

BRB No. 10-0485 BLA

DAVID McENDREE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 03/29/2011
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

David McEndree, Bridgeport, Ohio, *pro se*.

William S. Mattingly, Kathy L. Snyder, and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Paul L. Edenfield (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, without the assistance of counsel, the Decision and Order (09-BLA-5314) of Administrative Law Judge Daniel L. Leland denying benefits 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 April 14, 2008.<sup>1</sup> After crediting claimant with thirty-eight years and three months of coal mine employment,<sup>2</sup> the administrative law judge found that the new evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). In light of this finding, the administrative law judge found that claimant failed to establish that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, arguing that the administrative law judge erred in finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). In response to the Director's brief, employer argues in support of the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

### **Impact of the Recent Amendments**

The recent amendments to the Act apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that, if a miner

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<sup>1</sup> Claimant filed previous claims in 1982, 1989, 1995, 2001, and 2006, all of which have been finally denied. Director's Exhibits 1-4. Claimant's last claim, filed on July 13, 2006, was denied by a district director, on February 28, 2007, because claimant failed to establish the existence of a totally disabling pulmonary impairment. Director's Exhibit 5.

<sup>2</sup> The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 8. 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*).

had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability 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)).

In his response brief, the Director contends that the recent amendments are applicable in this case, as the claim was filed after January 1, 2005, and the miner was credited with thirty-eight years and three months of coal mine employment. The Director, therefore, requests that this case be remanded to the administrative law judge to consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's total disability was due to pneumoconiosis. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

In its response brief, employer argues that Section 1556 does not affect this case because claimant failed to establish a totally disabling respiratory impairment. Alternatively, employer contends that retroactive application of the amendments is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.<sup>3</sup>

Based upon the parties' responses, and our review, we conclude that this case is potentially affected by Section 1556. As discussed below, we must remand this case for the administrative law judge to reconsider whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, we will also instruct the administrative law judge, on remand, to consider this case in light of the recent amendments to the Act.

### **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 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

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<sup>3</sup> We deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. We also deny employer's request to hold the case in abeyance because the constitutionality of Public Law No. 111-148 has been challenged.

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 was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibit 5. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

### **Total Disability**

#### **Section 718.204(b)(2)(i)**

The administrative law judge correctly noted that both of the new pulmonary function studies, namely the studies conducted on May 29, 2008 and October 29, 2009, are non-qualifying.<sup>4</sup> Decision and Order at 6; Director’s Exhibit 14; Employer’s Exhibit 7. Consequently, we affirm the administrative law judge’s finding that the new pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

#### **Section 718.204(b)(2)(ii)**

The record contains two new arterial blood gas studies conducted on May 29, 2008 and October 20, 2009. While the May 29, 2008 arterial blood gas study is non-qualifying, Director’s Exhibit 14, the October 20, 2009 arterial blood gas study produced qualifying values. Employer’s Exhibit 7. The administrative law judge erred in not addressing whether the new arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge’s failure to discuss and weigh this relevant evidence requires remand. *See* 20 C.F.R. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

#### **Section 718.204(b)(2)(iii)**

Because there is no evidence of record indicating that the claimant suffers from

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<sup>4</sup> A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A “non-qualifying” study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6.

#### **Section 718.204(b)(2)(iv)**

The record also contains new medical opinions submitted by Drs. Knight, Ghio, and Fino. Dr. Knight opined that claimant is totally disabled due to a respiratory impairment, namely hypoxemia. Director's Exhibit 14; Employer's Exhibit 12 at 20-21. On the other hand, Dr. Ghio opined that the "evidence does not support any respiratory impairment." Employer's Exhibit 4. Dr. Ghio opined that claimant is totally disabled due to his heart disease. *Id.* Although Dr. Fino, in a November 3, 2009 report, stated that claimant is totally disabled from a respiratory standpoint, *see* Employer's Exhibit 7, he subsequently corrected himself during a December 2, 2009 deposition, explaining that he meant to indicate, in his report, that claimant *is* totally disabled from a respiratory standpoint. Employer's Exhibit 11 at 20-21.

In evaluating the new medical opinion evidence, the administrative law judge found that Dr. Knight's opinion was neither well-reasoned, nor well-documented, because the doctor did not account for the effect of claimant's heart disease. Decision and Order at 7. Conversely, the administrative law judge found that the opinions of Drs. Fino and Ghio, that claimant is not disabled from a respiratory or pulmonary impairment, were well-reasoned and well-documented. *Id.* at 6-7. The administrative law judge, therefore, found that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited Dr. Fino's opinion that claimant did not suffer from a totally disabling pulmonary impairment. As noted above, while Dr. Fino initially stated, in a medical report, that that claimant is totally disabled from a respiratory standpoint, *see* Employer's Exhibit 7, he subsequently corrected himself during a deposition, explaining that he meant to indicate, in his report, that claimant *is* totally disabled from a respiratory standpoint. Employer's Exhibit 11 at 20-21. The administrative law judge erred in failing to address Dr. Fino's correction of his initial disability assessment. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

We also agree with the Director that the administrative law judge erred in focusing on the cause of claimant's total disability at 20 C.F.R. §718.204(b)(2). The cause of a claimant's respiratory disability is relevant at 20 C.F.R. §718.204(c), not 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge erred in finding that Dr. Knight's disability assessment was not well-reasoned because the doctor failed to

explain why claimant's pulmonary impairment could not have been caused by his heart disease.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, when considering whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.<sup>5</sup> See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997).

In light of our decision to vacate the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309. On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. The administrative law judge would then be required to consider claimant's 2008 claim on the merits, based on a weighing of all of the evidence of record, including the evidence that was submitted in connection with claimant's prior claims. See *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

### **Application of the Recent Amendments**

On remand, should the administrative law judge determine that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant would be entitled to the rebuttable presumption of total disability due to pneumoconiosis under reinstated Section 411(c)(4) of the Act.<sup>6</sup> 30 U.S.C. §921(c)(4), *amended by* Pub. L. No.

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<sup>5</sup> If, on remand, the administrative law judge finds that the new medical evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) or (iv), he would be required to 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*).

<sup>6</sup> In addition to having established the existence of a totally disabling pulmonary impairment, claimant would satisfy all of the other conditions for entitlement to the

111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The administrative law judge would then be required to determine whether the medical evidence rebuts the presumption by showing that claimant did not have pneumoconiosis or that his total disability “did not arise out of, or in connection with,” coal mine employment. 30 U.S.C. §921(c)(4). If the administrative law judge determines that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), he must allow the parties the opportunity to submit evidence relevant to rebuttal of the presumption. This evidence, however, must be in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

Accordingly, the administrative law judge’s Decision and Order denying 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

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rebuttable presumption. Claimant’s claim was filed after January 1, 2005, and was pending on March 23, 2010. Moreover, the administrative law judge credited claimant with thirty-eight years of coal mine employment, all of which the administrative law judge noted were underground. Decision and Order at 3.