BRB No. 14-0245 BLA

NORWOOD E. BUCKNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIGH POWER ENERGY	)	DATE ISSUED: 10/31/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (2010-BLA-5136) of Administrative Law Judge Richard A. Morgan

on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with at least twenty-seven years of qualifying coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established at least twenty-seven years of qualifying coal mine employment. *Buckner v. High Power Energy*, BRB No. 11-0756 BLA, slip op. at 3 n.4 (Aug. 23, 2012)(unpub.). The Board also rejected employer's challenges to the constitutionality of the application of amended Section 411(c)(4) to this case. *Buckner*, BRB No. 11-0756 BLA, slip op. at 3-4. However, the Board vacated the administrative law judge's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b) and remanded the case for further consideration. *Buckner*, BRB No. 11-0756 BLA, slip op. at 5-6. The Board also vacated the administrative law judge's findings that the evidence established a change in an applicable condition of entitlement

[1] Claimant filed his first claim on December 18, 2001. Director's Exhibit 1. It was finally denied by the district director on March 23, 2003 because the evidence did not establish a totally disabling respiratory impairment that was due to pneumoconiosis. *Id*. Claimant filed this claim (a subsequent claim) on December 4, 2008. Director's Exhibit 3.

[2] In 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

pursuant to 20 C.F.R. §725.309(d), that the evidence established invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), and that employer failed to establish rebuttal of the presumption. *Buckner*, BRB No. 11-0756 BLA, slip op. at 6. The Board instructed the administrative law judge: to weigh the conflicting evidence regarding the validity and probative value of the objective tests; to reevaluate and weigh the medical opinions of record in light of their reasoning and documentation; to provide a rationale for crediting or discrediting evidence; and to determine whether the weight of the evidence, like and unlike, was sufficient to establish total respiratory disability at Section 718.204(b). *Id*. Further, the Board instructed the administrative law judge that if, on remand, he again determines that claimant has established total respiratory disability, a change in an applicable condition of entitlement, and invocation of the amended Section 411(c)(4) presumption, he should determine whether employer met its burden of establishing rebuttal of the presumption. *Buckner*, BRB No. 11-0756 BLA, slip op. at 6-7.

On remand, the administrative law judge found that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant established total respiratory disability at 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant established entitlement to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), as claimant established at least fifteen years of qualifying coal mine employment and total respiratory disability. The administrative law judge also found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption by establishing that claimant does not have legal pneumoconiosis or total disability due to pneumoconiosis. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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 by 30

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 5.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Specifically, employer asserts that the administrative law judge erred in finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b). Employer argues that the administrative law judge erred in weighing the arterial blood gas study and medical opinion evidence.

In considering total respiratory disability on remand, the administrative law judge found that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order on Remand at 6. The administrative law judge also found that none of the pulmonary function studies of record produced qualifying[4] values. *Id*. Further, after weighing the arterial blood gas study and medical opinion evidence, the administrative law judge concluded:

> Given I have found the claimant's prior coal mining work required heavy labor, the fact he established a prima facie case which has not been adequately rebutted, and considering all the evidence of disability together, including the non-qualifying PFSs, I find the claimant has established a total respiratory disability.

Id. at 11.

Employer asserts that the administrative law judge erred in weighing the arterial blood gas study evidence by substituting his own interpretation of the medical data for that of the physicians. In considering the arterial blood gas study evidence, the administrative law judge listed the results of the studies dated February 4, 2009, June 25, 2009, and December 31, 2009. Specifically, the administrative law judge noted that, while the February 4, 2009 study administered by Dr. Rasmussen produced non-qualifying values at rest, this same study produced qualifying values during exercise. The administrative law judge also noted that the June 25, 2009 study administered by Bellotte produced non-qualifying values at rest. Lastly, the administrative law judge noted that the December 31, 2009 study administered by Dr. Zaldivar produced non-

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

qualifying values at rest and during exercise.[5] The administrative law judge then considered the findings of the physicians with respect to the testing conducted at rest and during exercise for these studies.[6]

In addition, the administrative law judge considered the opinions of Drs. Gaziano, Rasmussen, and Zaldivar regarding the discrepancy between the qualifying values produced by the February 4, 2009 exercise study administered by Dr. Rasmussen and the non-qualifying values produced by the December 31, 2009 exercise study administered by Dr. Zaldivar. After stating that "[n]one of the three physicians provides much of a helpful analysis of the [arterial blood gas studies]," the administrative law judge considered the heart rates that were attained by claimant during the exercise studies.[7] *Id*.

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[5] Employer asserts that the administrative law judge should have given greater weight to Dr. Zaldivar's non-qualifying exercise arterial blood gas study because it was the most recent exercise study of record. The Board has held that it was proper to find that eight months is not a significant period of time separating objective evidence. *See generally Aimone v. Morrison Knudson Co*., 8 BLR 1-32, 1-34 (1985). While Dr. Zaldivar's non-qualifying exercise study was conducted on December 31, 2009, Dr. Rasmussen's qualifying exercise study was conducted on February 4, 2009. Thus, we reject employer's assertion that the administrative law judge should have given greater weight to Dr. Zaldivar's non-qualifying exercise arterial blood gas study based on its recency. *See generally Aimone*, 8 BLR at 1-34.

[6] The administrative law judge noted that "Drs. Bellotte and Zaldivar only tested [claimant] once for each portion of their [arterial blood gas studies]." Decision and Order on Remand at 9. The administrative law judge also noted that "[Dr. Zaldivar] had exercised [claimant] for one minute and twenty seconds to a heart rate of 101." *Id*. Further, the administrative law judge noted that, while "[Dr. Zaldivar] reported [that claimant] stopped the exercise[,] complaining of shortness of breath…, he emphasized that the test had reached its normal ending point." *Id*. By contrast, the administrative law judge noted that "Dr. Rasmussen obtained three exercise samples (using an in-dwelling line) but reported only the 'qualifying' level, i.e., 45/57 taken at 11:46 and accepted at 11:49 for analysis (presumably six minutes into the test)." *Id*. The administrative law judge additionally noted: "[p]resumably, in most humans heart rate increases as one exercises more, so Dr. Rasmussen's initial non-qualifying sample was more likely than not drawn at a lower heart rate than 127. However, we do not know if the last non-qualifying sample was drawn at a higher or lower heart rate or the level of exertion." *Id*.

[7] The February 4, 2009 exercise arterial blood gas study administered by Dr. Rasmussen noted a heart rate of 127, Director's Exhibit 11, while the December 31, 2009 exercise arterial blood gas study administered by Dr. Zaldivar noted a heart rate of 101, Employer's Exhibit 1.

at 10. The administrative law judge stated that it "is clear that Dr. Rasmussen exercised [claimant] harder and for a longer period" than Dr. Zaldivar, based on the heart rate level attained by claimant during Dr. Rasmussen's study. *Id*. The administrative law judge then stated, "[c]omparing the exercise [arterial blood gas studies] administered by Drs. Rasmussen and Zaldivar, we do know that at a heart rate of 101 [claimant] could perform his prior work (i.e., a 'non-qualifying' test) while at a 127 pulse he could not (a 'qualifying' test)."[8] *Id*. The administrative law judge also stated that "[i]t is quite possible that his prior coal mine work would never have required that level of exertion, but we have nothing in the record to base that conclusion." *Id*. Nevertheless, the administrative law judge accorded more weight to Dr. Rasmussen's qualifying exercise study than to Dr. Zaldivar's non-qualifying exercise study because he found that Dr. Zaldivar did not exercise claimant during the tests as much as Dr. Rasmussen exercised him, and because the exercise test administered by Dr. Zaldivar was ended prematurely. The administrative law judge additionally noted that, "[e]ven if the 127 rate was exceptionally high, presumably, because the doctor had him reach that level, it could have been reached at times during [claimant's] work." *Id*. at 11. Hence, based on his determination that there was a lack of information concerning relevant heart rates of miners who performed claimant's usual coal mine work, the administrative law judge found that Dr. Rasmussen's qualifying exercise study was more probative than Dr. Zaldivar's non-qualifying exercise study. Further, the administrative law judge found that "Dr. Zaldivar's explanation that [claimant] must no longer have the condition given the different exercise test outcomes is simply too trite to give much credit given the different exercise times and reported heart rates." *Id*.

Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts. *Marcum v. Director,* OWCP, 11 BLR 1-23 (1987). Thus, to the extent that the administrative law judge accorded more weight to Dr. Rasmussen's qualifying exercise study than to Dr. Zaldivar's non-qualifying exercise study because he found that claimant would be disabled at the heart rate of 127, the administrative law judge erroneously interpreted the medical data. *Marcum*, 11 BLR at 1-24.

Employer also asserts that the administrative law judge erred in failing "to elaborate why Dr. Zaldivar's opinion regarding total respiratory disability lacked

[8] The administrative law judge stated that "[a]t a 101 pulse, [claimant] would not be disabled, but at a 127 heart rate he would be." Decision and Order on Remand at 11.

reasoning and sufficient conclusions." Employer's Brief at 14. Employer argues that the administrative law judge erred by relying on medical opinions that claimant is totally disabled as a whole man. Employer maintains that "[the administrative law judge] intermingles non-pulmonary causes of impairment with pulmonary impairment to find the existence of total disability under [Section] 718.204(b)." *Id*. at 16.

In considering the procedural history of the case, the administrative law judge noted that the Board instructed him on remand to "reconsider the evidence of total disability, i.e., specifically: (1) the conflict in arterial blood gas study evidence; (2) whether the miner was disabled by a chronic respiratory or pulmonary impairment, rather than disabled by any cause or by a combination of respiratory and non-respiratory impairments; and, (3) provide an adequate rationale for discounting Dr. … Zaldivar's opinion, that [claimant] had no respiratory or pulmonary impairment whatsoever, and for relying on the opinions of Drs. Rasmussen, Gaziano, and Bellotte to support a finding of total disability." Decision and Order on Remand at 2. The administrative law judge, however, did not separately consider the conflicting arterial blood gas study and medical opinion evidence. After finding that the opinions of Drs. Zaldivar, Rasmussen, Gaziano and Bellotte did not establish a cardiovascular disease, the administrative law judge considered the arterial blood gas study evidence.[9] In considering the analysis of the physicians concerning the conflicting values produced by the exercise arterial blood gas studies, the administrative law judge addressed whether Drs. Zaldivar, Rasmussen, Gaziano and Bellotte relied on these studies. The administrative law judge found that the Board previously noted that Dr. Bellotte did not reference any specific tests to support his finding of total disability from both respiratory and non-respiratory causes;[10] that Drs. Rasmussen and Gaziano based their findings of total disability largely on Dr. Rasmussen's exercise blood gas study results; and that, while Dr. Zaldivar reviewed Dr. Rasmussen's testing, Dr. Zaldivar's conclusion that claimant does not have a respiratory or pulmonary impairment was based on the normal results produced by his own studies.

[9] The administrative law judge noted that "[claimant] reported no prior heart disease to Dr. Rasmussen, Dr. Zaldivar or to Dr. Bellotte." Decision and Order on Remand at 8. Further, the administrative law judge found that Dr. Zaldivar's suggestion that claimant has vascular congestion, based on his belief that claimant has an enlarged heart, was largely speculative. The administrative law judge also found that Dr. Gaziano's opinion that claimant has cardiovascular disease was unreasoned, because it was conclusory, had no reasoning and did not identify any specific tests.

[10] The administrative law judge stated that "[i]t is clear that Dr. Bellotte found a respiratory/pulmonary disability, including asthmatic bronchitis, to which [claimant's] cardiovascular system abnormalities contributed, as he wrote." Decision and Order on Remand at 9.

The administrative law judge therefore found that "[t]hree of the four physicians found [that claimant] ha[s] a total respiratory/pulmonary disability." *Id*. at 10.

The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not provide an explanation for crediting any of the medical opinions on the issue of total respiratory disability. Rather, based on his consideration of all the medical evidence, the administrative law judge concluded that "[t]he claimant has established he is totally disabled." Decision and Order on Remand at 15. Consequently, we hold that the administrative law judge erred in failing to provide a valid basis for his weighing the medical opinion evidence. *Wojtowicz*, 12 BLR at 1-165.

Based on the foregoing, we vacate the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). We, therefore, vacate the administrative law judge's finding that claimant established entitlement to invocation of the presumption at amended Section 411(c)(4). Furthermore, we vacate the administrative law judge's finding that employer failed to prove that claimant does not suffer from pneumoconiosis or a total disability arising out of, or in connection with, coal mine employment. Because the administrative law judge has not adequately followed the remand instructions from our prior Decision and Order, we again remand the case to the administrative law judge for further consideration of the relevant evidence. Specifically, on remand, the administrative law judge is again directed to weigh the conflicting evidence regarding the validity and probative value of the objective tests; reevaluate and weigh the medical opinions of record in light of their reasoning and documentation; provide a detailed rationale for his crediting or discrediting of the evidence; and determine whether the weight of the evidence, like and unlike, is sufficient to establish total respiratory disability at Section 718.204(b). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

If, on remand, the administrative law judge again determines that claimant has established total respiratory disability, a change in an applicable condition of entitlement, and invocation of the presumption at amended Section 411(c)(4), then he must determine whether employer has met its burden of establishing that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). We, therefore, vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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