BRB No. 12-0131 BLA

DEWEY W. GIBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
REEDY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 12/19/2012
	)	
ANESTHESIOLOGIST PROFESSIONAL ASSURANCE	)	
	)	
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 on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Felicia A. Snyder (Allen Kopet & Associates), 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 on Remand (07-BLA-5301) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant

to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's subsequent claim filed on February 10, 2006,[1] which is before the Board for the second time.

In his initial decision, the administrative law judge credited claimant with thirty-three years of coal mine employment,[2] and found that the new x-ray, biopsy, and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(2),(4). Additionally, the administrative law judge found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2),(c). Therefore, the administrative law judge concluded that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found that all of the evidence established that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for the administrative law judge to reconsider the new medical evidence relevant to whether claimant established a change in the applicable condition of total disability under 20 C.F.R. §725.309(d).[3] Specifically, the Board held that the administrative law judge failed to explain his determination to credit the medical opinions of Drs. Rasmussen and Alam, that claimant is totally disabled, on the ground that their

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[1] Claimant filed two previous claims, both of which were finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on April 5, 2004, was denied by the district director on January 6, 2005, because, although claimant established the existence of pneumoconiosis, he did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2 at 6.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 11; Hearing Transcript at 14. 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] Because the element of pneumoconiosis was decided in claimant's favor in his prior claim, it was not an applicable condition of entitlement in his subsequent claim. *See* 20 C.F.R. §725.309(d)(2). The Board therefore held that the administrative law judge's discussion of whether the new medical evidence established pneumoconiosis was not relevant to whether claimant established a change in the applicable condition of entitlement. *D.G.* [*Gibson*] *v. Reedy Coal Co.*, BRB No. 08-0457 BLA, slip op. at 3 n.5 (Mar. 26, 2009)(unpub.).

opinions were "consistent with the record." *D.G.* [*Gibson*] *v. Reedy Coal Co.*, BRB No. 08-0457 BLA, slip op. at 4 (Mar. 26, 2009)(unpub.). Further, the Board held that substantial evidence did not support the administrative law judge's finding that Drs. Jarboe and Dahhan offered no explanation for their opinions that claimant is not totally disabled. *Id*. Therefore, the Board vacated the administrative law judge's finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for him to discuss and weigh all of the relevant new medical opinion evidence as to whether claimant is totally disabled.[4] The Board further instructed the administrative law judge, on remand, that after he reconsidered whether the new medical opinion evidence established total disability, he was to weigh all of the relevant new evidence together, both like and unlike, to determine whether claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d).[5] *Gibson*, slip op. at 4-5.

On remand,[6] the administrative law judge found that the medical opinion evidence did not establish a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Therefore, the administrative law judge found that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

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[4] The Board noted that the administrative law judge had found that the new evidence under 20 C.F.R. §718.204(b)(2)(i)-(iii) did not establish total disability. *Gibson*, slip op. at 5 n.7.

[5] In the interest of judicial economy, the Board addressed the administrative law judge's findings on the existence of pneumoconiosis. The Board held that substantial evidence did not support the administrative law judge's finding that Drs. Jarboe and Dahhan offered no explanation for their opinions that claimant's respiratory impairment is unrelated to coal mine dust exposure. Therefore, the Board instructed the administrative law judge to reconsider the medical opinion evidence regarding both the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), and the cause of claimant's total disability under 20 C.F.R. §718.204(c), if those issues were reached on remand. *Gibson*, slip op. at 5-6.

[6] Before deciding the case on remand, the administrative law judge ordered briefing by the parties, and determined that a recent amendment to the Act, reinstating the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), was potentially applicable if claimant could establish that he is totally disabled. Decision and Order at 2-3.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv). Employer/carrier responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief on appeal.

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).

To be entitled 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 that he was totally disabled. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Rasmussen, Alam, Jarboe, and Dahhan.[7] All four doctors diagnosed claimant with a respiratory impairment. After examining and testing claimant, Dr. Rasmussen opined that claimant has a moderate impairment that leaves him with insufficient pulmonary capacity to perform the heavy to very heavy manual labor required by his job as a continuous miner operator. Director's Exhibits 13, 22; Claimant's Exhibit 4. Dr. Alam, who treated claimant from 2003 to 2007, opined that

[7] The record reflects that Dr. Rasmussen is Board-certified in Internal and Forensic Medicine, Claimant's Exhibit 4, and Drs. Alam, Jarboe, and Dahhan are Board-certified in Internal Medicine and Pulmonary Disease. Claimant's Exhibit 3; Employer's Exhibits 1, 2.

claimant is totally disabled based on pulmonary function studies,[8] and the presence of severe chronic shortness of breath and chronic obstructive pulmonary disease. Claimant's Exhibit 2. Drs. Jarboe and Dahhan examined and tested claimant and opined that he has a mild impairment, but retains the respiratory capacity to perform his coal mine work. Director's Exhibits 18, 26; Employer's Exhibits 1, 2.

The administrative law judge reiterated his prior findings that the new medical evidence submitted under 20 C.F.R. §718.204(b)(2)(i)-(iii) did not establish total disability. Turning to the medical opinions, the administrative law judge discounted Dr. Rasmussen's opinion that claimant is totally disabled. The administrative law judge found that Dr. Rasmussen relied on the results of pulmonary function and blood gas studies, when "I have already determined that both the pulmonary function studies and blood gas evidence are insufficient to establish total disability here. Thus . . . Dr. Rasmussen's opinion is inconsistent with the objective medical evidence. . . ." Decision and Order at 4. The administrative law judge found that Dr. Alam also relied on pulmonary function study results to diagnose claimant as totally disabled, when "I have already determined that the totality of the pulmonary function studies is insufficient to establish total disability here." *Id*. The administrative law judge therefore gave Dr. Alam's opinion "less weight." *Id*. In contrast, the administrative law judge found that the opinions of Drs. Jarboe and Dahhan were well-reasoned and documented, noting that their "findings regarding the pulmonary function and blood gas studies are consistent with mine and well-explained." Decision and Order at 4-5. Finally, the administrative law judge indicated that even without the opinions of Drs. Dahhan and Jarboe, he would find that the opinions of Drs. Rasmussen and Alam "are insufficient to establish total disability here." Decision and Order at 5.

Claimant contends that substantial evidence does not support the administrative law judge's finding because he did not consider all relevant evidence in weighing the medical opinions. Claimant's Brief at 10-12. We agree. As claimant contends, Dr. Rasmussen explained that although claimant's blood gas study results are above the qualifying level for total disability, Dr. Rasmussen's measurements of claimant's oxygen consumption reflect that claimant cannot increase his ventilatory capacity sufficiently to meet the "25ml/kg/min. work level" of oxygen consumption required by his job as a continuous miner operator.[9] Director's Exhibit 22 at 2. Dr. Rasmussen indicated that the

[8] Dr. Alam interpreted claimant's April 19, 2006 and August 30, 2007 pulmonary function studies as reflecting moderate obstructive and restrictive impairments that did not respond to bronchodilators. Claimant's Exhibits 9, 12.

[9] Dr. Rasmussen reported that claimant could achieve "an oxygen consumption of only 16.3 ml/kg/min. during this study. Were he able to exercise at his required work

oxygen consumption data also demonstrated that claimant would develop hypoxemia before he could reach the exertion level required to perform his coal mine work. *Id*. The record reflects that Dr. Jarboe reviewed Dr. Rasmussen's test results, and agreed that the "oxygen consumptions are low and might not be adequate to sustain heavy manual labor in an underground coal mine." Director's Exhibit 26 at 13. Dr. Jarboe, however, maintained that the oxygen consumptions Dr. Rasmussen recorded "were done at submaximal exercise" and thus, did not reflect claimant's "true oxygen consumption." *Id*.; Employer's Exhibit 2 at 13-14, 18-19. Dr. Rasmussen responded to Dr. Jarboe's criticisms, and opined that the tests were properly conducted and accurately reflected claimant's oxygen consumption capacity for his coal mine work. Claimant's Exhibit 4 at 30-36, 41.

The administrative law judge did not address this aspect of the conflicting medical opinion evidence. Therefore, the Board is unable to determine whether substantial evidence supports his determination that claimant did not establish that he is totally disabled. *See* 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for him to consider the relevant medical opinion evidence, in its entirety, as to whether claimant is totally disabled.

We instruct the administrative law judge, on remand, to consider the conflicting opinions of Drs. Rasmussen and Jarboe on whether the measurements of claimant's oxygen consumption were properly conducted, and to make a finding on whether those tests are sufficiently reliable to support a reasoned medical judgment on total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211 (6th Cir. 1997). If so, the administrative law judge must consider that evidence, the other objective testing addressed by the physicians, and the exertional requirements of claimant's usual coal mine employment, and determine whether the new medical opinion evidence establishes that claimant is totally disabled. *See Cornett*, 227 F.3d at 587, 22 BLR at 2-124; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In assessing the medical opinions on remand, the administrative law judge must take into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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level, he would have neither the ventilatory capacity nor the gas exchange ability to continue." Director's Exhibit 13 at 4.

If the administrative law judge finds that the new medical opinion evidence establishes total disability, he must consider whether all of the relevant new evidence, weighed together, establishes total disability pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). If so, the administrative law judge should then consider whether claimant can establish invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). If claimant cannot invoke the Section 411(c)(4) presumption, the administrative law judge must consider whether claimant can otherwise establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. Part 718. If the administrative law judge determines that the new evidence does not establish total disability, claimant will not have established a change in the applicable condition of entitlement, and his subsequent claim must be denied. 20 C.F.R. §725.309(d).

Lastly, claimant requests that we remand this case to a different administrative law judge because the case requires a "fresh look at the evidence." Claimant Brief at 13. The record does not reflect recalcitrance by the administrative law judge, or that he has demonstrated bias against claimant. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we decline to order that this case be reassigned to another administrative law judge.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand is vacated, and the 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