**U.S. Department of Labor**

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

BRB No. 20-0228 BLA

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| COSSIE C. HALE, SR. | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| BULLION HOLLOW ENTERPRISES, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| TRAVELERS INDEMNITY COMPANY | ) | DATE ISSUED: 06/28/2021 |
| | ) | |
| 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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

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

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-05708) rendered on a subsequent claim[1] filed on February 3, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with at least fifteen years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends the administrative law judge improperly invoked the Section 411(c)(4) presumption based on erroneous findings that Claimant has at least fifteen years of qualifying coal mine employment and is totally disabled. It further argues she erred in finding it did not rebut the Section 411(c)(4) presumption.[3] Claimant responds,

[1] 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 "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). The district director denied Claimant's prior claim, filed on April 22, 2014, for failure to establish total disability. Director's Exhibit 1 at 261-62. Therefore, to obtain review of his subsequent claim on the merits, he had to submit new evidence establishing this element of entitlement. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the claim was timely filed and Employer is the responsible operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

**Invocation of the Section 411(c)(4) Presumption: Length of Coal Mine Employment**

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's length of coal mine employment determination if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In making this determination, the administrative law judge must explain what evidence she credits or rejects and set forth her underlying rationale. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-11 (1984).

Employer argues that the administrative law judge's finding Claimant established at least fifteen years of underground coal mine employment cannot be affirmed. In support, it alleges she did not fully consider the relevant evidence and failed to adequately explain how she arrived at her conclusion. Employer's contention has some merit.

The administrative law judge noted the district director concluded Claimant established twenty-one years of coal mine employment but Employer stipulated to 12.16 years. Decision and Order at 4. Determining there was no evidence contradicting the district director's conclusion, she found Claimant established at least fifteen years of underground coal mine employment. *Id.* at 5.

Pursuant to 20 C.F.R. §725.455(a), "any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3-4.

judge." Therefore, when a party requests a formal hearing after a district director's proposed decision, an administrative law judge must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985). By omitting a substantive consideration of the evidence, the administrative law judge gave presumptive effect to the district director's finding of twenty-one years of coal mine employment, thereby failing to proceed *de novo*. We therefore must vacate her finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and remand the case for reconsideration of this issue.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and 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 consider all relevant evidence and weigh the evidence supporting total disability against the 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 the pulmonary function tests did not produce qualifying values, one of the arterial blood gas studies supported a finding of total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 11. She also considered the opinions of Dr. Shamma-Othman[5] that Claimant is totally disabled and those of Drs.

[5] Dr. Shamma-Othman opined Claimant is totally disabled and unable to perform the duties of his previous coal mine employment due to severe hypoxia as demonstrated by the May 4, 2016 arterial blood gas testing. Director's Exhibits 9, 28.

Sargent[6] and McSharry[7] that he is not. Decision and Order at 11; Director's Exhibits 9, 23, 28; Employer's Exhibits 17, 18. After summarizing the opinions of Drs. Shamma-Othman, Sargent, and McSharry, the administrative law judge stated:

> After considering all of the probative evidence, I find that the evidence establishes that the Clamant was totally disabled on a respiratory or pulmonary basis such that it prevented him from returning to his last and usual coal mine employment or comparable work.

Decision and Order at 11.

We agree with Employer's contention that the administrative law judge did not adequately explain her evaluation of the medical opinion evidence. Employer's Brief at 9-11. The Administrative Procedure Act (APA) requires the administrative law judge to consider all relevant evidence in the record, and to set forth her "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the administrative law judge summarized the opinions of Drs. Shamma-Othman, Sargent, and McSharry, she did not make any findings regarding the credibility of their opinions or the weight she accorded them. Decision and Order at 6-8, 11. Consequently, she failed to explain, in compliance with the APA, whether she determined their opinions establish or disprove total disability at 20 C.F.R. §718.204(b)(2)(iv).[8] *Wojtowicz*, 12 BLR at 1-165. Likewise, in finding Claimant established total disability based on the evidence as a whole, she failed to explain her consideration of all the relevant evidence or weigh the evidence supporting total disability against the contrary evidence. *See id.*; *Rafferty*, 9 BLR at 1-232 (1987); *Shedlock*, 9 BLR at 1-198. We thus must vacate her finding that Claimant

[6] Dr. Sargent concluded Claimant has a mild obstructive ventilatory impairment due to smoking and Parkinson's disease that affects his respiratory function, but Claimant does not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 23; Employer's Exhibit 17.

[7] Dr. McSharry opined Claimant has a mild-to-moderate pulmonary impairment most likely due to asthma and smoking, but it is not disabling. Director's Exhibit 23; Employer's Exhibit 18.

[8] The administrative law judge similarly failed to explain why she found the pulmonary function studies did not establish total disability or render a finding as to whether the arterial blood gas studies establish total disability. 20 C.F.R. §718.204(b)(i), (ii).

established total disability. 20 C.F.R. §718.204(b)(2)(i)-(iv); *see Wojtowicz*, 12 BLR at 1-165.

Because we vacate the administrative law judge's determinations that Claimant established at least fifteen years of underground coal mine employment and is totally disabled, we also vacate her finding that Claimant invoked the Section 411(c)(4) presumption.[9] We therefore vacate the award of benefits and remand the case for further consideration.

**Remand Instructions**

On remand as to the length of Claimant's coal mine employment, the administrative law judge must consider all relevant evidence *de novo* and render a finding on this issue. *See Oggero*, 7 BLR at 1-863; 20 C.F.R. §725.455(a). She must use a reasonable method of calculation to determine the length of such employment and fully explain her findings in accordance with the APA. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *Wojtowicz*, 12 BLR at 1-165; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Tackett v. Director, OWCP*, 12 BLR 1-11, 1-13 (1988).

At total disability, the administrative law judge must evaluate whether the pulmonary function studies and arterial blood gas studies establish total disability and provide a rationale to explain her findings. *See Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2). She must further evaluate the medical opinions of Drs. Shamma-Othman, Sargent, and McSharry, explain the weight she accords to each, and determine whether Claimant has established total disability based on the medical opinions. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). If Claimant establishes total disability based on the pulmonary function studies, arterial blood gas studies, or medical opinion evidence, the administrative law judge must consider the contrary evidence and determine if he is totally disabled. 20 C.F.R. §718.204(b)(2).

If Claimant establishes at least fifteen years of qualifying coal mine employment and total disability, and thereby invokes the Section 411(c)(4) presumption, the administrative law judge must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. If Claimant does not establish fifteen years of qualifying coal mine employment, the administrative law judge must determine whether he can affirmatively establish all element of entitlement without the Section 411(c)(4)

[9] Because we have vacated the administrative law judge's findings that Claimant established total disability and invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's arguments that the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted.

presumption. If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). In rendering her credibility determinations on remand, the administrative law judge must explain her findings as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Granting Benefits in a Subsequent Claim is affirmed in part, 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

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge