BRB No. 11-0245 BLA

BOBBY J. ESTEP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL BRANCH COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 12/21/2011
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Jonathan Rolfe (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/carrier (employer) appeals the Decision and Order Award of Benefits (2008-BLA-05989) of Administrative Law Judge Daniel F. Soloman rendered on a claim filed 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). This case involves a subsequent claim filed on December 26, 2006.[1] After crediting claimant with at least twenty-two years of coal mine employment, more than fifteen years of which were underground,[2] the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

Considering the claim on its merits, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[3] 30 U.S.C. §921(c)(4). Applying amended Section 411(c)(4), the

[1] Claimant's prior claim, filed on October 14, 1988, was finally denied on October 9, 1992, because claimant did not establish any element of entitlement. Decision and Order at 1; Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] In an April 1, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. During a telephone conference held on August 27, 2010, in which all the parties participated, the administrative law judge set a schedule for the parties to submit additional evidence and argument. Employer subsequently submitted the September 29,

administrative law judge found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, he 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 relied on a change in law to find that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Employer also argues that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Further, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Finally, employer challenges the administrative law judge's determination of the date for the commencement of benefits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments that the administrative law judge relied solely on a change in law to justify adjudication of claimant's subsequent claim, and erred in determining the date for the commencement of benefits. Employer filed a combined reply brief, reiterating its contentions on appeal. [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. 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).

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the

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2010 medical report of Dr. Broudy, Employer's Exhibit 14, and a brief urging the administrative law judge to deny benefits. Neither claimant, nor the Director, Office of Workers' Compensation Programs, submitted additional evidence or argument.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established twenty-two years of coal mine employment, with at least fifteen years underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where 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.*, 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). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Contrary to employer's argument, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment with new evidence establishes the necessary change. *See* 20 C.F.R. §725.309(d)(2). However, as will be discussed, we must vacate the administrative law judge's findings at total disability. Therefore, we must also vacate his finding that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d).

Total Disability

Employer initially argues that, in concluding that claimant is disabled from performing his usual coal mine work from a respiratory standpoint, the administrative law judge erred in finding that claimant's work involved heavy manual labor. Employer's Brief at 14. Employer asserts that the administrative law judge focused on the hardest part of claimant's job to assess the functional demands of his work, without regard to the frequency of those demands. Employer's Brief at 14. Employer contends that the record does not establish that claimant's job required heavy manual labor on a sustained basis. Employer's Brief at 14. Employer's argument lacks merit.

The administrative law judge found, and the record reflects, that claimant was a mine supervisor and foreman from 1972 to 1987. Director's Exhibit 5 at 1. The administrative law judge further found, based on claimant's testimony at the hearing, that although claimant was a supervisor, he also performed heavy manual labor. Decision and Order at 7. Specifically, claimant testified that while his title was "mining foreman," if a miner was absent from work, he took his place for as long as necessary, whether it was for an hour, or all day. Hearing Tr. at 12, 34-35. Claimant testified further that this

occurred anywhere from once a week, to once every two to three weeks.[5] Hearing Tr. at 12, 34-35. Contrary to employer's assertion, the administrative law judge permissibly relied on claimant's testimony regarding the exertional requirements of his usual coal mine work, and rationally found that claimant's usual coal mine work required heavy manual labor.[6] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); Decision and Order at 7.

Employer next asserts that the administrative law judge erred in weighing the medical evidence in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). Employer's contention has merit. In evaluating the new evidence relevant to total disability, the administrative law judge briefly referenced some of the pulmonary function and blood gas study results of record, and concluded that the "[t]esting was not dispositive."[7] Decision and Order at 5. The administrative law judge explained that "[a]lthough the spirometry intermittently meet the standard for a finding of disability . . . they are not consistent. However, all of claimant's physicians[8] rendered an opinion that Claimant was totally disabled from a respiratory standpoint, as did Drs.

[5] In the description of his job as mine foreman submitted with his initial claim, claimant stated that this additional work included running a bolt machine, walking the belt line, doing mechanic work, and working around the dump. Director's Exhibit 1 at 428.

[6] Moreover, in opining that claimant's respiratory impairment is disabling, Drs. Rasmussen, Baker, Agarwal, and Jarboe each noted that claimant's usual coal mine work was that of a mine foreman. Claimant's Exhibits 1-3; Employer's Exhibit 1.

[7] The record contains new pulmonary function and blood gas studies performed by Drs. Agarwal, Baker, Rasmussen, Dahhan, and Jarboe. Director's Exhibit 14; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2. The administrative law judge summarized only the objective test results obtained by claimant's physicians, Drs. Agarwal, Baker, and Rasmussen, and did not render specific findings as to whether any of the results meet the standards for establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 5.

[8] Claimant relies on the opinions of Drs. Agarwal, Baker, and Rasmussen, each of whom opined that, from a pulmonary standpoint, claimant is not capable of performing his usual coal mine employment as a mine supervisor and foreman. Director's Exhibit 14, 17; Claimant's Exhibits 1, 2.

Dahhan[9] and Jarboe."[10] Decision and Order at 5. By contrast, the administrative law judge found that only Dr. Broudy opined that claimant is not totally disabled from a respiratory standpoint.[11] Decision and Order at 6. The administrative law judge discredited Dr. Broudy's opinion, finding it "self contradictory," unexplained, and based, in part, on a misinterpretation of Dr. Jarboe's opinion. Decision and Order at 6-7. The administrative law judge concluded that "after a review of all the evidence" claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 7.

Employer asserts that in finding that the new medical opinion evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge merely recited the conclusions of Drs. Agarwal, Baker, and Rasmussen, without subjecting them to any scrutiny or analysis, while subjecting the opinion of Dr. Broudy to extensive review. Employer's Brief at 15. Employer asserts that the opinions of Drs. Agarwal, Baker, and Rasmussen should have been rejected as unreasoned, because the doctors "offered no analysis of specific facts to support their opinion that [claimant] is totally disabled." Employer's Brief at 15. Employer further contends that the administrative law judge mischaracterized the opinions of Drs. Dahhan and Jarboe as supporting total disability, and compounded his error by discounting Dr. Broudy's opinion, in part, as based on a misinterpretation of Dr. Jarboe's opinion. Employer's Brief at 16-18.

Employer's contentions have merit, in part. Initially, we reject employer's contention that the administrative law judge should have found the opinions of Drs. Agarwal, Baker, and Rasmussen to be unreasoned as a matter of law. Contrary to employer's assertion, the administrative law judge could conclude that Drs. Agarwal, Baker, and Rasmussen based their diagnoses of total respiratory disability on several

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[9] Dr. Dahhan opined that claimant has "significant respiratory impairment and disability," but did not offer a clear opinion as to whether claimant is able to perform his usual coal mine work from a respiratory standpoint. Employer's Exhibits 2, 4, 7, 10.

[10] Dr. Jarboe initially opined that claimant does not have a totally disabling respiratory impairment; but after reviewing additional evidence, he concluded that claimant does not retain the respiratory capacity for hard manual labor and is totally disabled from a respiratory standpoint. Employer's Exhibits 1, 5, 9, 11.

[11] Dr. Broudy opined that while claimant has a "significant respiratory impairment," his best lung function test results "indicated that [claimant's] respiratory capacity exceeds the minimum Federal criteria for disability in coal workers. However, he has severe heart disease which would preclude him from doing arduous manual labor such as might be required of an underground miner." Employer's Exhibit 14 at 5.

factors, including their examination results, their understanding of the physical requirements of claimant's usual coal mine work, and the objective studies they administered. Director's Exhibits 14, 17; Claimant's Exhibits 1, 2. Whether a medical opinion is reasoned and explained is for the administrative law judge, as fact-finder, to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

We agree with employer, however, that the administrative law judge has not provided a sufficient basis for crediting the opinions of Drs. Agarwal, Baker, and Rasmussen. The administrative law judge merely stated that they all "rendered an opinion that [c]laimant was totally disabled from a respiratory standpoint," without addressing whether he found their opinions reasoned and documented. Decision and Order at 5. Further, while the administrative law judge also relied on Dr. Jarboe's opinion to find total disability established, review of the administrative law judge's Decision and Order reveals no findings by the administrative law judge as to whether Dr. Jarboe's opinion was reasoned and documented. Consequently, the administrative law judge's finding regarding the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically, 5 U.S.C. §557(c)(3)(A), which requires that every adjudicatory decision 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 on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because it is the function of the administrative law judge to examine the documentation and reasoning of the medical opinions, and to provide an adequate explanation for crediting or discounting evidence, we are constrained to vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand this case for reconsideration of the relevant evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We further agree with employer that, on remand, the administrative law judge should clarify his assessment of Dr. Dahhan's opinion. The administrative law judge initially stated that Dr. Dahhan opined that claimant has a totally disabling respiratory impairment. Decision and Order at 5. Subsequently, the administrative law judge stated that Dr. Dahhan diagnosed a significant breathing impairment, but was not directly asked whether claimant was disabled from a respiratory standpoint. Decision and Order at, 6. On remand, the administrative law judge should determine whether Dr. Dahhan diagnosed a totally disabling respiratory impairment, or provided an assessment of claimant's respiratory impairment which, when compared to the exertional requirements of claimant's usual coal mine work, supports a finding of total disability. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). If so, the

administrative law judge should then determine whether Dr. Dahhan's opinion is reasoned and documented. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Regarding the opinion of Dr. Jarboe, there is no merit to employer's contention that the administrative law judge mischaracterized Dr. Jarboe's opinion as diagnosing total respiratory disability. As the administrative law judge properly found, while Dr. Jarboe initially opined that claimant does not have a totally disabling respiratory impairment, Employer's Exhibit 1, he later revised his opinion and concluded that due to ischemic cardiomyopathy, congestive heart failure, bronchial asthma and the effects of smoking, claimant does not retain the pulmonary capacity to perform hard manual labor. Decision and Order at 5; Employer's Exhibits 5, 9. Contrary to employer's assertion, as the administrative law judge correctly found, if a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether a miner is totally disabled. 20 C.F.R. §718.204(a); Decision and Order at 7; Employer's Brief at 16. However, as noted, the administrative law judge did not determine whether Dr. Jarboe's opinion was reasoned and documented. On remand, the administrative law judge must analyze Dr. Jarboe's opinion and indicate what weight he accords it. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer next asserts that the administrative law judge erred in discounting Dr. Broudy's opinion. Employer's Brief at 17-18. The administrative law judge correctly noted that, in determining whether claimant has a totally disabling respiratory impairment, Dr. Broudy conducted a review of medical evidence, and summarized Dr. Jarboe's opinion, as expressed in his February 19, 2009 report, that claimant does not have a disabling respiratory impairment. Decision and Order at 7; Employer's Exhibit 14 at 1. As the administrative law judge properly found, however, Dr. Jarboe ultimately concluded that claimant has a disabling respiratory impairment, and a review of Dr. Broudy's report opinion does not reflect that Dr. Broudy was aware of Dr. Jarboe's revised opinion. Decision and Order at 7. Thus, contrary to employer's arguments, the administrative law judge could rationally discount the opinion of Dr. Broudy to the extent that he relied on Dr. Jarboe's initial, and later recanted, assessment of claimant's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); Decision and Order at 7. However, as the administrative law judge did not analyze the documentation and reasoning of any of the other medical opinions, including Dr. Jarboe's opinion, before weighing them against Dr. Broudy's opinion, it would be premature to affirm the administrative law judge's discounting of Dr. Broudy's opinion. On remand, following a critical analysis of all the medical opinions, the administrative law judge should reconsider the opinion of Dr. Broudy, together with the remaining medical opinions of record, in determining whether the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our decision to vacate the administrative law judge's finding that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), we further vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d). In addition, we decline to reach, as premature, employer's arguments regarding the administrative law judge's finding that rebuttal of the amended Section 411(c)(4) presumption was not established. On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b),[12] claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). The administrative law judge would then be required to reconsider claimant's 2006 claim on the merits, including whether employer has established rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Finally, employer asserts that, having found claimant entitled to benefits, the administrative law judge erred in awarding those benefits as of December 2006, the month in which claimant filed his subsequent claim. In a miner's claim, benefits are payable beginning with the month of onset of disability. 20 C.F.R. §725.503; Director's Brief at 2. Where the evidence does not establish the month of onset, benefits shall be payable beginning with the month during which the claim was filed, unless credited medical evidence establishes that claimant was not totally disabled at some point subsequent to the filing date of his claim. 20 C.F.R. §725.503; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Director's Brief at 2. In a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d).

Here, the administrative law judge found that claimant was totally disabled by April 14, 2007, based on Dr. Agarwal's opinion, and stated that it was reasonable to expect that claimant had the same symptoms just four months earlier on December 30, 2006, when he filed his subsequent claim. Decision and Order at 12. Contrary to employer's argument, because the administrative law judge did not credit any contrary evidence prior to the date of Dr. Agarwal's opinion of total disability, it was not error to

[12] On remand, the administrative law judge must perform a complete analysis of the new pulmonary function and blood gas study evidence to determine whether it establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and must further determine whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must then weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *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*).

award benefits beginning with the date of filing. *See Edmiston*, 14 BLR at 1-69. However, as we have vacated the administrative law judge's weighing of the medical evidence to find total disability established, we must also vacate the administrative law judge's reliance on Dr. Agarwal's April 14, 2007 opinion to establish the date of onset of claimant's disabling respiratory impairment. If, on remand, the administrative law judge again finds claimant entitled to benefits, he must reconsider the date of onset of total disability based on all of the relevant evidence. *See* 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Award of 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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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