

BRB No. 09-0720 BLA

ROGER B. TITCHENELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 08/12/2010
	)	
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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

William S. Mattingly and William P. Margelis (Jackson Kelly PLLC), Morgantown, 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<sup>1</sup> appeals the Decision and Order – Denying Benefits (2008-BLA-5480) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge credited claimant with seventeen years of coal mine employment, and adjudicated this claim, filed on June 26, 2007, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that claimant’s previous claim had been denied on the ground that the evidence was insufficient to establish any element of entitlement.<sup>2</sup> The administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and therefore, claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge’s finding that the evidence was insufficient to establish either the existence of pneumoconiosis at Section 718.202(a) or total respiratory disability at Section 718.204(b). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has declined to file a substantive brief in this case.<sup>3</sup>

By Order dated May 12, 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. *Titchenell v. Valley Camp Coal Co.*, BRB No. 09-0720 BLA (May 12, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the

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<sup>1</sup> Claimant initially filed a *pro se* appeal before the Board. By letter dated August 28, 2009, Lynda D. Glagola filed an Application to Appear in a Representative Capacity, and on September 3, 2009, Ms. Glagola filed a Petition for Review and brief dated August 25, 2009. On October 14, 2009, the Board issued an Order accepting Ms. Glagola as representative for claimant.

<sup>2</sup> Claimant’s original claim for benefits, filed on May 29, 1990, was administratively denied on August 22, 1990. Director’s Exhibit 1.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

“15-year presumption” of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>4</sup> All parties have responded. The Director contends that this case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis, as the administrative law judge made no specific finding at 20 C.F.R. §718.204(b)(2)(i). If invocation is established, the Director asserts that the administrative law judge should allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if evidence exceeding those limitations is offered. Employer contends that the amendments to the Act are not applicable to this claim, as the administrative law judge has fully analyzed all the relevant evidence and concluded that it is insufficient to establish total respiratory disability at Section 718.204(b). In the alternative, employer maintains that the presumption may be inapplicable as claimant’s coal mine employment history may not meet the requirement of at least fifteen years of underground employment.<sup>5</sup> Claimant responds, agreeing with the Director that this case should be remanded to the administrative law judge for further findings and the submission of additional evidence. As discussed *infra*, we agree with the position of claimant and the Director.

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.<sup>6</sup> 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).

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<sup>4</sup> Section 411(c)(4) provides that if a miner 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 or, relevant to a survivor’s claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

<sup>5</sup> To invoke the Section 411(c)(4) presumption, claimant must initially establish that he worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988).

<sup>6</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibits 1, 5.

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Where a claimant 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 the existence of pneumoconiosis and total disability due to pneumoconiosis. Consequently, claimant had to submit evidence establishing the existence of pneumoconiosis or total respiratory disability in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d).

Claimant initially challenges the administrative law judge’s finding that no physician interpreted the CT scan of record as revealing the presence of pneumoconiosis pursuant to 20 C.F.R. §718.107, arguing that Dr. Smith’s interpretation was positive for pneumoconiosis. Claimant’s Petition, First Argument. We disagree. The administrative law judge correctly summarized the interpretations of the August 20, 2008 CT scan, and determined that Dr. Renn noted three small nodules of indeterminate etiology; bronchiectasis; and no evidence of pneumoconiosis, Employer’s Exhibit 5, while Dr. Smith noted “several subpleural nodular densities, which are non-calcified and of indeterminate etiology, in the range of the right middle lobe as well as in the lateral left lung base.”<sup>7</sup> 20 C.F.R. §718.107; Claimant’s Exhibit 5; Employer’s Exhibits 5, 11; Decision and Order at 3, 10. Accordingly, as neither physician attributed any of the densities seen on the CT scan to pneumoconiosis or coal dust exposure, the administrative law judge properly found that the CT scan evidence was insufficient to establish the existence of pneumoconiosis at Section 718.107. We note, however, that the administrative law judge additionally considered interpretations of this CT scan by Drs. Burton and Popovich, which were not designated by the parties for inclusion in the record, and which exceeded the evidentiary limitations at 20 C.F.R. §725.414.<sup>8</sup> Decision

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<sup>7</sup> In the same report, Dr. Smith also interpreted a conventional PA and Lateral CR x-ray as positive for pneumoconiosis. Claimant’s Exhibit 5.

<sup>8</sup> The Board has held that 20 C.F.R. §718.107 is reasonably interpreted to allow for the submission, as part of a party’s affirmative case, of one reading of each separate CT scan or digital x-ray undergone by claimant. *Webber v. Peabody Coal Co.*, 23 BLR

and Order at 3; Employer's Exhibits 5, 11 at 13-16; *see Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). As set forth *infra*, the administrative law judge relied on the CT scan evidence, in part, to credit or discredit the medical opinion evidence at Section 718.202(a)(4), and his findings thereunder cannot be affirmed. On remand, the administrative law judge must consider only the CT scan evidence admitted into the record, and reconsider the medical opinion evidence in light of the admissible CT scan evidence.

Claimant next challenges the administrative law judge's finding that the weight of the newly submitted medical opinions of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge provided invalid reasons for crediting the opinions of Drs. Renn and Fino, over the contrary opinions of Drs. Rasmussen and Parker. Specifically, claimant contends that the administrative law judge erred in finding that Dr. Parker "incorrectly stated the location of the bronchiectasis as identified on CT scan," and that the opinions of Drs. Rasmussen and Parker "were not soundly reasoned because they relied on studies that state that coal dust can cause obstructive lung disease." Claimant's Petition, Second and Third Arguments. Claimant further challenges the administrative law judge's reliance on the opinions of Drs. Renn and Fino, arguing that all of the physicians considered the same evidence and that the record contains no evidence of diffuse bronchiectasis that would cause claimant's level of obstruction. Claimant's Petition, Fourth and Fifth Arguments. Some of claimant's contentions have merit.

In evaluating the newly submitted medical opinions of record, the administrative law judge summarized the physicians' findings and the bases for the conclusions of Drs. Celko,<sup>9</sup> Fino, Renn, Parker, and Rasmussen. The administrative law judge determined that because Dr. Celko had not considered the CT scan evidence, when making his diagnosis of chronic bronchitis due to cigarette smoking and coal mine dust exposure, the doctor's opinion was based on incomplete information, and was, therefore, entitled to no weight. Decision and Order at 10; Director's Exhibit 12; Employer's Exhibit 4. The administrative law judge further determined that the opinion of Dr. Parker, who

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1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*).

<sup>9</sup> Dr. Celko examined the miner on August 23, 2007, and diagnosed a severe obstructive lung impairment due to coal dust exposure and smoking, an intrinsic chronic asthmatic bronchitis, and sleep disturbance. He concluded that the miner has legal pneumoconiosis and is totally disabled from performing his last coal mine job. Director's Exhibit 12.

diagnosed a moderate to severe obstructive lung disease due to coal dust and smoking, was entitled to diminished weight because the doctor failed to provide a valid rationale for his opinion, except to rely on “medical articles demonstrating that coal dust exposure can and does cause obstructive pulmonary disease.” Decision and Order at 10; Employer’s Exhibits 5, 7, 9, 10, 11. In making this finding, the administrative law judge determined that Dr. Parker based his opinion, that the miner’s focal bronchiectasis was too mild to cause the miner’s moderate to severe airflow obstruction,<sup>10</sup> on an incorrect premise, namely, that the bronchiectasis was limited to the superior segment of the left lower lung, rather than the lower and the right middle lobe. Decision and Order at 10; Claimant’s Exhibits 1, 8. The administrative law judge credited the contrary opinions of Drs. Fino and Renn, who both diagnosed no pneumoconiosis and agreed that the miner’s respiratory impairment was due to bronchiectasis, as he found these opinions to be much more soundly reasoned and entitled to greater weight than those of Drs. Parker and Rasmussen. The administrative law judge found Dr. Renn’s opinion to be particularly well reasoned, because he based his diagnosis of bronchiectasis on “the copious amounts of yellowish-brown sputum, blood streaked sputum, fine crackles that did not clear with deep cough, the CT scan evidence, the lack of response to bronchodilators, and normal diffusing capacity and resting blood gases.” Contrary to the administrative law judge’s findings, however, the interpretations of the CT scan evidence of record diagnosed bronchiectasis in the left lower lobe, but not in the right middle lobe.<sup>11</sup> Employer’s Exhibit 5; Claimant’s Exhibit 5. Furthermore, in determining that the opinions of Drs. Fino and Renn were “based on a number of factors not considered” by Drs. Parker and Rasmussen, the administrative law judge failed to state a reason for discounting Dr. Rasmussen’s opinion, that claimant’s obstructive pulmonary impairment was multifactorial and due to smoking, coal mine employment, and bronchiectasis, and the

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<sup>10</sup> Dr. Parker considered a diagnosis of bronchiectasis based on claimant’s expiratory crackles, wheezes, and CT scan diagnosis of mild focal bronchiectasis. Dr. Parker determined that there was no history of recurrent infections to suggest diffuse bronchiectasis, and determined that the anatomical description of the bronchiectasis in the superior segment of the left lower lobe was not enough airway injury to cause a 40% fall in FEV<sub>1</sub>, and would virtually never be associated with such severe airflow obstruction as exhibited by claimant. Claimant’s Exhibit 8.

<sup>11</sup> Two interpretations of the August 20, 2008 CT scan were admitted into the record. Dr. Renn interpreted the scan as revealing three small nodules of indeterminate etiology; bronchiectasis primarily in the superior segment of the left lower lobe; and no evidence of pneumoconiosis. Employer’s Exhibit 5. Dr. Smith noted “several subpleural nodular densities, which are non-calcified and of indeterminate etiology, to the range of the right middle lobe as well as in the lateral left lung base,” but did not diagnose bronchiectasis or pneumoconiosis. Claimant’s Exhibit 5.

administrative law judge failed to indicate the factors that Drs. Fino and Renn considered that the other physicians did not, as all of the physicians examined claimant and relied on substantially similar objective testing. We decline to address claimant's contention, that there was no evidence of diffuse bronchiectasis of the type that would cause claimant's level of obstruction, as the Board is not empowered to reweigh the evidence, nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Nonetheless, we must vacate the administrative law judge's finding at Section 718.202(a)(4), and remand for further consideration of the evidence.

Claimant next challenges the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory disability at Section 718.204(b), arguing that the administrative law judge mischaracterized the medical opinion of Dr. Parker at subsection (b)(2)(iv). Claimant's Petition, Sixth Argument. We disagree. In evaluating the physicians' assessments of whether claimant had the respiratory capacity to perform his usual coal mine work, the administrative law judge determined that claimant's last job was as a bit grinder and outside janitor, which entailed carrying boxes of drill bits, weighing approximately forty pounds, fifteen to sixteen times per day, for a distance of between six and ten feet. Decision and Order at 3, 11-12. The administrative law judge discounted Dr. Parker's opinion, that claimant was totally disabled from performing his usual coal mine work, on the ground that "Dr. Parker stated that claimant carried the boxes of bits 50 to 100 yards, while he actually carried the boxes a distance of only 6 to 10 feet." Decision and Order at 12. While claimant argues that Dr. Parker, in fact, merely testified at deposition that "if I remember correctly," claimant carried the boxes of bits 50 to 100 yards, Claimant's Exhibit 8 at 36, the administrative law judge's findings and inferences are rational and supported by substantial evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Nevertheless, we cannot affirm the administrative law judge's finding that the weight of the newly submitted evidence was insufficient to establish total disability at Section 718.204(b) because, as claimant and the Director correctly maintain, the administrative law judge failed to weigh the pulmonary function study evidence at Section 718.204(b)(2)(i). Rather, the administrative law judge determined that the July 11, 2007 and August 20, 2008 pulmonary function studies produced qualifying<sup>12</sup> values,

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<sup>12</sup> A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

both before and after the administration of bronchodilators; the July 16 and November 25, 2008 studies produced qualifying values before bronchodilation but produced non-qualifying values after bronchodilation; and the November 20, 2008 studies produced non-qualifying values, before and after bronchodilation. Decision and Order at 11. While the administrative law judge acknowledged that some of the studies were qualifying and others were not, the administrative law judge failed to render a finding as to whether the weight of the evidence was sufficient to establish total disability at Section 718.204(b)(2)(i). Accordingly, we vacate the administrative law judge's finding that total disability was not established at Section 718.204(b), and remand this case for further consideration of the evidence thereunder. In reviewing the pulmonary function studies of record, the administrative law judge must first make a specific factual finding regarding claimant's height, if there is a conflict,<sup>13</sup> and determine if the studies are valid and conforming,<sup>14</sup> as these findings may affect the weight to be accorded to the conflicting medical opinions of record. See *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 4 n.5; 20 C.F.R. §718.103.

If, on remand, the administrative law judge finds that claimant has established total respiratory disability pursuant to Section 718.204(b), see *Fields*, 10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*), and a change in an applicable entitlement pursuant to Section 725.309(d), he must consider this claim under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge must initially determine whether claimant worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine, see *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988). The administrative law judge must also allow the parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1). If, on remand, the administrative law judge determines that claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(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 in whole, or in part, out of coal mine employment.

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<sup>13</sup> The record reflects that claimant's height was variously listed as 68.5 inches, Director's Exhibit 14; 171 cm, Claimant's Exhibit 1; 173 cm, Claimant's Exhibit 4; 171.45 cm, Employer's Exhibit 5; and 69 inches, Employer's Exhibit 7.

<sup>14</sup> The quality standards for pulmonary function studies require a notation of the miner's understanding and cooperation. 20 C.F.R. §718.103.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this 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