BRB No. 09-0599 BLA

JOHN H. MAYNARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEN COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 07/27/2010
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Ann Marie Scarpino (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:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05738) of Administrative Law Judge Richard A. Morgan 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). The administrative law judge credited claimant with twenty-six years of coal mine employment and adjudicated this claim, filed on January 24, 2006, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b). The administrative law judge further found that the evidence was insufficient to establish total respiratory disability and total disability due pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in his evaluation of the x-ray evidence and medical opinions at 20 C.F.R. §§718.202(a)(1), (4), 718.204(b)(2)(iv), (c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief on the merits of this case.

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[1] *Maynard v. Pen Coal Corp.*, BRB No. 09-0599 BLA (Mar. 30, 2010)(unpub. Order). The parties have responded.

Claimant argues that the recent amendments to the Act are applicable to his claim because he has fifteen or more years of coal mine employment and has been diagnosed with pneumoconiosis and a totally disabling pulmonary impairment. The Director states that Section 1556 will not affect this case if the Board affirms the administrative law

[1] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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 is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. In this case, claimant filed his claim after January 1, 2005 and he was credited with twenty-six years of coal mine employment.

judge's finding that claimant failed to establish the existence of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2). However, the Director further asserts that the administrative law judge erred in finding that total disability was not established. Employer indicates that the recent amendments do not apply to this claim, despite the length of claimant's coal mine employment, because the administrative law judge found that claimant failed to establish that he is totally disabled due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer further indicates that, if the Board determines that the recent amendments apply, due process requires the claim to be remanded for employer to develop evidence addressing the new standards created by the legislation. Additionally, employer argues that retroactive application of the amendments is unconstitutional because it denies employer due process and constitutes an unconstitutional taking of private property.

To determine whether this case must be remanded for consideration of the invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will first address claimant's and the Director's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv).

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.[2] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the conflicting medical opinions of Drs. Mullins, Zaldivar and Fino. Dr. Mullins examined claimant on February 28, 2006 and authored a medical report dated March 8, 2006. Director's Exhibit 11. Dr. Mullins diagnosed a moderate ventilatory impairment,

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3; Hearing Transcript at 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

which would prevent claimant from performing his last coal mining position. *Id*. Dr. Mullins was deposed on April 10, 2007, and reiterated her diagnosis of a moderate impairment and stated that it "probably would" prevent claimant from performing his last coal mining work. Director's Exhibit 31; Employer's Exhibit 3. Upon reviewing the pulmonary function study (PFS) performed during Dr. Zaldivar's examination of claimant on August 23, 2006, which showed higher values, Dr. Mullins testified that the study showed a moderate impairment with some reversibility and that, based on the results of Dr. Zaldivar's study, claimant could perform work requiring light to moderate exertion. Employer's Exhibit 3 at 16-17.

Dr. Zaldivar examined the claimant on August 23, 2006 and authored a medical report dated September 4, 2006. Director's Exhibit 14. Dr. Zaldivar opined that claimant has no pulmonary impairment, as the mild abnormality shown on the PFS was not corroborated by exercise testing and that, from a pulmonary standpoint, claimant was capable of performing his usual coal mine work or work requiring similar effort. Dr. Zaldivar opined that any pulmonary impairment is due primarily to smoking. *Id*. Dr. Zaldivar was deposed on August 13, 2007 and testified that the PFS he performed revealed moderate obstruction, which did not respond to bronchodilators. Director's Exhibit 31; Employer's Exhibit 8. Dr. Zaldivar also stated that while claimant has a respiratory impairment, it would not prevent him from performing his prior coal mine work while being treated with bronchodilators. Employer's Exhibit 8 at 35-36. In addition, Dr. Zaldivar testified that, if claimant took his medications, his exercise capacity would be sufficient to allow him to perform heavy labor. *Id*.

Dr. Fino reviewed the medical reports and testing by Drs. Mullins and Zaldivar and in a report, dated February 14, 2007, opined that claimant has a mild respiratory impairment, but "is neither partially nor totally disabled from performing his last mining job that included occasional bursts of heavy labor on a daily basis." Director's Exhibit 31. Dr. Fino was deposed on August 20, 2007, and testified that claimant retains the pulmonary capacity to perform his most recent coal mine positions as a shuttle car operator and a continuous miner operator. Employer's Exhibit 9 at 12.

In evaluating the medical opinions of Drs. Mullins, Zaldivar and Fino, the administrative law judge accurately summarized the physicians' respective qualifications, as well as their findings, the explanations provided for their conclusions, and the underlying documentation. Decision and Order at 22-24. The administrative law judge found that claimant's work as a continuous miner operator and shuttle car operator required moderate exertion, along with some occasional heavy labor. *Id*. at 23 n. 38. The administrative law judge noted that Drs. Zaldivar and Fino relied on the normal blood gas studies, taken both at rest and after exercise, showing no evidence of oxygen transfer impairment, hypoxemia, or malfunctioning of the lungs that would prevent the claimant from performing labor. *Id*. at 23. The administrative law judge also indicated that Drs.

Zaldivar and Fino testified that the mild abnormality present in the PFS obtained by Dr. Zaldivar was not corroborated by the exercise blood gas studies. *Id*.

The administrative law judge accorded the most weight to the opinions of Drs. Zaldivar and Fino because their opinions were well documented and well reasoned, better supported by the objective medical data of record and supported by more extensive documentation than the opinion of Dr. Mullins. Decision and Order at 23. Upon considering Dr. Mullins's opinion, the administrative law judge determined:

> In her medical report, Dr. Mullins states that the claimant has a moderate ventilatory impairment which would prevent the claimant from performing his usual coal mine work. Dr. Zaldivar, however, performed more extensive lung function studies and determined that during exercise the claimant has sufficient ventilatory capacity. Dr. Fino also opined, after reviewing the lung function studies, that [c]laimant has no ventilatory limitation in exercise. Furthermore, Dr. Mullins specifically relied on the February 28, 2006 PFS FEV_1 result of 54% to determine that the claimant is totally disabled. Dr. Mullins testified that an FEV_1 below 60% impacts physical performance and an FEV_1 below 55% is considered totally disabling. However, the pulmonary function studies performed during Dr. Zaldivar's examination showed markedly less impairment in the claimant's FEV_1. Dr. Mullins acknowledged the difference, stating that based on the FEV_1 result of 69% obtained during Dr. Zaldivar's examination, which occurred approximately six months later, the claimant could perform light to moderate exertion. More importantly, Dr. Mullins stated that the claimant's impairment is "probably not as bad" as the 54% FEV_1 obtained during her examination. This statement undermines her opinion which relies heavily on an FEV_1 result below 55% to determine total disability.

Decision and Order 23-24. The administrative law judge concluded, therefore, that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that the administrative law judge erred in finding that Dr. Zaldivar's opinion supported a determination that claimant is not totally disabled, when Dr. Zaldivar indicated that claimant could not perform his usual coal mine duties unless he was taking his bronchodilator medication. Claimant also maintains that Dr. Mullins's opinion, that he could engage in only light to moderate exertion, was sufficient to establish totally disability because, at times, he was required to perform work at a heavy level of exertion. The Director argues that the administrative law judge erred in determining that Dr. Mullins relied on her PFS when, in her deposition, Dr. Mullins explicitly revised her assessment of claimant's functional capacity, in light of the PFS obtained by Dr. Zaldivar. The Director further alleges that Dr. Mullins's revised opinion,

that claimant can perform light to moderate exertion, establishes the existence of a totally disabling respiratory or pulmonary impairment because claimant's last coal mine employment involved some heavy labor.

These allegations of error have merit. With respect to Dr. Zaldivar's opinion, claimant is correct in maintaining that the administrative law judge did not consider whether Dr. Zaldivar's acknowledgment, that claimant would be unable to perform his usual coal mine employment if he did not take bronchodilator medication, constituted a finding of total disability.[3] Because the administrative law judge did not address this aspect of Dr. Zaldivar's opinion, we must vacate the administrative law judge's determination that Dr. Zaldivar provided a reasoned and documented opinion that claimant is able to do his usual coal mine work. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Regarding Dr. Mullins's opinion, the administrative law judge's determination that Dr. Mullins relied heavily on the February 28, 2006 PFS, and did not take into account the later improved PFS results, is contradicted by Dr. Mullins's deposition testimony, that the later study demonstrated that claimant could perform only light to moderate exertion. Because the administrative law judge did not accurately characterize Dr. Mullins's opinion, we vacate the administrative law judge's decision to accord less weight to her disability assessment at 20 C.F.R. §718.204(b)(2)(iv). *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must reconsider whether Dr. Mullins's opinion supports a finding of total disability under 20 C.F.R. §718.204(b)(2)(iv) in light of an accurate understanding of the basis of her opinion.

In light of our decision to vacate the administrative law judge's findings with respect to the opinions of Drs. Zaldivar and Mullins, we must also vacate the administrative law judge's determination that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case to the administrative law judge for reconsideration of these opinions. On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4). If the administrative law

[3] In making disability determinations, the question is whether the miner is able to perform his job, not whether he is able to perform his job after he takes medication. 20 C.F.R. §718.204(b)(1). Thus, the results of a post-bronchodilator PFS are not necessarily dispositive of the issue of total disability. *See* 45 Fed. Reg. 13682 (1980) (Although the use of a bronchodilator does not provide an adequate assessment of the miner's disability, it may aid in determining the presence or absence of pneumoconiosis).

judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Finally, because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated in part and the case is remanded 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