**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0299 BLA

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| CLARENCE R. COTTRELL | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| MYSTIC ENERGY, INCORPORATED | ) | DATE ISSUED: 06/25/2020 |
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| 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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-06185) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on November 9, 2015.[1]

The administrative law judge credited claimant with twenty years of underground coal mine employment, based on the parties' stipulation, and found the new evidence, and evidence as a whole, establishes claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant established a change in the applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding claimant totally disabled and, therefore, erred in finding the Section 411(c)(4) presumption

[1] This is claimant's second claim for benefits. On May 20, 2008, the district director denied his prior claim, filed November 14, 2007, for failing to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing his current claim. Director's Exhibit 3.

[2] 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(c); *White v. New White Coal Co*., 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(c)(3). Because claimant's prior claim was denied because he failed to establish any element of entitlement, he had to submit new evidence establishing at least one element to have his case considered on the merits. 20 C.F.R. §725.309(c)(2), (3).

[3] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

invoked. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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.[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).

**Invocation of the Section 411(c)(4) Presumption – Total Disability**

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability with qualifying[6] pulmonary function studies or arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge found total disability established based on the blood gas studies and medical opinion evidence.[7]

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4, 7; Decision and Order at 5-6; Hearing Transcript at 12-13.

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

[7] The administrative law judge found the five pulmonary function studies of record are non-qualifying and the record does not contain evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 19-21. Thus, claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii).

The record includes five new blood gas studies. The December 16, 2015 study by Dr. Habre, conducted only at rest, produced qualifying values. Director's Exhibit 15. The August 3, 2016 study by Dr. Zaldivar, conducted at rest and with exercise, produced non-qualifying values. Director's Exhibit 23. The November 30, 2017 and December 14, 2017 studies by Drs. Jarboe and Green, conducted only at rest, produced non-qualifying values. Claimant's Exhibit 1; Employer's Exhibit 4. Finally, the February 15, 2018 study by Dr. Raj, produced non-qualifying values at rest but qualifying values with exercise. Claimant's Exhibit 2. Noting "the last two exercise tests" had qualifying values – and finding "more weight can be given to exercise studies and more recent studies" – the administrative law judge found the blood gas study evidence established a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20-21.

Employer argues the administrative law judge erred in considering the February 15, 2018 exercise study twice and in not considering all of the evidence of record. Employer's Brief at 10-12. Specifically, it asserts Dr. Raj administered a blood gas study on February 15, 2018, and Dr. Green considered that same study in his supplemental report. *Id*. Employer states the administrative law judge mistakenly believed Drs. Raj and Green administered separate blood gas studies, and as a result counted and weighed the qualifying February 15, 2018 study as two different studies.[8] *Id*.; *see* Claimant's Exhibit 1. Further, it contends the administrative law judge erred in not considering Dr. Rasmussen's non-qualifying December 19, 2007 blood gas study. Employer's Brief at 10-11; Director's Exhibit 1. Employer's arguments have merit.

As employer alleges, when considering the blood gas studies, the administrative law judge listed two studies dated February 15, 2018. Decision and Order at 21; Employer's Brief at 10-12. He attributed one to Dr. Green conducted only with exercise, and one to Dr. Raj conducted at rest and with exercise, and found the exercise studies by each physician qualifying. Decision and Order at 21. The record reflects, however, Dr. Green reviewed Dr. Raj's February 15, 2018 blood gas values when preparing his supplemental report and did not independently conduct a blood gas study on February 15, 2018.[9] *See* Claimant's Exhibit 1. Thus, the administrative law judge erred in finding "the last two exercise tests" qualify for total disability. Decision and Order at 21. Because we are unable

[8] Employer notes "[a]lthough Dr. Raj drew two samples, it is only one exercise study." Employer's Brief at 10. It also states "[p]art of the confusion may be the fact that Dr. Green notes the date of service in his supplemental report as December 14, 2017, the date of his original examination. [Claimant's Exhibit 1]." *Id*.

[9] Attached to Dr. Green's supplemental report is a print out of the February 15, 2018 blood gas study and it notes Dr. Raj is the requesting physician. Claimant's Exhibit 1.

to determine from the administrative law judge's explanation whether this error would have made a difference in his weighing of the blood gas study evidence, we must vacate his determination the blood gas studies support a finding of total disability.[10] 20 C.F.R. §718.204(b)(2)(ii); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With regard to the medical opinion evidence, the administrative law judge gave the most weight to the opinions of Drs. Habre and Raj, who diagnosed a totally disabling respiratory impairment, finding they are well documented and well-reasoned and consistent with his blood gas study finding. Decision and Order at 26; Director's Exhibits 15, 24; Claimant's Exhibit 2. He found Dr. Green's opinion, also diagnosing total disability, not well reasoned because he focused on claimant's health if he had continued exposure to coal dust as opposed to his ability to perform "comparable and gainful employment."[11] Decision and Order at 25-26; Claimant's Exhibit 1. He further determined the contrary opinions of Drs. Zaldivar and Jarboe are not well reasoned because "they do not reflect the totality of the arterial blood gas results." Decision and Order at 25; Director's Exhibits 23; Employer's Exhibits 4, 5. Consequently, the administrative law judge determined claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 26.

Because the administrative law judge's medical opinion determinations are based on his blood gas study finding at 20 C.F.R. §718.204(b)(2)(ii), which we have vacated, we must also vacate his conclusion the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). Consequently, we further vacate his determinations claimant established total disability overall at 20 C.F.R. §718.204(b)(2), established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption. Thus, we must also vacate his award of benefits.

On remand, the administrative law judge must first reconsider whether the blood gas study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii), based on a weighing of all of the new blood gas studies of record, and clearly explain the basis for his

[10] The Board is not a fact-finder; it cannot consider the evidence and make determinations which are the province of the administrative law judge. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

[11] Dr. Green initially found claimant was not totally disabled due to a respiratory impairment based on the non-qualifying blood gas study he conducted, but subsequently found claimant was totally disabled after reviewing Dr. Raj's February 15, 2018 blood gas study that produced qualifying values with exercise. Claimant's Exhibit 1.

findings. *See Wojtowicz*, 12 BLR at 1-165. Furthermore, the administrative law judge must reconsider his weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

After reconsidering whether the new blood gas study and medical opinion evidence establish total disability, the administrative law judge must weigh all new evidence together to determine whether claimant established total disability at 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *Rafferty*, 9 BLR at 1-232. If so, he must consider all relevant evidence of record, including Dr. Rasmussen's December 19, 2007 blood gas study from the prior claim.[12] *See* 20 C.F.R. §725.309(c)(2) ("[a]ny evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim"). The administrative law judge must set forth his findings in detail, including the underlying rationales, in accordance with the Administrative Procedure Act.[13] *See Wojtowicz*, 12 BLR at 1-165.

[12] If claimant establishes total disability he will also have established invocation of the Section 411(c)(4) presumption, in which case the administrative law judge may reinstate his unchallenged finding that employer failed to rebut the presumption and the award of benefits. If claimant fails to establish total disability, an essential element of entitlement, an award of benefits is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[13] 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 the administrative law judge to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order Awarding 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

GRESH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to vacate the administrative law judge's award of benefits. Instead, I would reject employer's argument the administrative law judge erred in finding the evidence establishes total disability. Employer's Brief at 9-14.

In considering the blood gas study evidence, the administrative law judge permissibly gave more weight to the qualifying February 15, 2018 blood gas values obtained with exercise because they are the most recent and because he found exercise studies are more indicative of claimant's respiratory ability to perform his usual coal mining work. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (more recent evidence rationally credited if it shows the miner's condition has progressed or worsened); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980); Decision and Order at 20-21. Thus, contrary to employer's assertion, any error in the administrative law judge's consideration of the February 15, 2018 study values twice is harmless. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-11. In addition, given the administrative law judge's reliance on the most recent study, employer has not adequately

explained how the administrative law judge's failure to consider Dr. Rasmussen's non-qualifying December 19, 2007 blood gas study conducted at rest and with exercise would have made a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Thus, the administrative law judge's finding is supported by substantial evidence and the Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge, even if our conclusions would have been different. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Consequently, I would affirm the administrative law judge's finding claimant established total disability based on the blood gas study evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 21.

I would also reject employer's contention the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Jarboe because they did not consider the totality of the blood gas study evidence when none of the other physicians did either. Employer's Brief at 12-14. In preparing his report, Dr. Zaldivar examined claimant and conducted a review of records, including Dr. Rasmussen's 2007 report from claimant's prior claim and Dr. Habre's report from his current claim. Director's Exhibit 23. The August 3, 2016 blood gas studies Dr. Zaldivar conducted had non-qualifying values at rest and with exercise. *Id*. Dr. Zaldivar observed a drop in oxygen late in exercise but ultimately concluded "this hypoxemia is not disabling." *Id*. In his supplemental report, based on a review of additional records, which did not include the most recent February 15, 2018 blood gas study, Dr. Zaldivar stated "[a] single isolated abnormality of blood gas as noted by Dr. Habre does not constitute a statement for disability." Employer's Exhibit 5. Dr. Zaldivar therefore reiterated his previous finding that claimant is not totally disabled. *Id*. Dr. Jarboe examined claimant and diagnosed a mild restrictive defect based on the pulmonary function studies he conducted, but found this was not confirmed by lung volume testing "which is the gold standard for diagnosing restriction." Employer's Exhibit 4. He also relied on the non-qualifying, resting blood gas study he conducted in 2017 to conclude claimant's gas exchange is normal. *Id*.

In contrast, Dr. Raj relied on the most recent qualifying February 15, 2018 blood gas study value taken with exercise to diagnose a totally disabling respiratory impairment. Claimant's Exhibit 2. Additionally, while Dr. Habre did not review the February 15, 2008 study, he relied on qualifying blood gas study values to diagnose claimant with a totally disabling respiratory impairment. Director's Exhibit 15. Thus, contrary to employer's assertion, the administrative law judge permissibly gave less weight to the opinions of Drs. Zaldivar and Jarboe because they did not consider the totality of the blood gas study evidence, including the most recent test which produced qualifying values with exercise,

which the administrative law judge permissibly credited as the most recent and because exercise studies are more indicative of claimant's respiratory ability to perform his usual coal mining work. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Compton*, 211 F.3d at 211; Decision and Order at 25; Employer's Brief at 12-14. In addition, the administrative law judge permissibly gave the most weight to the opinions of Drs. Habre and Raj because he determined they are consistent his finding the weight of the blood gas study evidence establishes total disability. *Looney*, 678 F.3d at 316-17; *Compton*, 211 F.3d at 211; Decision and Order at 26. Thus I would affirm, as supported by substantial evidence, his finding the medical opinion evidence supports a finding of total disability.[14] 20 C.F.R. §718.204(b)(2)(iv); *Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528; Decision and Order at 26.

Consequently, I would also affirm the administrative law judge's findings claimant established total disability at 20 C.F.R. §718.204(b)(2) overall, and therefore a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. Because claimant invoked the presumption, and employer has not challenged the administrative law judge's finding it did not rebut it, I would further affirm claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

DANIEL T. GRESH
Administrative Appeals Judge

[14] Employer does not challenge the administrative law judge's discrediting of Dr. Green's opinion.