**U.S. Department of Labor**

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

BRB No. 17-0063 BLA

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| JAMES W. CLUTTER | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ISLAND CREEK KENTUCKY MINING/ISLAND CREEK COAL COMPANY | ) | DATE ISSUED: 11/02/2017 |
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| Employer-Petitioner | ) | |
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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 Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

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

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5761) of Administrative Law Judge Natalie A. Appetta, rendered on a miner's subsequent claim filed on September 8, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least thirty-two years of coal mine employment, based on the stipulation of the parties, and found that all of this work was performed underground. The administrative law judge also determined that claimant established total disability at 20 C.F.R. §718.204(b)(2), establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309[2] and invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability. Employer also argues that the administrative law

[1] Claimant filed five previous claims. His most recent prior claim, filed on June 2, 2011, was denied by the district director on December 8, 2011, because he did not establish that he has a totally disabling respiratory or pulmonary impairment or that he is totally disabled due to pneumoconiosis. Director's Exhibit 5. Claimant did not take any further action until he filed the current subsequent claim. Director's Exhibit 7.

[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 at least "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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, as claimant's prior claim was denied for failure to establish total disability and total disability causation, the administrative law judge concluded that claimant satisfied the requirements of 20 C.F.R. §725.309 because the evidence submitted with the subsequent claim established that claimant is totally disabled. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 17.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

judge did not properly weigh the evidence relevant to rebuttal of clinical pneumoconiosis and improperly shifted the burden of proof on the issue of the existence of pneumoconiosis from claimant to employer. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 362 (1965).

## I. Invocation of the Presumption – Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition is totally disabling.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv).

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least thirty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

[5] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 2, 3, 9; Decision and Order at 3, n.4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] The administrative law judge determined that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iii) , or (iv): none of the pulmonary function studies are qualifying; there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure; and the administrative law judge determined that the medical opinions are not "especially persuasive." Decision and Order at 21. These findings are unchallenged.

Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered blood gas studies dated November 17, 2014 and April 23, 2016.[7] Decision and Order at 9, 19; Director's Exhibit 16; Employer's Exhibit 9. She found the 2014 study qualifying, both at rest and after exercise, and the 2016 study, performed only at rest, non-qualifying. Decision and Order at 19. Based on the significance she attributed to the 2014 exercise study given claimant's last coal mine job, she determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) and on the evidence as a whole:

> Exercise [arterial blood gas studies] may be credited as more probative of a claimant's ability to perform a physically arduous coal mine job because exercise testing assesses oxygen levels during exertion and I so credit the exercise [arterial blood gas] study as more probative. I therefore find the claimant has met his burden of proof in establishing the existence of total disability.

*Id*. at 21 (internal citations omitted).

Employer argues that the administrative law judge erred because she incorrectly determined that the exercise portion of the study was qualifying and because she also failed to consider a July 5, 2016 blood gas study conducted by Dr. Habre. Claimant acknowledges that the 2014 exercise study is non-qualifying, but maintains that any error is harmless because the resting portion of the study is qualifying. Claimant also notes that Dr. Rasmussen, who performed the study, relied on it to conclude that claimant is unable to perform his usual coal mine employment.

We agree with the parties that the administrative law judge erred in finding 2014 exercise blood gas study values qualifying. Although the administrative law judge correctly indicated that the qualifying pO2 value for a miner with a pCO2 of 35 is equal to, or less than, 65, she erroneously concluded that claimant's pO2 of 69 was qualifying. 20 C.F.R. Part 718, Appendix C; Decision and Order at 9, 19; Director's Exhibit 16.

We further agree with employer that the error is not harmless. The administrative law judge stated that she relied on the 2014 exercise study to find total disability established because it is most probative of claimant's ability to perform his usual coal mine job. Decision and Order at 21. Indeed, that finding served as the sole foundation for her disability analysis. *Id.* Without it, her determination that claimant is totally

[7] The administrative law judge's finding that Dr. Vuskovich's invalidation of the November 17, 2014 blood gas study is "poorly documented and reasoned" is affirmed as unchallenged by employer on appeal. Decision and Order at 19-20; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Exhibit 8.

disabled is not based on substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (substantial evidence is such evidence "that a reasonable mind would accept to support a conclusion."); *McKinney v. Director, OWCP*, 6 BLR 1-1046 (1983). Moreover, claimant's argument is further unavailing, as claimant does not address the significance of the non-qualifying resting blood gas study performed in 2016 in light of the non-qualifying 2014 exercise study. Employer's Exhibit 9.

Employer is also correct in asserting that the administrative law judge did not address Dr. Habre's July 5, 2016 blood gas study. At the June 28, 2016 hearing, the administrative law judge granted claimant's motion to allow the post- hearing submission of rebuttal x-ray readings and an affirmative medical opinion based on a new physical examination by Dr. Habre. Hearing Transcript at 11-12. The administrative law judge set a deadline of August 8, 2016 for receipt of claimant's evidence and gave employer until September 12, 2016 to submit any rebuttal evidence it wished to submit. *Id*. at 12, 27.

Dr. Habre examined claimant on July 5, 2016 and performed a variety of tests, including a resting blood gas study that produced non-qualifying values. Report of Blood Gas Study dated July 5, 2016 (marked by employer as Employer's Exhibit 11). Claimant submitted the rebuttal x-ray readings on August 5, 2016, but did not submit the results of Dr. Habre's examination. Claimant's Exhibits 2, 3. Instead, employer submitted Dr. Habre's July 5, 2016 blood gas study on August 15, 2016, as affirmative evidence under 20 C.F.R. §725.414(a)(3)(i), and cited it in its closing brief before the administrative law judge. Employer's Evidence Summary Form dated August 15, 2016; Employer's Brief filed October 17, 2016 at 7-8; Report of Blood Gas Study dated July 5, 2016.

Neither claimant nor the administrative law judge responded to employer's submission of Dr. Habre's July 5, 2016 blood gas study. The administrative law judge further did not mention the study in her Decision and Order. Because the administrative law judge was silent, we cannot discern why she did not consider the study. The omission of the study without a rationale does not constitute harmless error, as the study could be contrary probative evidence relevant to total disability. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 254, 25 BLR 2-779, 2-787 (4th Cir. 2016).

In light of the erroneous characterization of the November 17, 2014 exercise blood gas study as qualifying, and the absence of a determination as to the admissibility of the July 5, 2016 blood gas study, we vacate the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2). *See Addison*, 831 F.3d at 254, 25 BLR at 2-787; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We also vacate the administrative law judge's weighing of the medical opinions of Drs. Rasmussen, Green, and Zaldivar under 20 C.F.R. §718.204(b)(2)(iv), because the administrative law judge based her findings on her consideration of the blood

gas study evidence.[8] Decision and Order at 20-23. Accordingly, this case is remanded to the administrative law judge for reconsideration of her determination that claimant established total disability at 20 C.F.R. §718.204(b)(2).

On remand, the administrative law judge must first address the admission of the July 5, 2016 blood gas study.[9] The administrative law judge next must reconsider all properly admitted blood gas study evidence under 20 C.F.R. §718.204(b)(2)(ii) in light of the fact that the 2014 exercise blood gas study produced non-qualifying values.[10] The administrative law judge is then required to reconsider the medical opinion evidence in light of her findings with respect to the blood gas studies of record.

If the administrative law judge determines that claimant has established total disability under 20 C.F.R. §718.204(b)(2)(ii) or (iv), she must weigh all the relevant evidence together, like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20

[8] The administrative law judge found that Dr. Rasmussen's diagnosis of totally disabling hypoxia "is adequate because he relies on qualifying [arterial blood gas studies] to determine disability, but I also find it to be less persuasive because it is based on more limited evidence." Decision and Order at 21; Director's Exhibit 16. The administrative law judge determined that the contrary opinion of Dr. Green was "less persuasive" because he relied only on his own objective testing and was therefore unaware of the November 17, 2014 exercise blood gas study, which the administrative law judge mistakenly believed was qualifying. Decision and Order at 20; Employer's Exhibit 9. The administrative law judge concluded that Dr. Zaldivar's opinion that claimant does not have a totally disabling respiratory or pulmonary impairment is also "less persuasive," on the ground that it is speculative and Dr. Zaldivar did not account for the results of the November 17, 2014 exercise blood gas study. Decision and Order at 21; Employer's Exhibits 5, 10.

[9] The administrative law judge must admit the study or explain the basis on which it is being excluded. In accordance with the Board's decision in *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), the administrative law judge should advise the parties of her ruling and give them an opportunity to respond, in advance of issuing her opinion on the merits of the case.

[10] We reject employer's contention that the administrative law judge should have resolved the conflict in the blood gas study evidence by relying on the most recent study. Contrary to employer's argument, the administrative law judge is not required to give greater weight to the most recent evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993).

C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). 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). If the administrative law judge again finds total disability established, however, she may reinstate her conclusions that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).

## II. Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we also address employer's contention that the administrative law judge improperly shifted the burden of proof on rebuttal. Employer argues that because the terms of 20 C.F.R. §718.305(c) do not provide that the existence of pneumoconiosis is presumed, claimant retains the burden of establishing this element of entitlement by a preponderance of the evidence. We disagree.

Pursuant to Section 411(c)(4) of the Act and the regulation at 20 C.F.R. §718.305(c)(1), the presumption of total disability due to pneumoconiosis encompasses both the existence of pneumoconiosis and total disability causation. *Minich v. Keystone Mining Coal Mining Corp.*, 25 BLR 1-149, 1-159 n.14 (2015) (Boggs, J., concurring and dissenting). Thus, if invocation is established, it is not claimant's burden to independently establish the existence of pneumoconiosis. *Id.* Rather, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201."[11] 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich*, 25 BLR at 1-154-56.

As employer has not further challenged the administrative law judge's findings that it failed to rebut legal pneumoconiosis, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because employer is required to disprove the

[11] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

existence of both legal and clinical pneumoconiosis, and total disability due to both types of the disease, we further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 137, 25 BLR at 2-699. Thus, if the administrative law judge finds that claimant has again invoked the Section 411(c)(4) presumption, she may reinstate both her determination that employer did not rebut the presumption and the award of benefits.[12]

[12] Employer argues that the administrative law judge erred in failing to consider Dr. DePonte's negative interpretation of the July 5, 2016 x-ray in determining whether it rebutted the existence of clinical pneumoconiosis. Any error in that omission, however, is harmless given our affirmance of the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

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

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge