BRB No. 11-0851 BLA

GARY T. JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 09/25/2012
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Granting Benefits (2009-BLA-05777) of Administrative Law Judge Pamela J. Lakes rendered on a subsequent claim filed on September 9, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be

codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1] After crediting claimant with twenty-three years of coal mine employment, all of it in underground coal mining, the administrative law judge determined that claimant also established total respiratory disability pursuant to 20 C.F.R. §718.204(b).[2] Based on these findings, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge then found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge improperly and inconsistently evaluated the evidence in determining that claimant established total respiratory disability pursuant to Section 718.204(b)(2)(i), (iv). Employer also challenges the administrative law judge's determination that the x-ray evidence and the medical opinions of Drs. Hippensteel and Spagnolo did not rebut the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge's decision fails to comply with the requirements of 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Further, regarding the application of Section 411(c)(4), employer contends that the recent amendments to the Act are unconstitutional and do not apply to responsible operators. Employer also contends that the application of the recent amendments requires implementing regulations, which have not yet been promulgated. The Director, Office of Workers' Compensation Programs,

[1] Claimant's prior claim, filed on September 12, 2000, was denied for failure to establish any of the elements of entitlement. Director's Exhibit 1.

[2] The administrative law judge found that, because total respiratory disability was established at 20 C.F.R. §718.204(b) based on a consideration of both the old and new evidence, and claimant was, therefore, entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, she did not need to make a separate "subsequent claims analysis" pursuant to 20 C.F.R. §725.309(d).

[3] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground coal mine employment or coal mine employment in conditions substantially similar to those of underground coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

(the Director) responds that the administrative law judge's weighing of the evidence pursuant to Section 718.204(b)(2)(i), (iv) was "too brief and unclear" and that she failed to adequately evaluate the evidence relevant to Section 411(c)(4). The Director, therefore, agrees with employer that remand of this case is warranted for the administrative law judge to address the deficiencies in her decision.[4] Claimant has not filed a response 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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).

As an initial matter, we reject employer's constitutional arguments. Subsequent to the administrative law judge's Decision and Order and employer's appeal, the United States Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act (the PPACA). *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427819 (June 28, 2012). We also reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator, as the courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Further, there is no merit to employer's claim that application of Section 411(c)(4) is barred pending the promulgation of regulations implementing the amendments. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987).

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, her determination that all of claimant's coal mine employment was underground, and her finding that the evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 5, 7.

[5] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 1. 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).

Next, we consider the administrative law judge's finding that total respiratory disability was established pursuant to Section 718.204(b). First, the administrative law judge considered whether the pulmonary function study evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 6-7. The record contains four pulmonary function studies. The administrative law judge found that the pulmonary function study of October 25, 2000 (dating from the earlier claim) and the pulmonary function study of December 9, 2008 produced qualifying results.[6] Director's Exhibits 1, 12. Of the two 2009 pulmonary function studies, the administrative law judge found that the January 28, 2009 study was non-qualifying, and the April 15, 2009 study produced mixed results and, therefore, "was neither qualifying nor non-qualifying." Decision and Order at 6-7; Employer's Exhibits 1, 6. Consequently, the administrative law judge characterized the pulmonary function study evidence as "somewhat equivocal," but found that it "tend[s] to support a finding of total disability" under Section 718.204(b)(2)(i). Decision and Order at 7.

Turning to Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Agarwal's opinion, that claimant is totally disabled from a respiratory standpoint, was "better reasoned" than the contrary opinions of Drs. Hippensteel and Spagnolo. Decision and Order at 8; *see* Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 9, 10. The administrative law judge acknowledged that Drs. Hippensteel and Spagnolo offered "explanations as to why" the qualifying pulmonary function studies "should be ignored," and why they believed that they "[did] not establish total disability." Decision and Order at 8. Nonetheless, she found that their analysis of the qualifying pulmonary function studies[7] "[was] ultimately unpersuasive" and unreliable because, "at bottom, these physicians are arguing that the impairment is not constant and therefore has a different etiology, not that it would not be disabling a sufficient amount of time to preclude [c]laimant's resumption of coal mine employment." *Id*. The administrative law judge concluded, therefore, that Drs. Hippensteel and Spagnolo "were unable to explain adequately how they drew the conclusions they reached on the total disability issues from the [pulmonary function] testing as a whole." Decision and Order at 8-9; Employer's Exhibits 1, 3, 9, 10. Thus, the administrative law judge concluded that, while the disability assessments of Drs. Hippensteel, Spagnolo and Agarwal were "probative of

[6] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV_1 and either the MVV, FVC or the FEV_1/FVC values must qualify. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R §718.204(b)(2)(i).

[7] The administrative law judge also noted that Dr. Agarwal's opinion is consistent with the opinion of Dr. Forehand from the earlier claim. Decision and Order at 8-9.

[c]laimant's current condition," the opinion of Dr. Agarwal was better reasoned and therefore "more persuasive." Decision and Order at 9. Consequently, the administrative law judge concluded that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv). *Id*. Further, in weighing all of the relevant evidence, the administrative law judge concluded that "[t]he weight of the … evidence in this case" establishes total respiratory disability pursuant to Section 718.204(b).

Employer argues, however, that, "excluding Dr. Hippensteel's invalid post-bronchodilator study, the two most recent pulmonary function studies are non-qualifying and outweigh the one qualifying study [by Dr. Agarwal]." Employer's Brief at 9. Further, employer contends that Drs. Hippensteel and Spagnolo did not opine that the qualifying pulmonary function studies in this case should be ignored but, instead, explained in detail why they did not reliably indicate impairment. Employer's Exhibits 1, 3, 9, 10. Thus, employer asserts that the administrative law judge failed to adequately address the evidence regarding the reliability of the pulmonary function studies. Employer further asserts that the administrative law judge's findings are inconsistent with her determination that the more recent pulmonary function study evidence is more probative of claimant's actual respiratory condition, as the last two studies produced non-qualifying and mixed results. Additionally, employer asserts that the administrative law judge erred in finding that the medical opinion evidence supported a finding of total disability, as Dr. Agarwal relied on less relevant evidence, and the administrative law judge characterized his opinion as "internally inconsistent." Employer's Brief at 9-10; Decision and Order at 8.

We agree with employer that the administrative law judge's analysis of the pulmonary function study evidence is inadequate and confusing. An administrative law judge may rationally evaluate the reliability of the pulmonary function study evidence, and may conclude that a particular pulmonary function study is valid, based on a proper review of the interpretive report and an evaluation of whether it satisfies the regulatory requirements. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). An administrative law judge may rationally find that a pulmonary function study is entitled to diminished weight, when it is considered invalid by reviewing experts, and the administrative law judge must clearly explain her resolution of any evidentiary conflict regarding the validity of a pulmonary function study. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Moreover, as the Director points out, the administrative law judge's finding that the pulmonary function study results are "somewhat equivocal" yet "tend to support a finding of total disability," is inadequate to establish total respiratory disability pursuant to Section 718.204(b)(2)(i), Director's Response at 2, as claimant bears the burden of proof in establishing total respiratory disability. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b)(2).

In this case, therefore, notwithstanding the broad discretion afforded the fact-finder in evaluating the credibility of the evidence, we conclude that the administrative law judge did not provide a sufficient explanation to support her credibility findings. Pursuant to Section 718.204(b)(2)(i), her analysis of the pulmonary function study is incomplete, and calls into question her determination to credit Dr. Agarwal's qualifying pulmonary function study over more recent pulmonary function studies that resulted in non-qualifying or mixed results. While the administrative law judge briefly mentioned the evidence addressing the reliability of the pulmonary function study evidence, *i.e.*, the opinions of Drs. Hippensteel and Spagnolo, she failed to definitively resolve the issue. Consequently, we vacate the administrative law judge's determination that total respiratory disability was established pursuant to Section 718.204(b)(2)(i).

Next, we agree with employer that the administrative law judge's analysis of the conflicting medical opinion evidence pursuant to Section 718.204(b)(2)(iv) is inadequate. In view of her assignment of determinative weight to the opinion of Dr. Agarwal, because it was "more reasoned" than the opinions of Drs. Hippensteel and Spagnolo, the administrative law judge's reference to Dr. Agarwal's opinion as "internally inconsistent" renders her finding both confusing and insufficiently explained.[8] Decision and Order at 8; Director's Exhibit 12. Also, the administrative law judge has not adequately explained how the fact that Dr. Agarwal reviewed less of the evidence on the issue of total disability,[9] than did Drs. Hippensteel and Spagnolo, weighed into her overall finding that Dr. Agarwal's opinion was "better reasoned" than those of Drs. Hippensteel and Spagnolo. Decision and Order at 8. Additionally, the administrative law judge has failed to explain how Dr. Agarwal's 2008 disability opinion was bolstered by the October 2000 pulmonary function study performed by Dr. Forehand as part of claimant's previous claim, in light of her finding that Dr. Forehand's conclusions were "entitled to less weight due to their remoteness in time," and her observation that the most recent pulmonary function studies of record are more probative of claimant's current condition.[10] *Id*.

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[8] Specifically, in crediting Dr. Agarwal's opinion, the administrative law judge stated that it "is internally consistent and is documented. I find the opinion of Dr. Agarwal to be better reasoned than the opinions of the other two physicians[.]" Decision and Order at 8.

[9] Dr. Agarwal stated that his pulmonary disability assessment "is based on" the pulmonary function study values. Director's Exhibit 12 at 15, 17, 25, 32, 36. The administrative law judge stated, "I find the opinion of Dr. Agarwal to be better reasoned than the opinions of the other two physicians, although he admittedly lacked access to some of the other testing results that Drs. Hippensteel and Spagnolo were able to review." Decision and Order at 8.

[10] The administrative law judge also assigned less weight to Dr. Forehand's opinion because his supplemental report is missing from the record. The administrative

Similarly, we agree with employer that the administrative law judge's analysis of the medical opinions of Drs. Hippensteel and Spagnolo is inadequate. The administrative law judge found that both Drs. Hippensteel and Spagnolo opined that claimant does not have a totally disabling respiratory impairment by relying on the "varying nature of the pulmonary function [study] results." Decision and Order at 8. The administrative law judge concluded that "at bottom the physicians are arguing that the impairment is not constant and therefore has a different etiology, not that it would not be disabling a sufficient amount of time to preclude [c]laimant's resumption of coal mine employment." *Id*.

However, Dr. Hippensteel explained that the pulmonary function study he conducted showed "no obstruction," and the subsequent pulmonary function study values, obtained with suboptimal effort, showed "no more than mild airflow obstruction" and no restriction. Employer's Exhibit 9 at 17-18, 23-25. Dr. Hippensteel based his opinion, that the miner is not totally disabled from a pulmonary standpoint, on the pulmonary function study testing, blood gas testing, diffusion capacity[11] and lung volumes. *Id*. at 25. He found that claimant "has not suffered objective impairment in pulmonary function" and "has the ventilatory capacity to return to his previous job in the mines." Employer's Exhibit 1 at 5-6. Likewise, Dr. Spagnolo reviewed the pulmonary function testing in this case, and found that claimant "did not have an impairment," because "there is no obstructive defect and there is no restrictive defect." Employer's Exhibit 10 at 15-16, 18. Dr. Spagnolo stated that, based on the blood gas studies, diffusion capacity, lung volumes and pulmonary function testing, "everything looks normal and negative" and claimant does not have a totally disabling pulmonary or respiratory impairment. *Id*. at 19, 22. He concluded, therefore, that claimant is "fully capable" from a respiratory standpoint of performing his coal mine work or work requiring similar effort. Employer's Exhibit 3 at 5-6. Further, both Dr. Hippensteel and Dr. Spagnolo explained, in detail, why they disagreed with Dr. Agarwal's interpretation of the pulmonary function study testing, and his total disability assessment. Employer's Exhibits 1 at 3-4, 9 at 22-25, 10 at 15-18. The administrative law judge's statement that

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law judge referenced the district director's evidence summary, noting that Dr. Forehand's amended/supplemental opinion "continued to maintain that [c]laimant was totally disabled, even though he changed his mind with respect to the etiology of the disability." Decision and Order at 7-8.

[11] A disability opinion that is predicated on diffusing capacity studies may, in the fact finder's discretion, constitute relevant evidence regarding total disability, albeit that type of test is not listed in the regulations as a method of establishing a totally disabling respiratory impairment. *Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir 1991).

Drs. Hippensteel and Spagnolo "[*relied*] *on the variability of the testing results to rule out impairment*, does not, therefore, appear to be fully supported by the record, which shows that the doctors also relied on other factors. Decision and Order at 8. Thus, the administrative law judge's determination that the conclusions reached by Drs. Hippensteel and Spagnolo were not adequately explained requires further explanation, in light of the totality of the physicians' opinions. Decision and Order at 8-9; *see Milburn Colliery v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-2-323, 2-325 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Consequently, we vacate the administrative law judge's determination that total respiratory disability was established pursuant to Section 718.204(b)(2)(iv). *Compton*, 211 F.3d at 211, 22 BLR at 2-175.

In conclusion, we vacate the administrative law judge's finding that total respiratory disability was established at Section 718.204(b) overall, and we remand the case for the administrative law judge to reconsider the evidence. *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Moreover, in light of our determination to vacate the administrative law judge's finding of total respiratory disability and her disposition of the conflicting medical opinions, we also vacate her findings on rebuttal at Section 411(c)(4), 30 U.S.C. §921(c)(4), which rely, in part, on the same faulty analysis. In resolving the conflicting evidence on remand, the administrative law judge must render findings and conclusions that are consistent with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

On remand, therefore, if the administrative law judge finds that total respiratory disability is established, and that claimant is, therefore, entitled to invocation of the Section 411(c)(4) presumption, she must determine whether employer has established rebuttal of the presumption by proving that claimant does not have pneumoconiosis or that he is not totally disabled by it. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d at 473, 25 BLR at 2-8-9; *Rose*, 614 F.2d at 939, 2 BLR at 2-43. Should claimant fail to establish total respiratory disability pursuant to Section 718.204(b)(2), he is precluded from invoking the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). Moreover, a finding that claimant is not totally disabled from a respiratory or pulmonary standpoint precludes entitlement under the Act. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded 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