**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0320 BLA

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| CLAIR E. FULMER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BARNES & TUCKER COMPANY | ) | |
| | ) | DATE ISSUED: 05/29/2015 |
| Employer-Respondent | ) | |
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| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

James C. Munro, II (Spence, Custer, Saylor, Wolfe, & Rose), Johnstown, Pennsylvania, for employer.

Rae Ellen James (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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-6293) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim[1] filed on November 2, 2010, 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 at least twenty-eight years of coal mine employment, of which fifteen years or more, were spent in underground mines. The administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis. However, based on his finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4), and also failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge did not properly weigh the blood gas study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, asserts that the administrative law judge "improperly conflated the question of *whether* [claimant] was totally disabled from a respiratory standpoint with the question of what *caused* his disability." Director's Letter (unpaginated) at [1]. The Director asks the Board to vacate

[1] Claimant filed an initial claim for black lung benefits on May 13, 1986. Director's Exhibit 1. In a Decision and Order dated December 6, 1988, Administrative Law Judge George P. Morin denied benefits on the grounds that the evidence failed to establish total disability. *Id.* Claimant filed a second claim on October 17, 1995, which was denied by the district director on March 25, 1996, because the evidence was insufficient to establish total disability. *Id.* Claimant took no further action with respect to the denial until he filed the current subsequent claim on November 2, 2010. Director's Exhibit 3.

[2] Under amended Section 411(c)(4) of the Act, 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.

the denial of benefits and remand the case for further consideration of whether claimant can invoke the rebuttable presumption set forth in amended Section 411(c)(4) of the Act.[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 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 claimant demonstrates 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).[5] 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 failure to establish total disability was the reason for denial of his prior claim, claimant was required to establish this element in order to obtain a review of the merits of his claim. *See* 20 C.F.R. §725.309(c).

## I. TOTAL DISABILITY

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered five newly submitted blood gas studies. Decision and Order at 10, 26. Three of the studies, dated December 30, 2010, July 21, 2011 and August 29, 2011, produced results

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

[4] The record indicates that claimant's coal mine employment was in Pennsylvania and West Virginia. Director's Exhibits 1, 4. The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner's last coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c) (2014).

at rest only,[6] and were non-qualifying[7] for total disability. Director's Exhibit 10; Employer's Exhibits 11, 15. The April 5, 2011 and June 27, 2012 studies produced non-qualifying values at rest, but produced qualifying values with exercise. Director's Exhibit 11; Claimant's Exhibit 5.

In resolving the conflict in the blood gas study evidence, the administrative law judge discussed the medical reports of Drs. Rasmussen and Fino in relation to the cause of the qualifying post-exercise values. Decision and Order at 26; Director's Exhibit 11; Employer's Exhibit 11. He noted that, in a report dated May 9, 2011, Dr. Rasmussen attributed the impairment observed on exercise to pneumoconiosis, while Dr. Fino did not. Decision and Order at 26. The administrative law judge found that Dr. Rasmussen was "unclear" in his discussion of claimant's obesity and that he also provided a "somewhat equivocal" explanation as to why heart disease was not the cause of claimant's hypoxemia with exercise. Decision and Order at 26. In contrast, the administrative law judge credited Dr. Fino's explanation, that claimant's qualifying exercise values were due entirely to heart disease, and concluded:

> Given that all of the resting blood-gas tests are "non-qualifying;" that Dr. Rasmussen's opinion is somewhat equivocal; and that I rank Dr. Fino over Dr. Rasmussen, I find that claimant has failed to establish total disability on the basis of blood-gas testing by a preponderance of the evidence.

*Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that claimant's "last coal mining positions required heavy manual labor" and considered the medical opinions of Drs. Bajwa, Rasmussen, Houser and Fino. Decision and Order at 27. Dr. Bajwa diagnosed a totally disabling respiratory impairment caused by coal

[6] Dr. Bajwa stated that he did not administer an exercise blood gas study on December 30, 2010, as exercise was contraindicated by edema, shortness of breath and an abnormal resting PO2. Director's Exhibit 10. Dr. Fino indicated that claimant performed a six minute walk for the July 21, 2011 blood gas study. Employer's Exhibit 11. Although there is a notation that claimant's PO2 diminishes with exercise, no exercise values were reported. *Id*. Dr. Pickerill noted that claimant was not asked to exercise during the blood gas study obtained on August 29, 2011, because clamant had difficulty walking due to arthritis in his knee. Employer's Exhibit 15.

[7] A "qualifying" blood gas study yields values that are equal to, or less than, the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

workers' pneumoconiosis. Director's Exhibit 10. The administrative law judge gave little weight to Dr. Bajwa's opinion, on the grounds that he "based his opinion on 'non-qualifying' diagnostic test values and did not provide any explanation why claimant was disabled despite those values." Decision and Order at 27. With respect to the opinion of Dr. Rasmussen, the administrative law judge reiterated his determination that Dr. Rasmussen's statement that obesity played no role in producing the qualifying blood gas study results was "unclear," and that his opinion as to the role of claimant's heart disease in producing abnormal exercise blood gas values was "equivocal." *Id*.; *see* Director's Exhibit 11. Regarding Dr. Houser's diagnosis of a totally disabling respiratory impairment due to pneumoconiosis, the administrative law judge gave it little weight on the ground that the physician did not address the role of heart disease in claimant's abnormal blood gas values. Decision and Order at 27; Claimant's Exhibit 1. In contrast, the administrative law judge accorded great weight to the opinion of Dr. Fino, who determined that claimant is not disabled from a respiratory standpoint, because the administrative law judge found that Dr. Fino's diagnosis was thoroughly explained and was supported by the objective testing.[8] Decision and Order at 26, 27; Employer's Exhibit 11. The administrative law judge concluded: "Given . . . that I rank Dr. Fino over Drs. Bajwa, Rasmussen, and Houser, I find that claimant has failed to establish total disability on the basis of medical opinion evidence." Decision and Order at 27.

The Director contends that the administrative law judge did not properly address the issue of total disability separately from the issue of disability causation. Claimant argues that the administrative law judge did not properly weigh the medical opinions of Drs. Rasmussen, Houser and Fino.[9] These allegations of error have merit.

We agree with the Director that the administrative law judge erred in combining his analysis of the issue of total disability with his analysis of the issue of disability causation. The proper inquiry under each subsection of 20 C.F.R. §718.204(b)(2) is whether claimant has established a totally disabling respiratory or pulmonary

[8] In his report dated August 18, 2011, Dr. Fino concluded that claimant is neither partially nor totally disabled from a respiratory standpoint, as claimant's April 5, 2011 qualifying exercise blood gas values were attributable to heart disease. Employer's Exhibit 11. Dr. Fino's report preceded, and thus did not discuss, the most recent exercise blood gas study, obtained on June 27, 2012, which produced qualifying results.

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. Pickerill's opinion cannot establish total respiratory disability, because he diagnosed only partial disability from a respiratory standpoint. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 27; Employer's Exhibit 15.

impairment.[10] The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the amended Section 411(c)(4) presumption has been rebutted by proving that no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(ii). Furthermore, in addition to the administrative law judge's error in considering causation as part of his analysis of total disability, the administrative law judge's mischaracterization of the medical opinions of Drs. Rasmussen and Houser, as discussed *infra*, slip op. at 8-10, affected his credibility analyses under 20 C.F.R. §718.204(b)(2)(ii) and (iv). The result of these errors prevented claimant from invoking the amended Section 411(c)(4) presumption because, in addition to mischaracterizing claimant's medical experts' opinions, the administrative law judge required claimant to establish causation, when he only had to establish that he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(iii); *see West Virginia CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015).

In addition, the administrative law judge erred in relying, in part, on whether the physicians cited "non-qualifying" or "qualifying" tests, when weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 27. The regulations provide that a claimant may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Fuller v. Gibraltar Coal Corp*. 6 BLR 1-1291 (1984).

Accordingly, we vacate the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv), and remand the case to the administrative law judge for reconsideration. We must also vacate, therefore, the administrative law judge's findings that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and failed to invoke the amended Section 411(c)(4) presumption.

[10] The introductory paragraph of 20 C.F.R. §718.204(b)(2) provides that "[i]n the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability."

On remand, the administrative law judge must reconsider whether claimant has established total disability by the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). When addressing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must reconsider the opinions of Drs. Bajwa, Rasmussen, Houser and Fino on the issue of total disability. The administrative law judge should consider the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). When weighing the medical opinions relevant to whether claimant has a totally disabling respiratory or pulmonary impairment, the administrative law judge must not also address the issue of disability causation. If the administrative law judge finds that claimant has proven that he is totally disabled under 20 C.F.R. §718.204(b)(2)(ii), (iv), he must then weigh all of the evidence supportive of a finding of total disability against the contrary probative evidence of record and render a final determination as to whether claimant has satisfied his burden of proof. *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 claimant is unable to establish total disability, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). However, if the administrative law judge finds that claimant has proven that he suffers from a totally disabling respiratory or pulmonary impairment, claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the amended Section 411(c)(4) presumption.

## II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In the event that the administrative law judge determines that claimant has invoked the presumption, he must shift the burden to employer to rebut the presumption with affirmative proof that no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis.[11] 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §725.305(d)(1); *see Bender*, 782 F.3d at 134-35; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone*

[11] Because the administrative law judge found that claimant established the existence of both clinical and legal pneumoconiosis, by a preponderance of the evidence, employer cannot rebut the presumption by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see* Decision and Order 24.

*Mining Coal Mining Corp*., BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting). In the interest of judicial economy, we will address claimant's remaining arguments.

Claimant maintains accurately that the administrative law judge did not consider the corrected version of Dr. Rasmussen's report when he found that, because the physician was unclear as to whether exercise would improve claimant's resting hypoxemia, his opinion that coal dust exposure was a contributing cause of the impairment was not persuasive. Dr. Rasmussen initially submitted a report to claimant's lay representative dated May 9, 2011. Director's Exhibit 11. The administrative law judge commented on this report, in relevant part, as follows:

> [I]t is unclear if Dr. Rasmussen believed that claimant's ventilation should improve with exercise. He states:
>
> > "In this case, [claimant] did show mild resting hypoxia with a PACO2 of 40 and PAO2 of 65. *Ventilation* [sic] would have improved ventilation and gas exchange in an obese individual without chronic lung disease."

Decision and Order at 26, *quoting* Director's Exhibit 11 (original page 2) (emphasis added). On May 16, 2011, claimant's lay representative proffered for inclusion in the record "the corrected page 2 of the 5/09/11 medical report of D.L. Rasmussen, M.D." *Id*. On the revised page 2, Dr. Rasmussen stated:

> In this case, [claimant] did show mild resting hypoxia with a PACO2 of 40 and PO2 of 65. *Ambulation* would have improved ventilation and gas exchange in an obese individual without chronic lung disease.

*Id*. (emphasis added). The administrative law judge did not address the corrected report when rending his finding regarding the probative value of Dr. Rasmussen's opinion.

Because the administrative law judge omitted relevant evidence from consideration, we must vacate his discrediting of Dr. Rasmussen's opinion on the issue of total disability causation. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). On remand, the administrative law judge must reconsider his determination, that Dr. Rasmussen was unclear as to whether exercise would improve claimant's resting hypoxia, in light of the corrected report. The administrative law judge must also address the entirety of Dr. Rasmussen's corrected report, including his observation that exercise improves ventilation and gas exchange only "in an obese individual *without chronic lung*

*disease*." Director's Exhibit 11 (emphasis added). In addition, the administrative law judge must reconsider his finding, that Dr. Rasmussen's opinion was equivocal on the issue of whether obesity causes resting hypoxemia, based on an accurate recitation of Dr. Rasmussen's report. The administrative law judge stated:

> [Dr. Rasmussen] opined that obesity can lead to *resting* hypoxemia by virtue of compression of lower lung units by pressure from abdominal contents. However, *without ambulation*, i.e. resting, the diaphragm drops and ventilation is restored to the lower lung units. This statement partly contradicts his preceding statement that obesity leads to resting hypoxemia.

Decision and Order at 26. Contrary to the administrative law judge's summary, Dr. Rasmussen reported on both versions of page 2 that, "*with ambulation*, the diaphragm drops and ventilation is restored to the lower lung units." Director's Exhibit 11.

Furthermore, there is merit in claimant's assertions that the administrative law judge erred in finding that Dr. Houser did not address whether claimant's heart disease could cause his abnormal exercise blood gas results, and in crediting Dr. Fino's opinion. Dr. Houser summarized claimant's medical history, including procedures related to the diagnosis and treatment of claimant's heart disease, and acknowledged that Dr. Fino attributed claimant's hypoxemia to heart disease. Claimant's Exhibit 1. Dr. Houser further indicated his disagreement with Dr. Fino's conclusion, however, stating "[b]esides Dr. Fino's claim that [claimant's] hypoxemia is due to heart disease rather than his coal workers' pneumoconiosis with associated hypoxemia, he has not presented any additional evidence or medical literature to substantiate this claim or refute the evidence provided by Dr. Rasmussen." *Id*. Dr. Houser also cited textbooks supporting his view that interstitial lung disease, in the form of pneumoconiosis, is the source of claimant's hypoxemia. *Id*. Because the administrative law judge did not accurately characterize Dr. Houser's opinion, and credited Dr. Fino's opinion without considering whether Dr. Houser was correct in stating that Dr. Fino did not provide adequate support for his causation diagnosis, we vacate the administrative law judge's findings with respect to these opinions.[12] *See Gillen v. Peabody Coal Co*., 16 BLR 1-22, 1-26 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

In determining the weight to accord the conflicting medical opinions on the issue of total disability causation, the administrative law judge should address the credentials

[12] Claimant further maintains that Dr. Fino's opinion is equivocal as to whether pneumoconiosis is a contributing cause of a reduction in claimant's total lung capacity. Claimant also contends that, unlike Dr. Rasmussen, Dr. Fino did not compare the effects of obesity and coal workers' pneumoconiosis on claimant's diffusing capacity.

of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Balsavage* , 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Moreover, the administrative law judge must base his findings on a complete, and accurate, understanding of each physician's medical report. Finally, the administrative law judge must set forth the bases for his findings of fact and conclusions of law, in detail, including the underlying rationale, in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[13] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the 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 consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

[13] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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 30 U.S.C. §932(a).