BRB No. 13-0015 BLA

LUCIAN LOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	DATE ISSUED: 09/26/2013
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION, C/O OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05853) of Administrative Law Judge Alice M. Craft with respect to a subsequent claim filed on November 16, 2009, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge credited claimant with at least thirty-two years of underground coal mine employment and considered the claim under 20 C.F.R. Part 718. The administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv) and, therefore, did not invoke the amended Section 411(c)(4) presumption or establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).[2] Consequently, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he did not establish total disability at 20 C.F.R. §718.204(b)(2). Claimant states that the administrative law judge erred in rejecting the qualifying exercise blood gas study obtained by Dr. Chavda and in failing to defer to Dr. Chavda's opinion, that claimant is totally disabled, based on his status as claimant's treating physician. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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 rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant filed his initial claim on December 6, 2001, which was denied by the district director on June 23, 2003, as claimant established the existence of pneumoconiosis, but did not establish total disability and disability causation. Director's Exhibit 1. No further action was taken by claimant until he filed the current subsequent claim. Director's Exhibit 3.

[2] 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). Pursuant to Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established thirty-two years of coal mine employment and her finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) or invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States

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

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(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). In this case, claimant's prior claim was denied because he failed to establish total disability and disability causation. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his claim. See 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

Relevant to the issue of total disability, the record contains two newly submitted pulmonary function studies, three newly submitted blood gas studies, and three newly submitted medical opinions. Because the newly submitted pulmonary function studies produced nonqualifying values, the administrative law judge determined that they were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[5] Decision and Order at 17; Director's Exhibits 12, 14. Two of the three newly submitted blood gas studies were nonqualifying under 20 C.F.R. §718.204(b)(2)(ii), while the exercise study obtained by Dr. Chavda on December 28, 2009 produced qualifying values.[6] Director's

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Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[5] 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 nonqualifying study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Dr. Chavda initially obtained a nonqualifying resting blood gas study on December 21, 2009. Director's Exhibit 12. Dr. Repsher obtained a resting study on June 8, 2010, that was nonqualifying. Director's Exhibit 14. Dr. Repsher did not exercise claimant, as he felt it would be medically contraindicated due to claimant's previous stroke. Employer's Exhibit 5 at 16. Dr. Skreekumar obtained a resting study on September 10, 2010, that was nonqualifying. Claimant's Exhibit 2. Dr. Skreekumar did not indicate why he did not exercise claimant. *Id*.

Exhibits 12, 14; Claimant's Exhibit 2. Dr. Jarboe reviewed Dr. Chavda's exercise results and found that they were unacceptable, based on the one week delay between the resting study and the exercise study. Employer's Exhibit 4. Dr. Jarboe explained, "it is possible that [claimant] was in congestive heart failure. If resting gases had been obtained at the same time they may have reflected that even at rest his arterial gases were abnormal due to some underlying medical condition." *Id*. Dr. Repsher also reviewed Dr. Chavda's December 28, 2009 exercise study and testified at his deposition that the drop in the values was "probably" due to claimant's stroke, as it prevented him from taking full breaths and exerting sufficient effort while exercising. Employer's Exhibit 5 at 16-17. The administrative law judge stated:

> Drs. Jarboe and Repsher have discounted Dr. Chavda's exercise blood gas study results due to the fact that the resting and exercise blood gas studies were actually performed one week apart. The rationale for Dr. Jarboe's and Dr. Repsher's opinion is that this practice discounts the qualifying exercise study results because there are no resting blood gas studies on the same day for which a comparison between the two can be made. I agree with this analysis.

Decision and Order at 17-18. The administrative law judge concluded, therefore, that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id*. at 18.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the record contains the newly submitted medical opinions of Drs. Chavda, Jarboe and Repsher. In a report dated December 29, 2009, Dr. Chavda indicated that claimant's pulmonary function and blood gas studies were normal and that claimant has good lung function. Director's Exhibit 12. In a supplemental letter dated April 13, 2010, Dr. Chavda diagnosed "substantial legal pneumoconiosis," based on the exercise hypoxia revealed on the December 28, 2009 exercise study, and concluded that claimant is totally disabled from performing his coal mine employment. *Id*. At his deposition, Dr. Chavda explained the inconsistency by testifying that in his December 29, 2009 report, he "had overlooked the exercise [study]" and "that may be [the] reason I say that [claimant's] disability is minor." Employer's Exhibit 6 at 26. Drs. Jarboe and Repsher opined that claimant is not totally disabled from a respiratory or pulmonary standpoint. Director's Exhibit 14; Employer's Exhibits 4, 5.

The administrative law judge found that Dr. Chavda's opinion was not well-reasoned, as the blood gas study on which he relied was discredited and he "gave contradictory opinions" as to claimant's ability to perform his usual coal mine work. Decision and Order at 18. In contrast, the administrative law judge gave greater weight to the opinions of Drs. Jarboe and Repsher because "they are in better accord both with the evidence underlying their opinions, and the overall weight of the medical evidence of

record." *Id*. Accordingly, the administrative law judge determined that claimant did not prove that he is totally disabled under 20 C.F.R. §718.204(b)(2)(iv). *Id*. The administrative law judge also found that, when weighed together, the newly submitted evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2). *Id*. at 19.

Claimant contends that the administrative law judge erred in relying on the comments made by Drs. Jarboe and Repsher to reject Dr. Chavda's qualifying exercise blood gas study and in failing to consider Dr. Chavda's testimony that the study was valid, despite the week that elapsed between the resting and exercise studies.[7] Claimant's arguments have merit. With respect to the administrative law judge's reliance on the opinions of Drs. Jarboe and Repsher to discredit Dr. Chavda's exercise study, the administrative law judge did not adequately explain, in accordance with the Administrative Procedure Act (APA),[8] why he accepted the view that the one week interval between the resting study and the exercise study rendered the qualifying exercise values invalid. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). By the plain language of 20 C.F.R. §718.204(b)(2)(ii), the sole inquiry for the fact-finder is whether the blood gas studies "show the values listed in Appendix C." 20 C.F.R. §718.204(b)(2)(ii). The applicable quality standards, set forth in 20 C.F.R. §718.105, do not add any requirement related to the timing of the exercise study relative to the resting study, nor do they mandate a comparison of resting and exercise values.[9] In addition,

[7] When questioned about this issue at his deposition, Dr. Chavda replied that it was the practice of the clinic at that time to have the studies done on separate days, as he had to be present for the exercise portion of the study. Employer's Exhibit 6 at 16-19. Dr. Chavda confirmed that a resting value was not taken on the day that the exercise portion was obtained. *Id*. at 19-20. Dr. Chavda also stated, in response to questions concerning the oxygen saturation values, that the exercise study was valid. *Id*. at 36.

[8] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

[9] The quality standards contain the following provisions relevant to exercise studies: "[i]f the results of the blood-gas study at rest do not satisfy the requirements of Appendix C," the physician must offer an exercise study, "unless medically contraindicated;" if an exercise study is administered, "blood shall be drawn during exercise;" and any report of an exercise study must specify the "[d]uration and type of exercise." 20 C.F.R. §718.105(b), (c)(7).

rather than challenging the credibility of the exercise values, Drs. Jarboe and Repsher commented on the lack of contemporaneous resting values in the context of identifying the cause of the decreased exercise values, an issue addressed at 20 C.F.R. §718.204(c).[10] *See* Director's Exhibit 14; Employer's Exhibits 4, 5 at 16-17. Finally, claimant is correct in asserting that the administrative law judge did not address, as required by the APA, all of the evidence relevant to the credibility of the December 28, 2009 exercise study, as he did not discuss the deposition testimony in which Dr. Chavda maintained that the study was valid. *See Vigil v. Director, OWCP*, 8 BLR 1-99, 1-100-01 (1985); Employer's Exhibit 6 at 16-19, 36.

Based on the foregoing, we vacate the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). We also vacate the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv), as she gave less weight to Dr. Chavda's opinion because she found it was based solely upon the qualifying exercise blood gas study, which she discredited, and because it was inconsistent with the rest of the evidence.

On remand, the administrative law judge must initially reweigh Dr. Chavda's exercise blood gas study at 20 C.F.R. §718.204(b)(2)(ii), based on a review of all of the relevant evidence. The administrative law judge must then reconsider the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), based on her findings regarding the blood gas study evidence. When weighing the conflicting medical opinions on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In determining the probative value of Dr. Chavda's opinion, the administrative law judge must consider Dr. Chavda's testimony explaining why he initially stated that claimant's lung function was good, and that there was only a minor pulmonary impairment, but later stated that claimant has exercise hypoxia which renders him totally disabled.[11] If the administrative law judge determines that the evidence

[10] Dr. Jarboe's statement that the normal oxygen saturation levels and low METS level observed on the December 28, 2009 exercise test suggest that the duration and type of exercise performed by claimant were inadequate, may be relevant to the validity of the test, but the administrative law judge did not address them. *See* Employer's Exhibit 4.

[11] Claimant argues that Dr. Chavda's opinion is entitled to great weight, because he is a treating physician. However, whether Dr. Chavda is a treating physician is unclear, as he performed the Department of Labor-sponsored examination of claimant

shows a pulmonary impairment, even a mild one, the administrative law judge must determine the specific exertional requirements of claimant's usual coal mine employment in order to arrive at a reasoned conclusion as to whether the impairment prevents claimant from performing his usual coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). The administrative law judge is required to set forth her findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

In the event that the administrative law judge finds that total disability has been established under 20 C.F.R. §718.204(b)(2)(ii), (iv), she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *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 determines that claimant has failed to establish total disability under 20 C.F.R. §718.204(b)(2), an award of benefits is precluded. *White*, 23 BLR at 1-3; *see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). If the administrative law judge finds total disability established, claimant will have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[12] The administrative law judge would then be required to consider whether employer has rebutted the presumption.

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and, pursuant to 20 C.F.R. §725.406(b), the physician who does this examination cannot have "provided medical treatment within the twelve months preceding" the filing date of the claim. 20 C.F.R. §725.406(b); Director's Exhibit 12; Employer's Exhibit 6 at 4-5. Thus, on remand, the administrative law judge must determine whether Dr. Chavda is a treating physician. If the administrative law judge finds that he is, she must consider his opinion in accordance with 20 C.F.R. §718.104(d).

[12] The administrative law judge determined that claimant satisfied the other prerequisites for invocation of amended Section 411(c)(4), as his claim was filed after January 1, 2005, and he established at least fifteen years of underground coal mine employment. Decision and Order at 3.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge