

BRB No. 09-0835 BLA

THOMAS C. TRAYLOR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 09/30/2010
Employer-Petitioner)	
)	
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.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Helen H. Cox (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 appeals the Decision and Order-Award of Benefits (07-BLA-5771) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent 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).¹ The administrative law judge initially found that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge then credited claimant with at least thirty-six years of coal mine employment, as stipulated.² The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant has a totally disabling pulmonary or respiratory impairment, based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge, therefore, determined that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that the record as a whole established the existence of simple clinical pneumoconiosis³ based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and that the pneumoconiosis arose out of claimant's coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that this claim was timely filed. Employer also challenges the administrative law judge's finding that claimant established total disability and a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). Moreover, employer challenges the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance. In a limited response, the Director, Office of Workers'

¹ Claimant filed three previous claims, all of which were finally denied. His third claim, filed on January 29, 1998, was denied on July 31, 2000, because claimant did not establish total disability. Director's Exhibit 3 at 444, 721. Claimant timely requested modification of the denial, which was denied on March 6, 2003. Director's Exhibit 3 at 2, 432. Claimant filed his fourth and current claim on May 25, 2006. Director's Exhibit 5.

² The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. 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 The administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order at 8. The administrative law judge did not address whether claimant established that his chronic obstructive pulmonary disease constitutes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Compensation Programs (the Director), urges affirmance of the administrative law judge's finding that employer failed to rebut the presumption that claimant's subsequent claim was timely filed. Employer filed a reply to the briefs filed by both the Director and claimant.⁴

By Order dated June 8, 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. The Director responds that, if the Board cannot affirm the administrative law judge's award of benefits, Section 1556 affects this case. Specifically, the Director states that the case would have to be remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis that was reinstated by Section 1556.⁵ Claimant responds, agreeing with the Director's position. Employer responds that Section 1556 may affect this claim, and states that, if the Board vacates the award of benefits, the case should be remanded to the district director so that the parties can respond to the change in law.

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).

Timeliness of Subsequent Claim

Employer contends that the administrative law judge erred in relying on the decision in *Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 483, 24 BLR 2-

⁴ Employer does not challenge the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Those findings are, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ 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), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. 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)).

135, 2-154 (6th Cir. 2009) to find that this subsequent claim was timely filed. Employer's Brief at 11. Employer's contention lacks merit.

In *Hatfield*, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year statute of limitations, if it was discredited or found outweighed by other evidence in the prior denied claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-154. Applying that rule in this case, the administrative law judge found that the opinions of Drs. Houser, Majmudar, and Simpao, which employer argued were medical determinations that were communicated to claimant in the 1990s, had to be deemed misdiagnoses, in view of the 2003 denial of claimant's previous claim. Decision and Order at 5-7. Employer contends that this aspect of the *Hatfield* court's opinion was dicta, because the court had already affirmed the Board's holding that the employer did not demonstrate good cause for its failure to timely controvert Mr. Hatfield's claim. Employer's Brief at 11.

Contrary to employer's argument, the Sixth Circuit's ruling with respect to the timeliness issue in *Hatfield* is not dicta. The *Hatfield* court determined that the employer waived its right to controvert the subsequent claim by failing to timely respond to the initial finding of entitlement. But if the court had found merit in the employer's additional argument that Mr. Hatfield's subsequent claim was not timely filed, an award of benefits would have been precluded, regardless of the employer's waiver of its right to controvert the claim. See 20 C.F.R. §725.308(a),(c). Therefore, the court's consideration of the timeliness issue was necessary to the outcome of the case, and thus, was not dicta. *Hatfield*, 556 F.3d at 479 n.2, 24 BLR at 2-147 n.2. We affirm, therefore, the administrative law judge's determination that claimant's subsequent claim was timely filed under 20 C.F.R. §725.308.

We also reject employer's alternative argument that, because Dr. Houser's former diagnosis of total disability due to pneumoconiosis is deemed a misdiagnosis under *Hatfield*, the administrative law judge could not credit the new medical opinion in which Dr. Houser reached the same conclusion. Employer's Brief at 11-12. Although a physician's diagnosis of total disability due to pneumoconiosis, which predates the prior denial, is deemed a misdiagnosis for the purpose of assessing when the statute of limitations begins to run, the court did not indicate that a subsequent opinion by the same physician based on new evidence but reaching the same conclusion as the prior opinion, could not be credited. See *Hatfield*, 556 F.3d at 482, 24 BLR at 2-151-52. Moreover, employer's argument ignores that a miner's condition may worsen over time. See *Hatfield*, 556 F.3d at 482, 24 BLR at 2-152. Thus, under *Hatfield*, the administrative law judge properly treated the previous determination of Dr. Houser, that the miner was totally disabled due to pneumoconiosis, as legally insufficient to trigger the statute of

limitations, but he was not required to discredit Dr. Houser's similar determination in his current report.

20 C.F.R. §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 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 total disability. Director's Exhibit 3 at 444. 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).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Houser, Baker, Fino, and Repsher addressing whether claimant is totally disabled. Dr. Houser opined that claimant's pre-bronchodilator pulmonary function study showed a moderately severe obstructive impairment, while claimant's post-bronchodilator study showed mild obstruction. Based on the results of the post-bronchodilator study, Dr. Houser opined that claimant is physically unable to perform medium and heavy work. Claimant's Exhibit 1 at 12, 18-20. Dr. Baker interpreted the pre-bronchodilator pulmonary function study that he performed as indicating moderate obstruction with mild restriction, and stated that claimant does not have the respiratory capacity to perform his usual coal mine employment, although Dr. Baker acknowledged that he did not know what claimant's last coal mine job was. Claimant's Exhibits 2; 8 at 9-10, 12, 24-25. Upon review of the pulmonary function studies conducted by Drs. Houser and Baker, Dr. Fino opined that claimant has an obstructive impairment that reverses "almost to normal" when claimant receives a bronchodilator, and he opined that the "residual" impairment that remains "would not result in disability." Employer's Exhibit 3 at 3. Apparently relying on the pre-bronchodilator values, however, Dr. Fino opined that claimant "is disabled from returning to his last mining job as a result of obstructive airways disease" ⁶ *Id.* at 4. By

⁶ A chart in Dr. Fino's report listed claimant's last coal mine employment as "beltman/belt maintenance," but listed no specific job duties. Employer's Exhibit 3 at 3.

contrast, Dr. Repsher opined that claimant has no objective evidence of any pulmonary impairment, as the pulmonary function study that Dr. Repsher administered was “medically invalid due to poor effort and cooperation,” and claimant’s blood gas study was normal. Employer’s Exhibit 4 at 3. The record reflects that Dr. Repsher did not review the pulmonary function studies conducted by Drs. Houser and Baker.

The administrative law judge found that the preponderance of the medical opinion evidence did not support Dr. Repsher’s opinion that claimant has no respiratory impairment. Further, the administrative law judge accorded “significant weight to Dr. Fino’s opinion as substantiation for Dr. Houser’s opinion that the [c]laimant is totally disabled from a respiratory standpoint.” Decision and Order at 10. In view of claimant’s testimony as to the exertional requirements of his usual coal mine work, the administrative law judge found that claimant has “at least, a ‘moderate’ obstruction that would preclude work as a belt man.”⁷ *Id.*

Employer argues that the administrative law judge erred in relying on a “nose count” to discredit Dr. Repsher’s opinion that claimant has no impairment. Contrary to employer’s argument, the administrative law judge did not rely on a “nose count.” He discussed and weighed the medical opinion evidence, and rationally found that Dr. Repsher’s opinion that claimant has no respiratory impairment was not supported by the preponderance of the evidence, considering that Drs. Houser, Baker, and Fino diagnosed claimant with a respiratory impairment, based on pulmonary function study results that Dr. Repsher did not address. *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986).

⁷ The administrative law judge’s consideration of the doctors’ opinions in light of claimant’s job duties was as follows:

Claimant has at least, a “moderate” obstruction that would preclude work as a belt man. I find that Claimant is credible that [to] work [on the] “header” belt job, he had to shovel coal weighing about 20 pounds, lifted multiple times per day. He also had to continuously carry a tool belt weighing about 30 pounds. He also had to perform a significant amount of walking and can no longer perform it. I find that his testimony is substantiated by the medical opinion[] of Dr. Houser that he can no longer work and that the opinion of Dr. Houser is substantiated by . . . the opinion of Dr. Fino who found that Claimant is “totally disabled,” from a respiratory standpoint, albeit from other sources.

Decision and Order at 10.

Employer argues further that the administrative law judge's finding of total disability rests upon the administrative law judge's characterization of claimant's job duties as involving significant physical demands, when the record contains conflicting descriptions of claimant's usual coal mine employment that were not considered by the administrative law judge. As a consequence of the administrative law judge's characterization of claimant's duties, employer asserts that the administrative law judge did not properly consider the opinions of Drs. Houser, Baker, and Fino on the issue of total respiratory disability at Section 718.204(b)(2)(iv). Employer's arguments have merit.

The administrative law judge assessed the probative value of the medical opinions in light of his determination that claimant had to carry tools weighing thirty pounds, lift twenty-pound shovelfuls of coal multiple times a day, and walk a significant distance. Employer correctly maintains, however, that claimant's previous descriptions of his coal mine employment conflicted with the current description.⁸ As the administrative law judge did not acknowledge the inconsistent descriptions of the exertional requirements of claimant's coal mine employment contained in the record, resolve the conflicts in this evidence, and provide a rationale for his findings that comports with the requirements of the Administrative Procedure Act (APA), 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), we vacate the administrative law judge's findings pursuant to Section 725.309(d), and remand this case for further findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Additionally, as the administrative law judge's determination regarding the exertional requirements of claimant's job duties affected his weighing of the medical opinions on the issue of total respiratory disability, we also vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv) and remand for a reevaluation of the evidence thereunder. On remand, the administrative law judge must consider all of the relevant evidence and determine the exertional requirements of claimant's usual coal mine employment, then compare those requirements with the physicians' assessments, and determine whether claimant has established total respiratory

⁸ In claimant's second claim, he indicated that his usual coal mine employment as a beltman required him to sit for one hour, stand for five hours, and crawl 250 feet twice a day, but did not require him to use tools. Director's Exhibit 2 at 122. Claimant did not indicate that there were any lifting or carrying requirements. *Id.* Claimant provided the same written description of his coal mine employment in this claim. Director's Exhibit 7 at 2. At the initial hearing held on June 10, 1999, in connection with his third claim, claimant testified that his last coal mine employment was "hard work" because it required him to shovel the coal that fell off of the belt. Director's Exhibit 3 at 528-29. At the modification hearing held on his third claim in 2002, however, claimant testified that he "spent very little time shoveling coal." *Id.* at 92-96.

disability at Section 718.204(b)(2)(iv). The administrative law judge, on remand, must then weigh together all of the relevant new evidence in determining whether claimant has established total disability pursuant to Section 718.204(b)(2), and a change in the applicable condition of entitlement. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*).

Disability Causation

Because we have vacated the administrative law judge's finding of total disability pursuant to Section 718.204(b)(2), we also vacate his finding that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), and instruct him to reconsider that issue on remand, if reached. In the interest of judicial economy, and to avoid any repetition of error on remand, we instruct the administrative law judge, on remand, to explain fully his findings, taking into account that the disability causation opinions of Drs. Houser and Baker that he credited were based, in part, on those physicians' views that claimant has both complicated pneumoconiosis and legal pneumoconiosis, neither of which was found established by the administrative law judge.⁹ 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

Application of Section 411(c)(4)

Because this case was filed after January 1, 2005, and claimant was credited with at least thirty-six years of coal mine employment, the administrative law judge, on remand, must consider whether the evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge, on remand, finds that claimant has established invocation of the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does 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). The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Thus, although employer requests a remand to the district director for the parties to develop additional evidence,

⁹ We decline to address whether restrictions that employer alleges have been imposed on Dr. Baker's medical license should affect the credibility of his opinion, as employer raises this issue for the first time on appeal. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984); Employer's Brief at 18-19.

we agree with the Director that a remand to the administrative law judge is appropriate. Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 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).

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 proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge