BRB No. 97-1030 BLA

HURLEY STREET	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	
	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-0626) of Administrative Law Judge Pamela Lakes Wood on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Based on a stipulation of the parties, the administrative law judge credited claimant with at least twenty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Initially, the administrative law judge determined that the instant case involves a request for modification of a previously denied duplicate claim,[1] and found that the newly

[1] The record contains claimant's initial application for benefits dated May 29, 1991, which was denied by the district director, finding that claimant had not established any of the elements of 20 C.F.R. Part 718 entitlement. Director's Exhibit 30. Claimant filed a

submitted evidence was sufficient to establish a totally disabling respiratory and pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) and, therefore, was sufficient to establish both a change in conditions and a material change in conditions. 20 C.F.R. §§725.309, 725.310. The administrative law judge thereafter considered all of the evidence of record, old and new, and found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in her consideration of the medical opinion evidence pursuant to Section 718.202(a)(4). In response, employer urges affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). However, employer challenges the administrative law judge's finding that the newly submitted blood gas study evidence and medical opinion evidence was sufficient to establish a material change in conditions under Section 725.309. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 (1965).

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second claim on July 19, 1994, which was again denied by the district director on November 28, 1994, finding that claimant failed to establish any of the elements at 20 C.F.R. Part 718. Director's Exhibits 1, 13. Claimant filed a request for modification on October 19, 1995. Director's Exhibit 23.

[2] The parties do not challenge the administrative law judge's decision to credit claimant with at least twenty years of coal mine employment or her findings at 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1) and (c)(3). These findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In challenging the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred by substituting her own interpretation of the underlying objective documentation for that of the medical experts. Specifically, claimant contends that the administrative law judge erred in substituting her own opinion for those of Drs. Rasmussen and Forehand concerning the importance of the blood gas study evidence in formulating their opinions on the existence of pneumoconiosis. We agree.

The administrative law judge, in weighing the medical opinion evidence, accorded little weight to the medical opinions of Drs. Rasmussen and Forehand, finding that their opinions were inconsistent with the clinical data of record. In particular, the administrative law judge found that Drs. Rasmussen and Forehand relied on the non-qualifying exercise portion of the blood gas studies administered in conjunction with their physical examinations and that these results do not support the physicians' conclusions that claimant suffers from pneumoconiosis. Decision and Order at 12. However, the administrative law judge did not adequately discuss the physicians' interpretations of these studies and the extent to which each physician relied on the blood gas study in diagnosing pneumoconiosis. *See* Director's Exhibit 18; Claimant's Exhibits 1, 3. Inasmuch as the interpretation of the objective data is a medical determination for a medical professional and the administrative law judge substituted her own interpretation of the results of the blood gas studies for those of Drs. Rasmussen and Forehand, we vacate her decision to accord less weight to these opinions because she found them unsupported by the blood gas study evidence. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Consequently, on remand, the administrative law judge must consider the entirety of the medical opinions of Drs. Rasmussen and Forehand, including their explanations of the blood gas study results, in determining whether these opinions are supported by their underlying documentation as a whole, and whether they are sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). 20 C.F.R. §§718.201; 718.202(a)(4); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Initially, however, the administrative law judge must reconsider the newly submitted evidence of record to determine whether this evidence is sufficient to establish a material change in conditions. In challenging the administrative law judge's determination that the newly submitted blood gas study and medical opinion evidence is sufficient to establish a totally disabling respiratory or pulmonary condition, employer contends that the administrative law judge erred in her application of the quality standards for blood gas studies set forth at 20 C.F.R. §718.105. We agree.

The administrative law judge, in weighing the newly submitted blood gas study evidence found that the preponderance of the results of these studies was sufficient to establish total disability under the regulations. Decision and Order at 13. Specifically, the administrative law judge stated:

> The two most recent resting arterial blood gases, and one of the two earlier resting readings, were qualifying under Appendix C to Part 718 of title 20, Code of Federal Regulations. The preponderance of the newly submitted resting values are sufficient to establish total disability under the regulations; the regulations only require exercise tests to be administered if the resting tests are non-qualifying. 20 C.F.R. §718.105. For unknown reasons, the physicians performing blood gas tests in the instant case did the opposite -- the physicians who obtained qualifying resting values performed exercise blood-gas tests while those who obtained resting values that were nonqualifying did not. I thus do not find the nonqualifying exercise values to be entitled to much weight, as the regulations provide that exercise values shall only be taken if the resting values are not qualifying. I also do not find the two nonqualifying resting values to be of significance as the regulations require that an exercise reading be taken when the resting values are not qualifying, but this requirement was not followed. I also note that the regulations provide that blood shall be drawn during exercise, 20 C.F.R. §718.105(b), and this requirement was not followed by Dr. Sargent. Thus, considering all the arterial blood gas evidence, the Claimant has established that he is totally disabled under 20 C.F.R. §718.204(c)(2).

Decision and Order at 13-14.

As employer correctly contends, the administrative law judge's findings at Section 718.204(c)(2) do not comport with the language of the quality standards set forth in the regulations at Section 718.105. 20 C.F.R. §718.105. In particular, contrary to the administrative law judge's interpretation of the regulations, these regulations do not specifically prohibit the administering of exercise studies when the resting study is qualifying nor do the regulations state that an exercise study must be administered when the resting study produced non-qualifying values.[3] 20 C.F.R. §718.105. Rather, the regulations state that an exercise study shall be *offered* to the miner if the resting study was non-qualifying. *Id*. Inasmuch as the administrative law judge mechanically discredited those studies which did not conform to her mistaken interpretation of the

[3] Section 718.105, in pertinent part, states:

> (b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

20 C.F.R. §718.105.

regulations as to when an exercise study is allowable, we vacate her Section 718.204(c)(2) findings and remand the case for the administrative law judge to reconsider the newly submitted blood gas study evidence. 20 C.F.R. §718.105; *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring); *see generally Fazio v. Consolidation Coal Corp.*, 8 BLR 1-223 (1985).

In addition, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(c) inasmuch as it is based, in part, on the administrative law judge's findings regarding the blood gas study evidence. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). However, we reject employer's contention that the administrative law judge erred in failing to determine the extent to which Drs. Rasmussen and Forehand had knowledge of the exertional requirements of claimant's usual coal mine employment. Contrary to employer's argument, the administrative law judge properly determined that the opinions of Drs. Sargent and Hippensteel, who opined that claimant was physically capable of doing his usual coal mine employment, were not sufficient to outweigh the contrary opinions of Drs. Rasmussen and Forehand, on the basis that the opinions of Drs. Sargent and Hippensteel were less consistent with claimant's testimony regarding the heavy nature of his work than the contrary opinions of Drs. Rasmussen and Forehand. Decision and Order at 14; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991). Consequently, on remand, the administrative law judge must consider all of the newly submitted evidence, like and unlike, in determining whether the evidence is sufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). 20 C.F.R. §718.204(c); *see Fields, supra*.

Finally, if on remand, the administrative law judge determines that the newly submitted evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 and also that the record as a whole establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge must also determine whether the evidence is sufficient to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to 20 C.F.R. §718.203(b). Furthermore, the administrative law judge must determine whether the medical evidence of record, like and unlike, is sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). *See Fields, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Lastly, if, the administrative law judge finds the evidence sufficient to establish a totally disabling respiratory impairment, he must then determine whether pneumoconiosis was a contributing cause of the total disability pursuant to 20 C.F.R. §718.204(b). *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co*., 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

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

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge