

BRB No. 06-0258 BLA

CHRIS BARTLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEYENNE ELKHORN COAL	)	DATE ISSUED: 09/28/2006
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	on RECONSIDERATION

Employer requests reconsideration of the Board's decision in the above captioned case granting the Motion to Remand filed by the Director, Office of Workers' Compensation Programs, (the Director). In his Motion to Remand, the Director contended that because Dr. Baker, the physician who conducted claimant's pulmonary evaluation on April 18, 2003, at the behest of the Director, failed to address whether claimant's mild impairment would preclude claimant from performing his usual coal mine work, the administrative law judge was unable to assess the probative value of Dr. Baker's opinion regarding total respiratory disability and the Director, therefore, failed to provide claimant with a complete and credible pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b). The Board granted the Director's Motion to Remand to the district director for further evidentiary development and vacated the administrative law judge's Decision and Order denying benefits. *Bartley v. Cheyenne Elkhorn Coal*, BRB No. 06-0258 BLA (Feb. 28, 2006) (unpub.).

In its request for reconsideration, employer asks the Board to reconsider its order remanding the case as the record contains a supplemental report by Dr. Baker, fully addressing total disability, that was not considered by the administrative law judge. Employer argues, therefore, that the case should be remanded to the administrative law judge for her consideration of Dr. Baker's supplemental report, rather than remanded to the district director for further evidentiary development. Hence, employer requests that the Board's order remanding the case to the district director be withdrawn and the case be remanded to the administrative law judge to address the merits of claimant's entitlement to benefits. Notwithstanding this contention, employer also contends that the administrative law judge's failure to consider Dr. Baker's supplemental report constitutes

harmless error, inasmuch as the report supports the administrative law judge's ultimate determination that entitlement to benefits is precluded. Neither claimant, who is without the assistance of counsel, nor the Director has filed a response to employer's motion for reconsideration.

Simultaneous with the Board's consideration of the Director's Motion to Remand, on February 22, 2006 the Director filed a letter withdrawing his motion. In that February 22, 2006 letter, the Director acknowledged that he had inadvertently overlooked Dr. Baker's supplemental report, dated April 29, 2005 when reviewing the case file. The Director asserted that Dr. Baker's April 2005 supplemental report cured the critical defect in his original opinion dated April 18, 2003, because the physician rendered a total disability assessment, and thus remand for further evidentiary development was not required. The Director's February 22, 2006 letter was not associated with the case file prior to issuance of the Board's final Decision and Order in this case on February 28, 2006. Consequently, employer's request for reconsideration has merit. Accordingly, we will address the merits of the administrative law judge's decision.

In adjudicating the claim, the administrative law judge found that while claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and a respiratory impairment due to pneumoconiosis, claimant failed to establish by a preponderance of the evidence that he was totally disabled by his respiratory impairment pursuant to 20 C.F.R. §718.204(b). Benefits were, therefore, denied.

In finding that the medical evidence failed to establish total disability, the administrative law judge properly found that the pulmonary function study evidence produced non-qualifying values, and therefore, failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 12.<sup>1</sup> Relevant to Section 718.204(b)(2)(ii), the administrative law judge permissibly determined that the reliability of the qualifying arterial blood gas study was diminished since the blood gas tests conducted both before and after the qualifying test produced non-qualifying values and the non-qualifying

---

<sup>1</sup> There are three pulmonary function studies of record dated April 18, 2003, September 12, 2003, and October 26, 2004, which all yielded non-qualifying values. Director's Exhibits 12, 17; Claimant's Exhibit 3; Employer's Exhibit 1.

A "qualifying" pulmonary function study or 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, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

studies were, therefore, more indicative of claimant's respiratory condition.<sup>2</sup> See *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984); Decision and Order at 12-13. Similarly, the administrative law judge correctly determined that because the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); see *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 12 n.8.

While we affirm the administrative law judge's determination that claimant failed to affirmatively demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iii), we must vacate the administrative law judge's Section 718.204(b)(2)(iv) determination and remand the case for the administrative law judge to consider the supplemental report of Dr. Baker dated April 29, 2005, which she failed to consider, in conjunction with the other medical opinions of record, namely those of Drs. Forehand and Westerfield. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); see also *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). If, on remand, the administrative law judge finds that the medical opinion evidence is sufficient to establish that claimant has a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), she must then weigh together all relevant evidence at Section 718.204(b)(2)(i)-(iv), *i.e.*, pulmonary function study evidence, blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence, and determine whether claimant has carried his burden of establishing total respiratory disability. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct 2251, 18 BLR 2A-1(1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*).

---

<sup>2</sup> At Section 718.204(b)(2)(ii), the three arterial blood gas studies of record consist of two non-qualifying tests administered on April 18, 2003 and October 26, 2004 and one qualifying study conducted on September 12, 2003. Director's Exhibits 12, 17; Claimant's Exhibit 1; Employer's Exhibit 1.

Accordingly, employer's Request for Reconsideration and the relief requested are granted, and the case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge