BRB No. 10-0254 BLA

RAYMOND E. BAIRD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 12/23/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Revised and Amended Decision and Order – Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Raymond E. Baird, Jonesville, Virginia, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, 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, without the assistance of counsel,[1] appeals the Revised and Amended Decision and Order – Rejection of Claim[2] (2007-BLA-5573) of Administrative Law Judge Edward Terhune Miller rendered on a subsequent claim[3] 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 thirty-one years of qualifying coal mine employment, and adjudicated this claim, filed on December 19, 2005, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. 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 thus, that claimant had 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 generally challenges the administrative law judge's weighing of the evidence and his denial of benefits. 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.

By Order dated September 10, 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.

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[1] Before the administrative law judge, claimant was represented by Jerry Murphree, a benefits counselor with Stone Mountain Health Services. Mr. Murphree has requested, on behalf of claimant, that the Board review the claim in its entirety, as he is not representing claimant on appeal. Hearing Transcript at 4; Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Upon claimant's request for reconsideration, the administrative law judge ordered that his initial Decision and Order – Rejection of Claim, issued on October 16, 2009, be withdrawn and vacated *nunc pro tunc*. Order dated December 7, 2009.

[3] Claimant's initial claim was filed on July 3, 1978, and was denied by Administrative Law Judge Reid C. Tait on March 16, 1987 for failure to establish a total respiratory disability. Director's Exhibit 1. Claimant's next claim was filed on April 13, 1990, and was administratively denied on May 21, 1990. *Id.* Another claim was filed on November 8, 1996 that was denied by Administrative Law Judge Joseph E. Kane on December 14, 1998, for failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. *Id.* Upon claimant's Request for Modification, Administrative Law Judge Jeffrey Tureck denied the claim on March 17, 2004, for failure to establish either a change in condition or a mistake in a determination of fact. *Id*.

111-148. *Baird v. Westmoreland Coal Co.*, BRB No. 10-0254 BLA (Sept. 10, 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 "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).[4] Employer and the Director have responded. Employer contends that this claim is not affected by the recent amendments, as claimant failed to establish a totally disabling respiratory impairment. Employer also asserts that retroactive application of the amendments is unconstitutional, as it denies employer due process and because it constitutes an unconstitutional taking of private property.[5] The Director asserts that, based on the filing date and the length of claimant's coal mine employment, the amended version of Section 411(c)(4) would apply if claimant establishes that he has a totally disabling respiratory impairment. The Director maintains that, if the Board vacates the administrative law judge's finding of no total respiratory disability at Section 718.204(b), it must remand this case for consideration of the impact of the recent amendments to the Act. If the rebuttable presumption is applicable, 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,[6] as application of the amended Section 411(c)(4) will alter the parties' burdens of proof and impose on employer the obligation of showing either that the miner did not suffer from pneumoconiosis or that his disability was unrelated to pneumoconiosis in order to defeat entitlement.

[4] 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)).

[5] We decline to address employer's arguments concerning the constitutionality of the recent amendments, as we fully addressed and rejected these and similar issues in *Mathews v. United Pocahontas Coal Co.*, ___ BLR 1-___, BRB No. 09-0666 BLA (Sept. 22, 2010)(recon. pending).

[6] A showing of "good cause" is necessary in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. *See* 65 Fed. Reg. 79,993 (Dec 20, 2000); 20 C.F.R. §725.456(b)(1).

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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 the existence of pneumoconiosis and total disability due to pneumoconiosis. Consequently, claimant had to submit new 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).

In finding that the newly submitted x-ray evidence of record[8] was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge considered the ten interpretations of four x-rays taken between March 7, 2005

[7] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 15.

[8] We find no abuse of discretion in the administrative law judge's denial of the Director's Motion to Reopen the Record filed on September 30, 2008, as both claimant and the Director failed to timely request extensions of time within which to submit post-hearing evidence. *See V.B.* [*Bates*] *v. Elm Grove Coal Co.*, 24 BLR 1-107 (2009); *Harris v. Old Ben Coal Co.*, 24 BLR 1-13,1-17 n.1 (2007)(*en banc recon.*)(McGranery & Hall, JJ., concurring and dissenting).

and November 8, 2006.[9] Initially, the administrative law judge correctly noted that greater probative weight may properly be given to x-ray readings performed by B readers and physicians who are dually qualified as both B readers and Board-certified radiologists.[10] Decision and Order at 12; *see Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985). The administrative law judge determined that the "x-ray evidence was in equipoise from all perspectives, including the balanced number of positive and negative readings, the ages of the films, and the qualifications of the readers." Decision and Order at 12. The administrative law judge further found that the time span of the films, from March 2005 to November 2006, "[did] not affect the weight of the readings significantly." *Id*. Lastly, the administrative law judge considered the narrative interpretations of the negative x-ray readings by Drs. Wiot and Meyer,[11] and determined

[9] The March 7, 2005 x-ray was interpreted as positive (2/1 p/t) by Dr. Alexander, and as negative by Dr. Wiot, both dually qualified physicians. Director's Exhibits 14, 15. The February 13, 2006 x-ray was interpreted as positive by both Dr. Baker (1/0 p/q), a B reader, and by Dr. Alexander (1/1 q/t), a dually qualified physician, and as negative by Drs. Meyer and Wiot, both dually qualified physicians. Director's Exhibits 12, 15; Claimant's Exhibit 1; Employer's Exhibit 5. The April 3, 2006 x-ray was read as positive by Dr. Miller (2/1 t/q), and as negative by Dr. Wiot, both dually qualified physicians. Director's Exhibits 14, 15. The November 8, 2006 x-ray was interpreted as positive by Dr. Ahmed (1/1 q/p), and as negative by Dr. Wiot, both dually qualified physicians. Director's Exhibit 16; Employer's Exhibit 1. After reviewing the x-ray interpretations of record, Dr. Rosenberg testified at deposition that linear opacities are classified as s, t or u shaped on the ILO form, while the classifications of p, q, and r represent the micronodular opacities consistent with coal workers' pneumoconiosis. Employer's Exhibit 4 at 8-10.

[10] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[11] In his reading of the March 7, 2005, February 13, 2006, and April 3, 2006 films, Dr. Wiot noted "Prob. IPF, not cwp," and stated in his narrative report that the x-rays were very abnormal, but that the findings did not represent coal workers' pneumoconiosis. He further noted that opacities of coal workers' pneumoconiosis are primarily rounded, whereas these were irregular in shape, and that "there is irregular interstitial disease primarily in the bases, with less significant involvement of the mid lung fields, and relative sparing of the upper lung fields." Director's Exhibit 15. In his

that they were more persuasive than the positive classifications by Drs. Alexander, Baker, Miller, and Ahmed,[12] which the administrative law judge noted "varied, one from the other" and "were not accompanied by explanations [that] were similarly helpful." *Id.* We find no error in the administrative law judge's weighing of the individual x-rays of record. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc on recon*.). We note, however, that in finding that the narrative explanations accompanying the negative interpretations were persuasive, the administrative law judge failed to summarize the explanations accompanying the positive interpretations and failed to adequately explain why he credited the opinions of two dually-qualified readers, that irregularly-shaped opacities found primarily in the lower lung zones did not represent pneumoconiosis, over the contrary opinions of three dually-qualified readers, that both irregular and rounded opacities consistent with pneumoconiosis were found in all lung zones. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Director's Exhibits 12, 14, 16. As the administrative law judge's credibility determinations at subsection (a)(1) also affected his weighing of the medical opinions regarding the existence of clinical and legal pneumoconiosis at subsection (a)(4), *see* Decision and Order at 12-13, we vacate his finding that the evidence is insufficient to support a finding of pneumoconiosis at Section

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interpretation of the November 8, 2006 film, Dr. Wiot stated that there was no evidence of coal workers' pneumoconiosis, but linear stranding at the bases is consistent with some type of interstitial disease. The doctor went on to say that coal workers' pneumoconiosis invariably begins in the upper lung fields, and progresses to the lower lung fields, and he also noted that there are multiple causes of basilar interstitial fibrosis, most commonly IPF, but coal workers' pneumoconiosis is not one of them. Employer's Exhibit 1. Dr. Meyer found basilar linear and nodular interstitial process, which is not coal workers' pneumoconiosis, because coal workers' pneumoconiosis begins as an upper zone nodular process. He stated that the findings suggest "an inflammatory bronchiolar process/cellular bronchiolitis" possibly caused by aspiration or atypical mycobacterial infection. Employer's Exhibit 5.

[12] Dr. Alexander noted "coalescence of small opacities in right upper zone; Q opacities in both upper zones; and possible atelectasis, infiltrate, or scarring in right lower zone," Director's Exhibit 14, and "emphysematous change in right lower zone." Claimant's Exhibit 1. Dr. Miller noted multiple bilateral small irregular and round opacities up to 3 mm; a coalescence of small pneumoconiotic opacites; and COPD. Director's Exhibit 14. Dr. Ahmed noted minute soft irregular and rounded parenchymal densities up to 3 mm scattered throughout both lungs and changes of COPD with bullous emphysema. Director's Exhibit 16.

718.202(a),[13] and remand this case for further findings and explanation that comport 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). In reviewing the medical opinion evidence at Section 718.202(a)(4) on remand, the administrative law judge is additionally instructed to consider whether the opinions expressed by the various physicians are consistent with the science relied upon by the Department of Labor in promulgating the amended regulations pertaining to the definition of legal pneumoconiosis. *See* 65 Fed. Reg. 79,938-42 (2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

Turning to the issue of total respiratory disability, the administrative law judge considered the three newly submitted pulmonary function studies of record pursuant to Section 718.204(b)(2)(i). Without resolving the discrepancy between claimant's height of 68 inches as recorded by Drs. Craven and Castle, and the height of 68.5 inches as recorded by Dr. Baker, *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983), the administrative law judge determined that the pulmonary function study administered by Dr. Baker on February 13, 2006, and validated by Dr. Michos, yielded qualifying values,[14] but that Dr. Baker "did not administer bronchodilators or address the effects of bronchodilation." Director's Exhibit 12; Decision and Order at 5, 14. The administrative law judge determined that the November 8, 2006 pulmonary function study, administered by Dr. Castle, yielded qualifying values before bronchodilation, and non-qualifying values after the application of bronchodilators, Director's Exhibit 13, and that the most

[13] While the administrative law judge did not make a finding at Section 718.202(a)(2), we note that there is no biopsy evidence of record. Thus, claimant cannot establish the existence of pneumoconiosis thereunder. Further, pursuant to Section 718.202(a)(3), the presumptions at 20 C.F.R. §§718.304 and 718.306 are inapplicable, as the record contains no evidence of complicated pneumoconiosis and this claim is not a survivor's claim filed before June 30, 1982.

[14] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). Although the Department of Labor has provided tables with qualifying pulmonary function values for miners according to gender, height, and age, the tables do not provide values for miners older than 71. 20 C.F.R. Part 718, Appendix B. Because claimant was 87, 88, and 89 at the time the studies were obtained herein, the administrative law judge permissibly applied the table values listed for a 71-year-old. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008).

recent study, administered by Dr. Craven on January 4, 2008, yielded non-qualifying pre-bronchodilator values and did not contain post-bronchodilator values. Claimant's Exhibit 2. While the administrative law judge concluded that claimant had failed to establish total respiratory disability at Section 718.204(b)(2)(i) by a preponderance of the pulmonary function study evidence, Decision and Order at 5, 14, he did not set forth and explain the comparative weight he accorded to the individual tests and to the pre-bronchodilator and post-bronchodilator results, in violation of the APA. *See Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i), and instruct the administrative law judge on remand to resolve the discrepancy in claimant's reported heights and provide a rationale for his weighing of the pulmonary function study evidence.

The administrative law judge properly found that both of the newly submitted blood gas studies were "normal" and yielded non-qualifying values for total disability pursuant to Section 718.204(b)(2)(ii). Decision and Order at 5, 14; Director's Exhibits 12, 13. Additionally, the administrative law judge determined correctly that the newly submitted evidence does not contain a diagnosis of cor pulmonale with right-sided congestive heart failure sufficient to establish total disability at Section 718.204(b)(2)(iii). We affirm, therefore, the administrative law judge's finding that the newly-submitted evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(ii), (iii).

Pursuant to Section 718.204(b)(2)(iv), after determining that claimant's usual coal mine employment involved heavy manual labor, the administrative law judge considered the medical opinions of Drs. Castle, Rosenberg, and Baker. Decision and Order at 5-10, 14. Dr. Castle opined that pulmonary function testing revealed a moderate obstructive impairment that improved significantly upon bronchodilation to only a mild impairment, and concluded that claimant is permanently and totally disabled as a result of bronchial asthma or hyperactive airways disease, his age, and other medical conditions unrelated to his pulmonary condition. Director's Exhibit 13; Employer's Exhibit 3. Dr. Rosenberg opined that claimant's moderate degree of airflow obstruction, as shown on pre-bronchodilator pulmonary function testing, would be disabling, but that his pulmonary obstruction improved significantly after bronchodilation, such that claimant would not be disabled with intensive therapy for hyperactive airways. Employer's Exhibits 2, 4. Dr. Baker determined that claimant does not have the respiratory capacity to perform the work of a coal miner, based on the moderate obstructive defect shown on pulmonary function testing. Director's Exhibit 12. The administrative law judge credited the opinions of Drs. Castle and Rosenberg over that of Dr. Baker, as the administrative law judge determined that Dr. Baker's analysis and assessment "did not impeach or refute the reasoned conclusions of Dr. Castle and Dr. Rosenberg." Decision and Order at 14. In finding, however, that "claimant has not established a totally disabling pulmonary impairment or a contribution to such an impairment by pneumoconiosis," the

administrative law judge conflated the issues of total respiratory disability and disability causation. *Id*. We note that in making disability determinations, the question is whether the miner is able to perform his job from a respiratory standpoint, and not whether he is able to perform his job after he takes medication. 20 C.F.R. §718.204(b)(1). Thus, the non-qualifying results of a post-bronchodilator pulmonary function study are not necessarily dispositive of the issue of total disability. *See* 45 Fed. Reg. 13,682 (1980). Accordingly, we must vacate the administrative law judge's finding that total respiratory disability was not established, and remand the case for the administrative law judge to reassess the relevant medical opinion evidence. The administrative law judge must make a separate finding at Section 718.204(b)(2)(iv), and determine whether the medical opinion evidence of record is sufficient to establish total respiratory disability thereunder. The administrative law judge must then determine whether the weight of the relevant evidence, like and unlike, is sufficient to establish total respiratory disability under Section 718.204(b)(2). *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). On remand, as a preliminary matter, the administrative law judge should readjudicate the issue of total respiratory disability, and if he finds that total disability is established, claimant will be entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Revised and Amended Decision and Order – Rejection of Claim 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