal mine employment as of 1992, he

must consider, *de novo*, whether the opinions of Drs. Baker and Nash satisfy the criteria set forth in Section 725.308(a).

We will now address the administrative law judge's finding that claimant established a change in an applicable condition of entitlement. Pursuant to Section 725.309(d), if 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., Inc.*, 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 1992 claim was denied because he failed to establish that he was suffering from a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Ross*, 42 F.3d at 997, 19 BLR at 2-21.

The record contains the newly submitted medical opinions of Drs. Baker and Dahhan. Dr. Baker examined claimant on December 9, 2003 and indicated that claimant was last employed as a mine inspector. Director's Exhibit 19. Dr. Baker diagnosed a mild obstructive impairment. *Id.* He did not indicate the extent, if any, to which this impairment affected claimant's ability to perform his usual coal mine employment. *Id.* Dr. Dahhan examined claimant on March 23, 2004 and noted that claimant told him that he last worked as a mine inspector. Director's Exhibit 21. Dr. Dahhan diagnosed a moderately severe, partially reversible obstructive impairment based upon claimant's pulmonary function study. *Id.* In the section of his report in which he set forth his conclusions, Dr. Dahhan indicated that claimant "does not retain the physiological capacity to continue his previous coal mining work or [a] job of comparable physical demand." *Id.*

The administrative law judge determined that the newly submitted medical opinion evidence supported a finding of total disability under Section 718.204(b)(2)(iv), stating that:

> Here, Dr. Baker reported that the Claimant has a mild respiratory impairment. Additionally, Dr. Dahhan conceded that claimant does not retain the physiological capacity to continue his prior work. Thus, the criteria in 20 C.F.R. 718.204(b)(2)(iv) has (*sic*) been met.

Decision and Order at 8 (unpaginated). Employer argues that the administrative law judge erred in determining that Dr. Baker's opinion supported a finding of total disability, as Dr. Baker did not assess claimant's ability to perform his usual coal mine employment.

This contention has merit. Although Dr. Baker's diagnosis of a mild impairment could establish total disability based upon the administrative law judge's comparison of this diagnosis to the exertional requirements of claimant's usual coal mine employment, the administrative law judge did not make a finding as to these requirements.[4] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246, 19 BLR 2-123, 20127 (6th Cir. 1995). In addition, as employer suggests, the administrative law judge did not determine whether Dr. Baker's diagnosis of a mild impairment was supported by the documentation underlying his opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We must, therefore, vacate the administrative law judge's finding that Dr. Baker diagnosed a totally disabling impairment pursuant to Section 718.204(b)(2)(iv).

Regarding Dr. Dahhan's opinion, employer argues that the administrative law judge erred in treating the physician's statement that claimant "does not have the physiological capacity" to do his usual coal mine work, as a finding of total respiratory or pulmonary disability. Director's Exhibit 21. This contention also has merit. Pursuant to Section 718.204(b)(2), a claimant is required to prove that he is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. 718.204(b)(1); *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc). Because the administrative law judge did not explain his finding with respect to Dr. Dahhan's opinion, we cannot discern whether the administrative law judge had a valid rationale for determining that Dr. Dahhan's reference to claimant's lack of "physiological capacity" constituted a diagnosis of a totally disabling respiratory or pulmonary impairment, as opposed to a totally disabling impairment attributable to another source. Thus, we must vacate the administrative law judge's finding with respect to Dr. Dahhan's opinion under Section 718.204(b)(2)(iv).

Because we have vacated the administrative law judge's findings regarding the reports of Drs. Baker and Dahhan, we must also vacate his finding that the newly submitted medical opinion evidence is sufficient to establish total disability at Section 718.204(b)(2)(iv), and a change in an applicable condition of entitlement pursuant to Section 725.309(d). On remand, the administrative law judge must reconsider the newly submitted medical reports of Drs. Baker and Dahhan and determine whether each physician has provided a reasoned and documented opinion regarding claimant's ability, from a respiratory or pulmonary standpoint, to perform his usual coal mine employment

[4] Whether the administrative law judge considers claimant's work as a mine inspector or his work in the ventilation department will depend upon the administrative law judge's determination as to whether claimant's work in the ventilation department constituted coal mine employment.

or has described claimant's physical limitations such that the administrative law judge can compare them to the exertional requirements of claimant's usual coal mine job. *See Cornett*, 227 F.3d at 596, 22 BLR at 2-123. In so doing, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act, 5 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). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986).

If the administrative law judge finds that the newly submitted medical opinions are sufficient to establish total disability under Section 718.204(b)(2)(iv), he must weigh this evidence against the newly submitted contrary probative evidence of record to determine whether claimant has established total disability pursuant to Section 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*). If the administrative law judge finds that claimant has established total disability and, therefore, the requisite change in an applicable condition of entitlement under Section 725.309(d), he must then determine whether claimant has established entitlement on the merits, based upon a weighing of all of the evidence of record.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings 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