BRB No. 11-0811 BLA-A

RALPH A. PARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEN R. MULLINS EXCAVATING	)	DATE ISSUED: 08/31/2012
	)	
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 on Subsequent Claim Denying Benefits and the Denial of Reconsideration of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

Roberta K. Kiser (Pohl, Kiser & Aubrey, P.S.C.), Lexington, Kentucky, for employer.

Jonathan P. Rolfe (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals[1] the Decision and Order on Subsequent Claim Denying Benefits (2009-BLA-05341) and the Denial of Reconsideration of Administrative Law Judge Robert B. Rae, rendered 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). Based on the filing date of this subsequent claim,[2] the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act,[3] which provides for a rebuttable presumption of total disability due to pneumoconiosis, if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The administrative law judge noted that while the parties stipulated to twenty-one years of coal mine employment,[4] the evidence established that 10.5 years of claimant's surface coal mine work was performed in conditions that were substantially similar to those of an underground mine. The administrative law judge also determined that the newly

[1] The Director, Office of Workers' Compensation Programs (the Director), initially filed an appeal in this case, which was assigned BRB No. 11-0811 BLA. The appeal was later dismissed at the Director's request. *Partin v. Steven R. Mullins Excavating*, BRB Nos. 11-0811 BLA and 11-0811 BLA-A (Jan. 24, 2012) (unpub. Order).

[2] Claimant filed an initial claim for benefits on October 27, 1999, which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on November 25, 2003. *Id*. On February 16, 2007, Administrative Law Judge Larry S. Merck denied benefits, finding that while claimant established the existence of pneumoconiosis arising out of coal mine employment, as well as total disability, the evidence failed to establish that claimant's disability was due to pneumoconiosis. *Id*. Claimant took no action with regard to the denial until filing his current subsequent claim on April 17, 2008. Director's Exhibit 3.

[3] On March 23, 2010, amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Plan and Affordable Care Act ("PPACA"), Public Law No. 111-148 (2010), were enacted, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010.

[4] Claimant testified that all of his coal mine work was above ground. December 15, 2009 Hearing Transcript at 16.

submitted evidence was insufficient to establish a totally disabling respiratory impairment and, thus, found that claimant did not invoke the presumption at amended Section 411(c)(4). The administrative law judge further determined that because claimant failed to prove total disability, based on the newly submitted evidence, claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and, therefore, was not entitled to any further review of his claim under the regulations at 20 C.F.R. Part 718. Accordingly, benefits were denied.

On June 16, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Reconsideration. The Director asserted that the administrative law judge erred: in requiring claimant to prove total disability in order to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309; in finding that claimant is not totally disabled; and in finding that claimant did not establish at least fifteen years of qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. Claimant joined in the Director's motion. On July 29, 2011, the administrative law judge denied reconsideration.

On appeal, claimant argues that the administrative law judge mischaracterized the nature of his dust exposure, erred in finding that he established 10.5 years of qualifying surface coal mine employment, and erred in finding that he is not totally disabled.[5] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, asserting that, because the administrative law judge did not adequately explain his finding that claimant failed to prove fifteen years of employment in conditions substantially similar to an underground mine, his Decision and Order fails to satisfy the requirements of the Administrative Procedure Act (APA). The Director also argues that the administrative law judge erred in finding that claimant did not establish total disability. The Director requests that the Board vacate the denial of benefits and remand the case for further consideration pursuant to amended Section 411(c)(4).

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30

[5] By letter dated March 28, 2012, the Board was notified of the death of claimant on December 24, 2011. Claimant's counsel has indicated that the claim is now being pursued on behalf of claimant's widow and claimant's estate.

[6] Although the administrative law judge stated that claimant's last coal mine employment was in Kentucky, he did not indicate the part of the record on which he relied. Decision and Order at 9. Employer's business address has been listed in both Kentucky and Virginia. *See* Director's Exhibits 1, 4, 8, 24, 26. Because claimant

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 this miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. SUBSEQUENT CLAIM

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). In this case, contrary to the administrative law judge's finding, claimant's prior claim, filed on November 25, 2003, was denied by Administrative Law Judge Larry S. Merck because the evidence failed to establish disability causation pursuant to 20 C.F.R. §718.204(c).[7] 2007 Decision and Order at 24. Thus, claimant was required to establish, based on the newly submitted evidence, this one element in order to obtain a review of his claim on the merits. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3. If claimant invokes the rebuttable presumption of total disability due to pneumoconiosis, set forth at amended Section 411(c)(4), he will necessarily demonstrate a change a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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testified during his deposition that he last worked for employer in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1-482-83.

[7] The administrative law judge erroneously stated that claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement. Decision and Order at 24.

II. INVOCATION OF THE AMENDED SECTION 411(C)(4) PRESUMPTION

A. Qualifying Coal Mine Employment

In order to invoke the amended Section 411(c)(4) presumption, a miner must initially establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required only to proffer sufficient evidence of dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then the function of the administrative law judge, "with his expertise and knowledge of the industry, to compare [the miner's] working conditions to those prevalent in underground mines." *Summers*, 272 F.3d at 480, 22 BLR at 2-726. However, a surface worker at an underground mine site is not required to show the comparability of the conditions, as the definition of an underground coal mine encompasses not only the underground mine shaft, but also all land, buildings and equipment. *See* 20 C.F.R. §725.101(a)(30); *Muncy v. Elkay Mining Co.*, 25 BLR 1-23, 1-29; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979).

In this case, the administrative law judge noted that claimant "alleged" that he worked in surface coal mines for twenty-one years. Decision and Order at 8. The administrative law judge determined that claimant had insufficient qualifying coal mine employment to be eligible for invocation of the amended Section 411(c)(4) presumption, and explained:

> I have thoroughly reviewed the information provided by the Claimant in his testimony concerning his work conditions. He is very specific in detailing the percentage of the time he spent in conditions which could be described as similar to those found in underground mining. The time he spent in such conditions totaled less than 8 years when all his coal mine work is added up. He testified that in all of his coal mine jobs, he "averaged" between one-third to one-half of the time in conditions similar to underground mining. Even allowing him the benefits of the doubt and giving him credit for [fifty percent] of the time in substantially similar conditions, the Claimant can at best show a total of 10.5 years of similar coal mine employment.

Decision and Order at 9. Furthermore, in response to the Director's request that he reconsider his comparability finding, the administrative law judge stated that he "spent an

inordinate amount of time going through the record and piecing together [claimant's] coal mine employment" and that "[c]laimant's own testimony was the major basis for the figures" used to determine the years that would satisfy the requirements of amended Section 411(c)(4). Denial of Reconsideration at 2.

Claimant argues that the administrative law judge erred in determining that he alleged twenty-one years of coal mine employment, when claimant provided "clear and unambiguous testimony" that he worked "for twenty-five or more years as a coal miner." Claimant's Brief at 3. Claimant also challenges the administrative law judge's finding that half of his surface coal mine employment was in dust conditions comparable to an underground mine, as claimant testified that "all of his mine work was done in heavy coal and rock dust." *Id*. at 4, *citing*, *inter alia*, December 15, 2009 Hearing Transcript at 12-16. Claimant argues that the administrative law judge erred in failing to identify the "actual comparison points" or "key distinguishing factors," between the conditions of claimant's surface coal mine employment and the conditions of an underground mine to support his conclusion that claimant established 10.5 years of qualifying coal mine employment. Claimant's Brief at 4-5.

The Director argues that the administrative law judge's comparability finding fails to satisfy the requirements of the APA because it is impossible "to determine from the [administrative law judge's] order which of [claimant's] work he credited as substantially similar and which of it he did not." Director's Response Brief at 6. The Director asserts that this error is not harmless since claimant's testimony and other evidence, if credited, would establish at least fifteen years of qualifying coal mine employment. To the extent that the administrative law judge appeared to rely on claimant's February 2, 2000 deposition testimony to reach his finding, the Director asserts that while claimant estimated "the number of days a week he was exposed to coal dust" in certain jobs, his deposition should not be "considered a definitive denial of exposure to other types of dust" in his surface coal mine employment.[8] *Id*. at 7 n.5. The Director contends that the administrative law judge's finding of 10.5 years of comparable coal mine employment cannot be reconciled with the record evidence, consisting of claimant's July 20, 2006 hearing testimony, Director's Exhibit 1-93-1-97, claimant's summary of his work history submitted with his prior claim, Director's Exhibit 1-631, the summary of claimant's work history submitted with the current claim, Director's Exhibit 4-1, and claimant's most recent hearing testimony, December 15, 2009 Hearing Transcript at 12-16, demonstrating

[8] The Director suggests that during the February 2, 2000 deposition, claimant "counted as exposure as a bulldozer operator only those periods when he was directly exposed to the coal seam or to loose coal and apparently did not include days in which he was removing overburden containing only dirt and rock." Director's Response Brief at 7 n. 5, *citing* Director's Exhibit 1-27.

"the dusty conditions of the surface mines at which [claimant] worked." *Id*. at 6. The Director argues that the case should be remanded for the administrative law judge to reconsider the evidence and identify the specific periods of claimant's surface coal mine work that he finds to be qualifying coal mine employment and which periods he does not.

The arguments of claimant and the Director have merit. We agree that the administrative law judge erred in stating that claimant alleged twenty-one years of coal mine employment.[9] According to the administrative law judge's summary of claimant's hearing testimony, claimant testified that he worked in coal mine employment from 1967-1968 and from 1974-1998. Decision and Order at 4; December 15, 2009 Hearing Transcript at 16; Director's Exhibit 3. This approximates twenty-five years of coal mine employment. Furthermore, although the administrative law judge generally stated that claimant's testimony supports his conclusion, the administrative law judge did not identify the specific periods of time or the specific work he relied upon in finding that fifty percent of claimant's surface coal mine employment was in conditions substantially similar to those in underground coal mines. Because the administrative law judge's findings with regard to the length of claimant's surface coal mine employment and the comparability of the conditions of claimant's surface work to an underground mine do not satisfy the requirements of the APA,[10] we vacate the administrative law judge's determination that claimant established 10.5 years of qualifying coal mine employment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that claimant failed to establish the requisite years of qualifying coal mine employment to be eligible for invocation of the amended Section 411(c)(4) presumption, and we vacate the denial of benefits.

B. Total Disability

The administrative law judge also determined that claimant was unable to invoke the amended Section 411(c)(4) presumption because he found that the newly submitted

[9] The district director found twenty-one years of coal mine employment and the parties stipulated to twenty-one years of coal mine employment at the hearing. However, because the stipulation was made prior to the enactment of the amendments, the administrative law judge determined that the stipulation was not binding. Decision and Order at 3 n. 1; Director's Exhibit 24.

[10] 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), requires that an administrative law judge explain the basis for all of these findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

evidence did not establish a totally disabling respiratory or pulmonary impairment. We agree with claimant and the Director that the administrative law judge erred in weighing the pulmonary function study evidence.[11] The record contains three newly submitted pulmonary function studies dated March 27, 2008, May 13, 2008 and September 5, 2008. Director's Exhibit 13; Claimant's Exhibits 2, 3. The administrative law judge found that each study had pre-bronchodilator values that qualify for total disability under the regulations.[12] Decision and Order at 7. The March 27, 2008 and May 13, 2008 studies had non-qualifying values, after administration of a bronchodilator, but the September 5, 2008 study, obtained by Dr. Dahhan, produced qualifying values for total disability after a bronchodilator was administered. *Id*. In finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge stated:

> Overall, the [pulmonary function] studies do not support a finding of total disability. Only Dr. Dahhan's studies have pre and post bronchodilator values which could be considered "qualifying." The remaining studies are not indicative of total disability based on the improvement after administering the bronchodilator.

Id. at 7.

Claimant maintains that a preponderance of the pulmonary function study evidence, including the most recent study, establishes that he is totally disabled. The Director asserts that the administrative law judge did not rationally explain why he accorded the non-qualifying post-bronchodilator values controlling weight. We agree with the Director that the administrative law judge's summary finding that claimant did not establish total disability, fails to satisfy the requirements of the APA, since the administrative law judge has not explained the basis for the weight accorded the conflicting pulmonary function study evidence. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge also erred in failing to address the significance, if any, of the fact that claimant's most recent pulmonary function study had qualifying values both pre-

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

bronchodilator and post-bronchodilator.[13] Thus, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i), and instruct the administrative law judge on remand to reconsider whether claimant has established a totally disabling respiratory impairment, based on the pulmonary function study evidence.

Furthermore, the administrative law judge erred in failing to render any finding as to whether the medical opinion evidence established total disability at C.F.R. §718.204(b)(2)(iv). The administrative law judge must specifically address the weight to accord Dr. Vaezy's opinion, that claimant is "unable to work as a coalminer" due to a "moderate obstructive impairment." Director's Exhibit 13.

III. REMAND INSTRUCTIONS

Because the administrative law judge erred in his consideration of whether claimant established sufficient comparable surface coal mine employment and a totally disabling respiratory impairment, we vacate the administrative law judge's finding that claimant failed to invoke the amended Section 411(c)(4) presumption, and we vacate the denial of benefits. On remand, the administrative law judge must resolve all conflicts in the evidence and determine the specific number of years of coal mine employment alleged by claimant and established by the record. The administrative law judge must also reconsider whether claimant has proved that his surface coal mine employment was performed in dusty conditions or whether claimant worked aboveground at an underground coal mine for any period of time. *See Summers*, 272 F.3d at 479-480, 22 BLR at 2-274-275; *Leachman* 855 F.2d at 512; *Muncy*, 25 BLR at 1-29; *Garrett v. Cowin & Co.*, 16 BLR 1-77 (1990). The administrative law judge must discuss the record evidence with specificity and explain the basis for his finding as to whether claimant has established at least fifteen years of qualifying coal mine employment.

The administrative law judge must also reconsider whether claimant has established a totally disabling respiratory or pulmonary impairment, based on the pulmonary function studies and medical opinion evidence of record. *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 concludes on remand that claimant is entitled to invocation of the amended Section 411(c)(4) presumption, claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as discussed *supra*. The administrative law judge must then consider whether employer has established rebuttal of the

[13] The administrative law judge should consider the position of the Department of Labor that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability." *See* 45 Fed. Reg. 13682 (1980).

presumption. *See Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8 (6th Cir. 2011).

If claimant is unable to invoke the presumption at amended Section 411(c)(4), the administrative law judge should reconsider claimant's entitlement pursuant to 20 C.F.R. Part 718. Such an analysis begins with a determination, pursuant to 20 C.F.R. §725.309, as to whether the newly submitted evidence is sufficient to establish disability causation, the element of entitlement that was previously adjudicated against claimant. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996); *White*, 23 BLR at 1-3. If claimant proves a change in an applicable condition of entitlement at 20 C.F.R. §725.309, the administrative law judge must then review of all of the evidence of record to determine whether claimant is entitled to benefits. In rendering all of his findings of fact and conclusions of law on remand, the administrative law judge is instructed to comply with the APA. *See Wojtowicz,* 12 BLR at 1-165.

Accordingly, the Decision and Order on Subsequent Claim Denying Benefits and the Denial of Reconsideration are 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge