BRB Nos. 12-0179 BLA
and 12-0179 BLA-A

HIRAM R. HATFIELD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	DATE ISSUED: 12/27/2012
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Hiram R. Hatfield, Pikeville, Kentucky, *pro se*.

Stanley S. Dawson (Fulton & Devlin, LLC), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2010-BLA-5754) of Administrative Law Judge Lystra A. Harris on a

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

subsequent claim[2] filed on May 22, 2009 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge accepted the parties' stipulation to thirty years of surface coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Parts 718 and 725, noting that amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were applicable. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)). Relevant to this claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. The administrative law judge found that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309,[3] but found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), as claimant failed to establish that the conditions of his surface coal mine employment were substantially similar to those in an underground coal mine. The administrative law judge further found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thus claimant could not establish that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[4] Accordingly, benefits were denied.

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[2] Claimant's first claim was denied for failure to establish any element of entitlement. Director's Exhibit 1. His second claim was denied for failure to establish total respiratory disability, although the existence of pneumoconiosis was established. Director's Exhibit 2.

[3] 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 the present case, the administrative law judge found that claimant's prior claim was denied for failure to establish total respiratory disability. Consequently, in order to obtain review of the merits of the current claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2), (3); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, BLR (6th Cir. 2012).

[4] 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

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, challenging the administrative law judge's finding that total respiratory disability was established at Section 718.204(b), based on Dr. Craven's qualifying[5] pulmonary function study of April 1, 2011 and the medical opinion of Dr. Alam. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[6] 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). For the reasons set forth below, we must vacate the administrative law judge's denial of benefits, as we cannot affirm her findings on the issues of whether claimant established: a change in an applicable condition of entitlement pursuant to Section 725.309; total respiratory disability pursuant to Section 718.204(b); sufficient comparability between claimant's surface coal mining conditions and those in underground mining to support invocation of the Section 411(c)(4) presumption; the existence of pneumoconiosis pursuant to Section 718.202; and disability causation pursuant to Section 718.204(c).

Turning first to the issue of whether claimant established a change in an applicable condition of entitlement pursuant to Section 725.309 with new evidence of total respiratory disability, the administrative law judge determined that, although all four of the new pulmonary function studies at Section 718.204(b)(2)(i) produced qualifying values before and/or after bronchodilation, three of the studies were invalid. While the

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out of coal mine employment. 30 U.S.C. §901; 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).

[5] A "qualifying" pulmonary function study or 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, Appendices B, C, respectively.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

technician noted good effort on the April 22, 2009 pulmonary function study, he did not indicate claimant's level of comprehension, and Dr. Fino invalidated the study due to poor effort, as reflected by the tracings. Director's Exhibit 18; Employer's Exhibit 1 at 23. Noting that little or no weight may be given to a study where the miner exhibited "poor" comprehension, the administrative law judge accorded less weight to this study because she was unable to determine claimant's level of comprehension. Decision and Order at 8. With respect to the July 16, 2009 pulmonary function study, the administrative law judge determined that, although Dr. Alam noted good effort and cooperation, he stated that claimant's expiratory time was less than six seconds. The administrative law judge accorded the study less weight, as the regulatory table provides in pertinent part that, after maximum inspiration has been attained, the subject will, "without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort," 20 C.F.R. Part 718, Appendix B(2)(ii), and Dr. Alam did not state that he found the test valid on the basis that a plateau had been reached for the last two seconds. Decision and Order at 8-9; Director's Exhibit 14. The administrative law judge credited Dr. Fino's invalidation of the study, due to poor effort as reflected by the tracings, over Dr. Mettu's opinion, that the test was technically acceptable, because Dr. Mettu provided no reasoning for his opinion. Decision and Order at 9; Director's Exhibit 19 at 9; Employer's Exhibit 1 at 10, 15. The administrative law judge also credited Dr. Fino's uncontradicted opinion that the pulmonary function study he conducted on December 16, 2009 was invalid due to premature termination of exhalation, lack of reproducibility in the expiratory tracings, and the lack of an abrupt onset to exhalation. Decision and Order at 9; Director's Exhibit 19 at 7. The administrative law judge concluded that the April 1, 2011 pulmonary function study was valid and sufficient to establish total disability at Section 718.204(b)(2)(i), based on Dr. Craven's statement that claimant demonstrated good effort and cooperation. Decision and Order at 9; Claimant's Exhibit 2. The administrative law judge accorded less weight to Dr. Broudy's invalidation of the study, as it was based on the criteria used by the American Thoracic Society, rather than the standards set by the Department of Labor. Decision and Order at 9; Employer's Exhibit 4.

At Section 718.204(b)(2)(ii), the administrative law judge determined that Dr. Alam's blood gas study of July 16, 2009 produced qualifying values at rest, and the physician noted that the exercise portion of the study was medically contraindicated, since the PCO_2 and the PO_2 equaled only 66. Noting that Dr. Alam's reference was to the resting values, and that there was no exercise portion of the study, the administrative law judge gave less weight to Dr. Alam's interpretation of the study on the ground that she was "unable to determine if he considered the resting results medically contraindicated." Decision and Order at 10; Director's Exhibit 14 at 16. The administrative law judge also gave less weight to Dr. Mettu's opinion, that the study was technically acceptable, because no explanation was provided. Decision and Order at 10;

Director's Exhibit 14 at 15. The administrative law judge credited Dr. Fino's opinion, that the study was invalid based on venous blood contamination, because she found his explanation to be well-reasoned, *i.e.*, "results of this magnitude would indicate an individual hanging onto his life in an intensive care unit, if he had not died." Decision and Order at 10; Employer's Exhibit 1 at 17. Because Dr. Fino's blood gas test of December 16, 2009 produced non-qualifying results, the administrative law judge concluded that claimant failed to establish total disability under Section 718.204(b)(2)(ii). Decision and Order at 10; Director's Exhibit 19.

After finding that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge accurately summarized the new medical opinions of Drs. Alam, Fino and Broudy at Section 718.204(b)(2)(iv), and found that all of the physicians were well-qualified to issue opinions based upon their Board-certifications as pulmonary specialists. Decision and Order at 10-12. The administrative law judge gave less weight to the opinions of Drs. Broudy and Fino, that the pulmonary function studies were invalid and that claimant had no disabling respiratory impairment, as the opinions were inconsistent with the administrative law judge's finding that the April 1, 2011 pulmonary function study was valid and established total disability. Decision and Order at 12; Director's Exhibit 19; Employer's Exhibits 1, 2, 4. Noting that Dr. Alam based his finding of total disability on claimant's severe shortness of breath on exertion and the qualifying results of his pulmonary function study and blood gas study, the administrative law judge gave the most weight to Dr. Alam's opinion. Decision and Order at 12; Director's Exhibit 14. Despite the fact that she deemed Dr. Alam's tests to be invalid, the administrative law judge found that Dr. Alam's opinion was well-reasoned and sufficient to establish total disability at Section 718.204(b)(2)(iv), as it was consistent with her determination that the pulmonary function study evidence as a whole demonstrated total disability, and the physician "adequately reasoned how claimant's severe shortness of breath on physical examination supports a diagnosis of total disability." Decision and Order at 12. Weighing all subsections together, the administrative law judge concluded that claimant had established total respiratory disability under Section 718.204(b)(2) and a change in an applicable condition of entitlement under Section 725.309. *Id.*

Based on our review of the administrative law judge's findings at Section 718.204(b)(2)(i)-(iv), employer's arguments on cross-appeal, and the evidence of record, we have identified various errors in the administrative law judge's weighing of the new pulmonary function study evidence, blood gas study evidence and medical opinion evidence in finding total respiratory disability established thereunder. At Section 718.204(b)(2)(i), the administrative law judge credited Dr. Fino's invalidation of Dr. Craven's April 22, 2009 pulmonary function study on the ground that she could not determine claimant's level of comprehension, and "[l]ittle or no weight may be given to a study where the miner exhibited 'poor' comprehension." Decision and Order at 8.

However, as no physician indicated that claimant's effort was poor, the pertinent inquiry for the administrative law judge is whether the administering physician's notation of good effort is more reliable than Dr. Fino's opinion that the tracings reflected poor effort, rendering the study invalid. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). With regard to Dr. Alam's pulmonary function study of July 16, 2009, it appears that the administrative law judge, in discounting the study for lack of an explicit statement that a plateau had been reached for the last two seconds, substituted her opinion for that of Dr. Mettu, who validated the study. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). We note that a reviewing expert must provide a reason for finding a test to be invalid, but need not provide a reason for finding a test to be technically acceptable. Thus, the proper inquiry for the administrative law judge is whether Dr. Fino's opinion, that the study is invalid due to poor effort as reflected by the tracings, outweighs Dr. Alam's notation that claimant demonstrated good effort and cooperation, as supported by Dr. Mettu's validation of the study.[7] At Section 718.204(b)(2)(ii), the administrative law judge appears to have discredited Dr. Alam's blood gas study of July 16, 2009, with qualifying values at rest, based on a misunderstanding of the physician's notation that the exercise portion of the study was medically contraindicated because the resting values of the PCO_2 and PO_2 totaled only 66. Director's Exhibit 14 at 16. The administrative law judge stated that she was unable to determine whether Dr. Alam considered the resting results medically contraindicated, since there was no exercise portion of the study and the physician referred to the resting blood gas study values. Decision and Order at 10. If the resting portion of the study had been medically contraindicated, however, the physician would not have conducted the test. Thus, Dr. Alam's notation merely explained why he did not obtain blood gas study values on exercise. The administrative law judge also gave less weight to Dr. Mettu's validation report for failure to explain why he found the study to be technically acceptable, when in fact no explanation was necessary. While the administrative law judge, in a proper exercise of her discretion, could credit Dr. Fino's invalidation of the test as well-reasoned, she failed to provide valid reasons for discounting the conclusions of Drs. Alam and Mettu. Based on the foregoing, we vacate the administrative law judge's findings at Section 718.204(b)(2)(i), (ii), and remand the case for a reassessment of the validity of the new pulmonary function studies and blood gas studies, and a redetermination of whether the weight of this evidence is sufficient to support a finding of total respiratory disability. As the administrative law judge's

[7] The administrative law judge properly credited Dr. Fino's invalidation of his own pulmonary function study of December 16, 2009. Further, while employer correctly notes that Dr. Craven did not explicitly indicate that claimant's April 1, 2011 pulmonary function study was valid, Employer's Brief on cross-appeal at 2-3, the administrative law judge could properly discount Dr. Broudy's invalidation of the study, as it was based on the criteria used by the American Thoracic Society rather than the standards set by the Department of Labor.

findings thereunder will necessarily affect her weighing of the new medical opinions, we must also vacate her findings at Section 718.204(b)(2)(iv), for a reevaluation and weighing of this evidence on remand. In the interest of judicial economy, however, we note our agreement with employer's arguments on cross-appeal that a physician's conclusions must be adequately supported by their underlying documentation, and that an opinion based in large part upon the results of invalid tests may not be sufficiently reliable to qualify as well-reasoned. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984).

Because the administrative law judge's findings on the issue of total disability affected her weighing of the evidence on the remaining elements of entitlement, we also vacate her findings on the issues of the existence of pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c). If, on remand, the administrative law judge finds that the new evidence is insufficient to establish total respiratory disability at Section 718.204(b) and a change in an applicable condition of entitlement at Section 725.309, claimant will be precluded from entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). If claimant establishes a change in an applicable condition of entitlement on remand, *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, BLR (6th Cir. 2012), the administrative law judge must review the entire record, including the earlier evidence on the issue of total disability, and determine whether the weight of the evidence is sufficient to establish claimant's entitlement to benefits. *See* 20 C.F.R. §725.309(d)(4). In this regard, because it is not clear whether the administrative law judge applied the proper standard in determining whether claimant's surface mining conditions were substantially similar to those in an underground mine, the administrative law judge is directed to reassess the relevant evidence and determine whether claimant's thirty years of surface coal mine employment were equivalent to at least fifteen years of underground coal mine employment, entitling claimant to invocation of the amended Section 411(c)(4) presumption.

To establish that surface mining conditions were substantially similar to those in an underground mine, a claimant need only establish that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 480, 22 BLR 2-265, 2-276 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988); *see Harris v. Cannelton Inds.*, 24 BLR 1-217, 1-223 (2011). A claimant is not required to demonstrate that the environmental conditions at the surface mine are similar to the "most dusty area of an underground coal mine." *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-7 (1987). Additionally, the Board has held that a surface worker at an underground coal mine site is not required to show comparability of environmental

conditions in order to qualify for the amended Section 411(c)(4) presumption. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979)(Smith, Chairman, dissenting).

In the present case, the administrative law judge summarized claimant's testimony regarding his thirty years of surface mining, and determined that claimant operated machinery with open cabs for the first six or seven years of his employment, after which time the cabs were enclosed, and that claimant's last ten years of employment with employer were spent at the tipple. The administrative law judge noted that:

> Regarding his work at the tipple, Claimant testified that he was classified as an end load operator but that he performed all types of work. Those duties included operating the end loader, bobcat, and back hoe, cleanup work, and washing tipples. [Hearing Transcript] at 20-21. Claimant testified that the coal mine dust would fly back on him when it was dumped on the ground. The end loader was a closed cab, however, the bobcat was an open cab. Claimant stated that he was exposed to "a whole lot" of coal mine dust at the tipple and that the workers often looked like deep miners once they got off work. He was also exposed to coal mine dust that was on the belts running from the tipple to the outside. Claimant further testified that most of his 30 years of coal mine work was done on an end loader. [Hearing Transcript] at 20-26.

Decision and Order at 6. In finding that claimant failed to establish at least fifteen years of qualifying coal mine employment, the administrative law judge concluded that:

> The majority of Claimants' work was spent as an enclosed end load operator; however, outside of his initial 6 to 7 years or when an end loader broke down, Claimant was in an enclosed cab at this time. The fact that his end loader cab did leak coal mine dust does not establish that it was of the persistence and volume of an underground coal miner. Similarly, the fact that end loaders and bobcat operators had an appearance of deep miners after their shift does not establish that they in fact were exposed to similar types of coal dust. Accordingly, I find that Claimant is not entitled to the benefit of the [amended Section 411(c)(4)] presumption.

Decision and Order at 6. Contrary to the administrative law judge's finding, however, claimant is not required to establish that he was exposed to similar *types* of coal dust. Rather, exposure to any type of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment. *See Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 9186); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990).

Additionally, it is not clear from the record whether claimant's surface work at the tipple was performed at the site of an underground mine. Consequently, the administrative law judge is directed to reassess the relevant evidence on remand and determine whether claimant has established at least fifteen years of qualifying coal mine employment.

If, on remand, the administrative law judge finds that claimant's thirty years of surface mining equates to at least fifteen years of underground coal mine employment, claimant will be entitled to invocation of the amended Section 411(c)(4) presumption, and the administrative law judge must determine whether employer has established rebuttal with affirmative proof that claimant does not have pneumoconiosis or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). If the presumption is not invoked, the administrative law judge must reassess the evidence of record on the issues of pneumoconiosis at Section 718.202 and disability causation at Section 718.204(c), and determine whether claimant has met his burden of establishing entitlement to benefits. In the interest of judicial economy, we instruct the administrative law judge on remand to reevaluate whether the discrepancy between claimant's actual smoking history of five cigars per day for thirteen years and Dr. Alam's reliance on a smoking history of five cigars per day for nine years is sufficiently significant to affect the credibility of his opinion, that claimant's respiratory impairment is caused in major part by thirty years of coal dust exposure and in lesser part by smoking. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

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