BRB No. 14-0059 BLA

ROY A. TAYLOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 10/22/2014
	)	
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 A. Morgan, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5495) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on March 26, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with nineteen years of surface coal mine employment, but he determined that

[1] Claimant filed five prior claims for benefits, each of which was denied by the district director. Director's Exhibits 1-5. Claimant's most recent prior claim, filed on July 17, 2006, was denied by the district director on March 2, 2007, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 5. Claimant took no further action until he filed his current subsequent claim. Director's Exhibit 6.

claimant failed to establish that his surface coal mine work was in conditions that were substantially similar to those of an underground mine. Thus, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[2] Considering the claim under the regulations at 20 C.F.R. Part 718, the administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant is totally disabled and therefore, found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge further found that claimant established total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), (c), and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant's usual coal mine work required heavy manual labor and that he is totally disabled. Employer also asserts that the administrative law judge erred in rejecting Dr. Castle's disability opinion on the grounds that Dr. Castle did not fully understand the physical requirements of claimant's job. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

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.[4] 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 prove that he suffers from pneumoconiosis, that the pneumoconiosis arose

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[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 9, 11. 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).

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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When 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(c);[5] *see 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(c)(3). Because claimant's last prior claim was denied for failure to establish any of the requisite elements of entitlement, claimant had to submit new evidence proving at least one of the elements in order to obtain a review of the merits of his current claim. *See White,* 23 BLR at 1-3.

In considering whether claimant established total disability and a change in an applicable condition of entitlement, the administrative law judge weighed three newly submitted pulmonary function studies, pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9-10, 26. The administrative law judge determined that the May 21, 2010 pulmonary function study was qualifying[6] for total disability, before and after the use of a bronchodilator; the January 12, 2011 pulmonary function study was non-qualifying for total disability, without a bronchodilator, but was qualifying for total disability after the bronchodilator was administered; the November 3, 2011 pulmonary function study was conducted without the use of a bronchodilator and was qualifying for total disability. Decision and Order at 26; *see* Director's Exhibit 17; Claimant's Exhibit 6; Employer's Exhibit 3. The administrative law judge stated: "[t]hese mixed results indicate a total disability, but I cannot find they alone establish it." Decision and Order at 26.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that, because each of the three newly submitted arterial blood gas studies, dated May 21, 2010, January 12, 2011, and November 3, 2011, is non-qualifying, claimant did not establish

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language, previously set forth in 20 C.F.R. §725.309(d), is now set forth in 20 C.F.R. §725.309(c).

[6] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

total disability under that subsection. Decision and Order at 11, 26; *see* Director's Exhibits16; Claimant's Exhibit 6; Employer's Exhibit 3. Additionally, based on his finding that there was no evidence in the record that claimant has cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Relevant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge found that claimant worked as a heavy equipment operator, which involved "mostly sitting running a bulldozer at strip mines," but also required claimant to "clean dirt off the [bull]dozer tracks, carry [fifty pound] bags, shovel, and lift cutting heads[.]" Decision and Order at 5-6; *see* Hearing Transcript at 14-15. The administrative law judge concluded that claimant was required to perform heavy manual labor and then weighed the opinions of Drs. Gaziano, Rasmussen, Castle and Zaldivar, taking into consideration the exertional requirements of claimant's job. The administrative law judge gave little weight to Dr. Gaziano's opinion, that claimant is totally disabled, because he found that it was not well-reasoned. Decision and Order at 27. The administrative law judge determined that Dr. Rasmussen provided a reasoned and documented opinion that claimant is totally disabled. *Id*. In contrast, the administrative law judge gave little weight to Dr. Castle's opinion, that claimant is not totally disabled, stating that Dr. Castle "misapprehended the nature of [claimant's] work and did not consider his non-driving tasks," which required heavy manual labor. *Id*. The administrative law judge also gave little weight to Dr. Zaldivar's opinion, that claimant is not totally disabled, because Dr. Zaldivar "mis-characterized [claimant's] work as 'mild to moderate.'" *Id.* Relying on Dr. Rasmussen's opinion, the administrative law judge concluded that "claimant's symptoms render him unable to

[7] The administrative law judge weighed the opinions of Drs. Gaziano, Rasmussen, Castle and Zaldivar. Dr. Gaziano opined that claimant's moderate obstructive impairment renders him totally disabled. Claimant's Exhibit 6. Dr. Rasmussen opined that claimant is totally disabled from performing heavy manual labor associated with his last coal mine job. Director's Exhibit 16. He specifically reported that claimant last worked as a heavy equipment operator, which "required heavy and some very heavy manual labor." *Id*. Dr. Rasmussen noted that claimant is "[q]uite dyspneic after [one] flight of stairs" and opined that claimant is totally disabled from his job by a "moderate loss of lung function as reflected by his [moderate obstructive] ventilatory impairment and his impairment in oxygen transfer during exercise." *Id*. Dr. Castle noted that claimant worked as a heavy equipment operator and that the most difficult aspect of the job was cleaning dirt off the tracks. Employer's Exhibit 11. Dr. Castle opined that claimant had a moderate obstructive impairment and a "minor degree of variability in oxygenation, but was not totally disabled." *Id*. Dr. Zaldivar indicated that claimant was required to perform "mild to moderate" labor in his job and that claimant was not totally disabled from a respiratory or pulmonary standpoint. Employer's Exhibits 3, 12.

perform [his] duties without dyspnea." *Id*. He concluded that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and based on a weighing of all the evidence together. *Id*.

Employer asserts that the administrative law judge failed to consider that "[t]he description of the activities required in his last coal mine job given by [claimant] in his earlier claims was vastly different from the description given by [claimant] at the hearing in his current claim." Employer's Brief in Support of Petition for Review at 7. Employer argues that, to the extent the administrative law judge failed to consider all the relevant evidence pertaining to the exertional requirements of claimant's job and the credibility of claimant's account of his work duties, his Decision and Order does not satisfy 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). Employer's argument has merit.

The record reflects that claimant worked for employer from 1970 to 1992 as a heavy equipment operator/dozer operator. Director's Exhibits 1-5. In his report of examination, dated November 4, 1994, Dr. Rasmussen related that claimant worked as "a heavy equipment operator, especially a dozer operator." Director's Exhibit 1. He indicated that claimant described his job as involving "some manual labor" because claimant was required "to shovel treads during muddy or wet weather." *Id*. Dr. Belotte examined claimant on March 16, 2000, in conjunction with the second claim, and stated that he "very carefully questioned [claimant] regarding his occupation[']s requirements and [claimant] readily admits that running the equipment is not very physically demanding job." Director's Exhibit 3. On July 19, 2004, claimant completed a Form CM-913 "Description of Coal Mine Work and Other Employment," indicating that he worked for employer from 1970-1992 and his job title was a "heavy equipment operator." Director's Exhibit 4. When asked to describe the physical activity required to perform his last job, claimant wrote "8" hours of sitting. Director's Exhibit 4. *Id*. On July 11, 2006, claimant completed a Form CM-913 "Description of Coal Mine Work and Other Employment," indicating that he worked for employer as an equipment operator from 1970-1992, and his job required "8" hours of sitting. Director's Exhibit 5. In conjunction with his current claim, claimant also completed a Form CM-913, indicating that he worked as a "heavy equipment operator, which required him to sit "8" hours a day, with no lifting or carrying requirements identified. Director's Exhibit 10. In his report of examination, dated May 21, 2010, Dr. Rasmussen related claimant's description of being "required to load holes carrying [fifty pound] bags of explosives [fifty to one-hundred] feet" in the performance of his job as an equipment operatory/dozer operator. Director's Exhibit 17.

At the January 17, 2013 hearing, claimant provided the following testimony with respect to the physical requirements of his job:

A. Well, I run equipment. Then when the equipment run down, if you didn't have a piece of equipment, you worked on the equipment and if you had to put head on, you put them on. You had to clean the tracks and dozers to take the dirt off, take all the dirt off the tracks.
Q. When you were putting cutting heads on ---
A. Putting cutting heads on them dozers and help the mechanics. All of it was heavy lifting and brute work.
Q. You were required to do a lot of heavy lifting in that job?
A. Yeah.
Q. What would be the heaviest thing that you would have to lift?
A. Probably lifting them cutting heads and stuff. It was all heavy.
Q. Over 100 pounds?
A. Oh, yeah, some of them
Q. You say you had to clean the ---
A. tracks
Q. – tracks and how would you do that?
A. Take a shovel and just get all the dirt out of them. Now, if they didn't have that, they needed somebody to load holes, you helped load holes too, powder crew.
Q. And that would require lifting and carrying?
A. Lifting and shoveling, yeah.

Hearing Transcript at 14-15.

Before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, he must identify the employment that is, or was, the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is the miner's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *Id.*; *see Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The administrative law judge relied on claimant's hearing testimony to find that he was required to perform heavy manual labor in his usual coal mine employment as a heavy equipment operator. Although the administrative law judge has discretion to evaluate the credibility of the evidence of record, including witness testimony, he must discuss the weight he accords all of the relevant evidence of record, and explain his

findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). We agree with employer that the administrative law judge erred in failing to first discuss the significance, if any, of claimant's earlier descriptions of his job duties, prior to the hearing. We are unable to discern from the Decision and Order whether the administrative law judge considered any of the potentially conflicting evidence regarding the physical demands of claimant's job, and if so, the weight he accorded that evidence. Because the administrative law judge did not discuss all of the evidence of record relevant to claimant's job duties, and determine whether there is any conflict with claimant's hearing testimony, we must vacate the administrative law judge's finding that claimant's work required heavy manual labor. *See Wojtowicz*, 12 BLR at 1-165; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *McCune*, 6 BLR at 1-988. Additionally, as the administrative law judge's credibility findings with regard to the medical opinion evidence were based, in part, on his determination that claimant performed heavy manual labor, we vacate his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).[8] Because we vacate the administrative law judge's finding of total disability, we must also vacate his finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[9]

On remand, we instruct the administrative law judge to determine claimant's usual coal mine work, weigh all of the relevant evidence on the physical demands of that job, resolve any conflicts, and reach a determination as to exertional requirements of claimant's usual coal mine employment. Thereafter, the administrative law judge must determine whether claimant established total disability based on the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), and based on a weighing of all the evidence

[8] Employer asserts that the administrative law judge mischaracterized Dr. Castle's opinion by stating that Dr. Castle did not consider claimant's non-driving tasks. On remand, we instruct the administrative law judge to consider Dr. Castle's deposition testimony indicating that he was aware that bulldozer operators were required to clean tracks and that claimant's job would require "probably some episodes requiring heavy [manual] labor that are short-lived and not persistent." Employer's Exhibit 11 at 10.

[9] The administrative law judge gave little weight to the opinions of Drs. Castle and Zaldivar, as to the etiology of claimant's respiratory condition and disability, on the grounds that they expressed opinions that are "not in accord with the findings set forth in the Preamble to the 2001 regulations." Decision and Order at 33. Because employer does not challenge the administrative law judge's credibility determinations with respect to its physicians on the issue of disability causation, they are affirmed. *See Skrack*, 6 BLR at 1-711.

together pursuant to 20 C.F.R. §718.204(b)(2). In renderings his determinations on remand, the administrative law judge must explain the bases for all of his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz,* 12 BLR at 1-165. If the administrative law judge determines that claimant is totally disabled under 20 C.F.R. §718.204(b)(2), he may reinstate his findings at 20 C.F.R. §§725.309 and 718.204(c), and the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge