

BRB No. 12-0233 BLA

EARL B. MOUNTS)
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 Claimant-Respondent)
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 v.)
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 PIKEVILLE COAL COMPANY) DATE ISSUED: 02/13/2013
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 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Awarding Benefits (2010-BLA-05071) of Administrative Law Judge Theresa C. Timlin, rendered on a subsequent claim filed on May 14, 2004, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The pertinent procedural history of this case is as follows.¹ In a Decision and Order dated April 16, 2007,

¹ Claimant filed his initial claim for black lung benefits on May 3, 2001, which was denied by the district director for failure to establish any of the elements of

Administrative Law Judge Janice K. Bullard denied benefits because claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Claimant filed a request for modification on February 4, 2008, which was denied by the district director. Director's Exhibits 69, 75. Claimant filed a second request for modification on May 29, 2009. Director's Exhibit 78. The district director issued a Proposed Decision and Order denying benefits on August 3, 2009. Director's Exhibit 82. Claimant requested a hearing, which was held on October 26, 2010, before Judge Timlin (the administrative law judge).

In her Decision and Order issued on December 30, 2011, which is the subject of this appeal, the administrative law judge credited claimant with twenty years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence, in conjunction with the previous submitted evidence, established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). The administrative law judge, therefore, found that claimant satisfied his burden to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and a basis for modification under 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge did not consider all of the relevant evidence as to whether claimant is totally disabled. Employer further asserts that the administrative law judge erred in failing to make a specific finding as to whether granting claimant's modification request would render justice under the Act. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal. Employer has filed a reply, reiterating its contentions 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.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

entitlement. Director's Exhibit 1. Claimant took no further action until filing the current subsequent claim. Director's Exhibit 3.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

The regulations provide that a subsequent claim, filed more than one year after the effective date of a final order denying a claim, must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement³ has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309. Claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the evidence established the existence of pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Buck Creek Coal Co. v. Sexton*, F.3d , No. 11-4304, 2013 WL 135352 (6th Cir. Jan. 10, 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Employer asserts on appeal that the administrative law judge erred in finding that claimant is totally disabled. In considering the issue of total disability, the administrative law judge found that none of the pulmonary function studies was qualifying for total disability at 20 C.F.R. §718.204(b)(2)(i).⁴ Decision and Order at 14; Director's Exhibits 12, 18; Claimant's Exhibit 2; Employer's Exhibit 2. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge weighed five blood gas studies dated August 17, 2004, December 7, 2004, June 5, 2005, July 28, 2005 and May 6, 2008. Decision and Order at 4. Citing the progressive nature of pneumoconiosis, the administrative law judge credited the two most recent studies that had qualifying values at rest and concluded that claimant established total disability under 20 C.F.R. §718.204(b)(2)(ii).⁵ *Id.* at 15. In considering the medical opinion evidence at 20 C.F.R.

³ In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the 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).

⁴ A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B and C. A "non-qualifying" pulmonary function test or arterial blood gas study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

⁵ The August 17, 2004 arterial blood gas study was qualifying at rest, but non-qualifying during exercise. Director's Exhibit 12. The December 7, 2004 and June 15,

§718.204(b)(2)(iv), the administrative law judge found that the opinions of Drs. Agarwal, Rosenberg and Forehand established that claimant is totally disabled. *Id.* at 16. Weighing all of the evidence together, the administrative law judge concluded that claimant satisfied his burden to establish total disability.⁶ *Id.*

Employer correctly asserts that the administrative law judge did not address an arterial blood gas study obtained by Dr. Rosenberg in conjunction with his examination of claimant on August 3, 2009, which was non-qualifying for total disability.⁷ Employer's Exhibit 3. Claimant acknowledges the administrative law judge's error, but contends that substantial evidence nonetheless supports the administrative law judge's finding of total disability.

The Board's scope of review is a narrow one that can be exceeded if it engages in the initial consideration of evidence, which is the responsibility of the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Bozick v. Consolidation Coal Co.*, 732 F.2d 64, 6 BLR 2-23 remanded for recon., 735 F.2d 1017, 6 BLR 2-119 (6th Cir. 1984). When an administrative law judge fails to consider relevant evidence, which conflicts with credited evidence, the proper course for the Board is to remand the case to the administrative law judge, rather than to assume that consideration of the evidence would not alter the administrative law judge's judgment. *See also Anderson Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As the August 3, 2009 blood gas study was admitted into evidence at the October 26, 2010 hearing, the administrative law judge erred in failing to weigh that study pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See* Employer's Exhibit 3; Hearing Transcript at 11.

2005 studies were conducted at rest only and were non-qualifying. Director's Exhibit 18; Employer's Exhibit 1. The July 28, 2005 and May 6, 2008 studies were conducted at rest only and were qualifying for total disability. Director's Exhibit 79; Claimant's Exhibit 2.

⁶ The administrative law judge found that claimant was not eligible for any of the presumptions available to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 15.

⁷ The August 3, 2009 arterial blood gas study had a PCO₂ of 37.1 and a PO₂ of 80.2. Employer's Exhibit 1. Appendix C provides that for a study conducted at an elevation of 0-02999 feet above sea level, if the PCO₂ is less than 38, the PO₂ must be equal to or less than 62 in order to qualify for total disability. *See* 20 C.F.R. §718.204(b)(2)(ii).

Therefore, because the administrative law judge failed to weigh all of the relevant blood gas study evidence, we vacate the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and remand the case for further consideration. *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991) (en banc). To the extent that the administrative law judge's findings regarding the blood gas study evidence impacted the weight accorded the medical opinion evidence, we also vacate her findings that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and disability causation under 20 C.F.R. §718.204(c).⁸ On remand, the administrative law judge is instructed to consider all relevant evidence of record on the issue of the total disability and provide a rationale for her credibility determinations in accordance with Administrative Procedure Act.⁹ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As necessary, the administrative law judge must determine whether claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Additionally, we agree with employer that the administrative law judge erred in awarding benefits in this case without rendering a specific finding as to whether granting claimant's modification request would render justice under the Act. *See generally Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *McCord v. Ciphaz*, 523 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999). Therefore, on remand, if reached, the administrative law judge is instructed to render a specific finding as to whether granting claimant's request for modification under 20 C.F.R. §725.310 would render justice under the Act, prior to finding that claimant is entitled to benefits.

⁸ On March 23, 2010, amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Because both of claimant's claims were filed before January 1, 2005, the recent amendments do not apply to this case. 30 U.S.C. §921(c)(4).

⁹ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

Accordingly, the administrative law judge's Decision and Order Granting Modification and Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge