BRB No. 11-0750 BLA

FRANK L. ZANDLO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICG BECKLEY, LLC	)	DATE ISSUED: 08/13/2012
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5289) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed on April 24, 2009, 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 considered claimant's entitlement under amended Section 411(c)(4) of the Act, *see* 30 U.S.C. §921(c)(4), based on the filing date of the claim, and the administrative law judge's finding that claimant had forty-three years of underground coal mine employment. The administrative law judge determined that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant did not invoke the amended Section 411(c)(4) presumption and did not establish entitlement to benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the conflicting arterial blood gas study results obtained by Drs. Rasmussen and Crisalli, and erred in finding that claimant is not totally disabled. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Program, has not filed a brief in this appeal.[1]

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.[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 evaluating whether claimant established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that the record contained two resting arterial blood gas studies dated June 29, 2009 and February 22, 2010. He determined that the June 29, 2009 study, administered by Dr. Rasmussen, yielded qualifying results, while the February 22, 2010 study, administered by Dr. Crisalli, yielded non-qualifying results.[3] Decision and Order at 7; *see* Director's Exhibit 11;

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant established forty-three years of underground coal mine employment, and that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] Because claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

[3] A qualifying blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A non-

Employer's Exhibit 3. The administrative law judge found that claimant failed to establish total disability based on the arterial blood gas study evidence and gave the following rationale for his finding:

> As Dr. Crisalli's study is more recent than the study conducted by Dr. Rasmussen, the non-qualifying results of the February 22, 2010 study are found to be more probative than the qualifying results of the June 29, 2009 study. There is no reason to doubt the validity of the results of Dr. Crisalli's study, as Dr. Crisalli considered them valid and evidence of normal blood transfer. Thus, Dr. Rasmussen's study results can't be considered to be caused by an irreversible condition such as pneumoconiosis. Dr. Castle considered them to be due to obesity. Accordingly, the weight of the arterial blood gas study evidence under 20 C.F.R. §718.204(b)(2)(ii) fails to establish the existence of a totally disabling pulmonary impairment.

Decision and Order at 7.

Claimant argues that the administrative law judge's credibility determinations are not sufficiently explained and that he mechanically applied the most recent evidence rule to find that Dr. Crisalli's February 22, 2010 non-qualifying arterial blood gas study is more probative than Dr. Rasmussen's June 29, 2010 qualifying test. Claimant's assertion of error has merit. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that it is irrational to credit evidence, solely on the basis of recency. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Because the administrative law judge did not provide any rationale for according controlling weight to the non-qualifying February 22, 2010 arterial blood gas study, other than its recency,[4] we vacate the administrative law judge's finding that claimant did not

---

qualifying study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(ii).

[4] The administrative law judge stated that "Dr. Rasmussen's [qualifying] study results can't be considered to be *caused* by an irreversible condition such as pneumoconiosis" and further noted that Dr. Castle "considered them to be due to obesity." Decision and Order at 7 (emphasis added). Contrary to the administrative law judge's analysis, the proper inquiry at 20 C.F.R. §718.204(b)(2)(ii) is whether the arterial blood gas studies indicate the presence of a totally disabling respiratory or pulmonary impairment. The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in

establish total disability under 20 C.F.R. §718.204(b)(2)(ii), and remand the case for the administrative law judge to properly explain the weight accorded the conflicting arterial blood gas study evidence. Additionally, to the extent the administrative law judge's findings with regard to the credibility of arterial blood gas studies influenced his weighing of the conflicting medical opinions, we vacate his finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

On remand, in reconsidering whether claimant has established total disability, the administrative law judge is required to explain the weight accorded the conflicting arterial blood gas studies and medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If the administrative law judge determines that total disability has been demonstrated under one or more of the subsections, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record, and reach a determination as to whether claimant satisfied his burden to establish a totally disabling respiratory impairment. *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). If the administrative law judge finds that claimant is entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption. 30 U.S.C. §921(c)(4). In reaching his credibility determinations on remand, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the Administrative Procedure Act.[5] *See Wojtowicz*, 12 BLR at 1-165.

---

consideration of whether rebuttal of the amended Section 411(c)(4) presumption has been established by evidence proving that the miner's disability did not arise out of, or in connection with, his coal mine employment. *See* 20 C.F.R. §718.204(b)(2)(ii); 20 C.F.R. §718.204(c); 30 U.S.C. §921(c)(4).

[5] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the 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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge