BRB Nos. 09-0487 BLA
and 09-0487 BLA-A

ERMAL VANCE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	DATE ISSUED: 06/23/2010
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (08-BLA-5630) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] 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 at least twenty-two years of coal mine employment,[2] as stipulated, and found that claimant established that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.[3]

On appeal, claimant challenges the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Claimant filed a response to employer's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief in either appeal.

By Order dated March 30, 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] Claimant's first claim for benefits, filed on October 23, 2000, was denied on January 29, 2001, because claimant did not establish that he was totally disabled. Director's Exhibit 1. Claimant took no further action in regard to his 2000 claim. *Id.* Claimant filed his current claim on October 1, 2007. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Subsequently, pursuant to a Motion for Reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge corrected his initial decision to state that employer is the properly designated responsible operator. Employer does not challenge this finding. Therefore, the finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

111-148, which amended the Act with respect to the entitlement criteria for certain claims. The Director, claimant, and employer have responded.

The Director notes that Section 1556 reinstated a rebuttable presumption of total disability due to pneumoconiosis that is potentially applicable to claims such as this one.[4] Director's Brief at 1-2. The Director states that, since the presumption applies if claimant can establish that he suffers from a totally disabling respiratory impairment, the Board "must review the [administrative law judge's] total disability finding to determine whether the 2010 amendments would affect the outcome of this case." Director's Brief at 2. Whether the Board affirms or vacates that finding, the Director states, the Board must remand this case to the administrative law judge: Affirming total disability will require the administrative law judge "to address whether the Claimant has established total disability due to pneumoconiosis under the Section 411(c)(4) presumption," while vacating total disability will require him "to reconsider whether the evidence establishes total disability, and thus invocation of the Section 411(c)(4) presumption." *Id*. If the Board reverses the finding of total disability, however, a remand to the administrative law judge will be unnecessary. *Id*. The Director states further that, if the Section 411(c)(4) presumption is considered on remand, the administrative law judge should allow for the submission of additional evidence by employer, and from claimant in response to employer's new evidence. Director's Brief at 3.

Claimant responds that Section 1556 affects this case, and requests that this case be remanded to the administrative law judge so that he may consider the claim in light of the recent amendment to the Act. Claimant's Supplemental Brief at 3.

Employer responds that, although Section 1556 may affect this case, a remand to the administrative law judge for reconsideration of the claim in light of the recent amendment is unnecessary, because the Board should reverse the administrative law judge's finding of total disability. Employer's Supplemental Brief at 5-6. If the Board does not reverse, employer requests that the case be remanded to afford employer the

[4] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Director's Brief at 1. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). As the Director notes, claimant filed his claim after January 1, 2005, and the administrative law judge accepted the parties' stipulation to twenty-two years of coal mine employment.

opportunity to reopen the hearing record to present evidence responsive to the Section 411(c)(4) amendment, and for proper consideration of all relevant medical evidence.[5] *Id*. at 7-10.

Based upon the parties' responses, and our review, we conclude that this case is affected by Section 1556. As will be discussed below, we must vacate the administrative law judge's finding of total disability. Because we must remand this case for the administrative law judge to reconsider whether claimant has established total disability, we will also instruct him to consider the claim in light of the amendment to the Act.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant

[5] Employer also notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 9 n.7. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. Employer's request to hold this case in abeyance is denied.

had to submit new evidence establishing that he is totally disabled.[6] 20 C.F.R. §725.309(d)(2), (3).

Employer asserts that the administrative law judge erred in his consideration of the new medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer contends that the administrative law judge failed to consider all of the relevant evidence, and erred in finding that Dr. Zaldivar's opinion supports a finding that claimant is totally disabled. Employer's Brief at 16. Employer urges reversal of the administrative law judge's finding, on the grounds that there is no objective evidence of total disability, and the medical opinion evidence is "legally insufficient" to establish total disability. Employer's Supplemental Brief at 6. Employer's arguments have merit, in part.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge weighed the new medical opinions of Drs. Rasmussen and Zaldivar. Based on the "markedly reduced" results of a diffusion capacity study, Dr. Rasmussen opined that claimant is unable to perform his usual coal mine employment. Director's Exhibit 11. Dr. Rasmussen noted that, although claimant could not perform an exercise blood gas study because of his inability to walk on a treadmill, a "diffusion capacity this low is usually associated with significant impairment in oxygen transfer during exercise and is considered a marker of significant . . . impairment in lung function." *Id*. at 3. Dr. Zaldivar stated in his report that, based on pulmonary function and blood gas study results, claimant does not have any pulmonary impairment that would preclude him from performing his usual coal mine employment. Employer's Exhibit 1 at 3. With respect to Dr. Rasmussen's diffusion capacity study, Dr. Zaldivar opined that the results may have been "artificially reduced" by carbon monoxide resulting from claimant's smoking, and he noted further that, whether claimant's blood gases would drop with exercise was "speculative." *Id*. When deposed, Dr. Zaldivar reiterated that the diffusion capacity results may have been reduced by carbon monoxide present in claimant's blood due to his smoking; additionally, he noted that claimant has had a partial resection of a lung, which could reduce the diffusion capacity. Employer's Exhibit 6 at 24, 27. With respect to

[6] Despite finding that claimant established total disability, the administrative law judge determined that claimant "ha[d] not established that a material change in condition has taken place since the previous denial. . . ." Decision and Order at 23.

[7] The administrative law judge found that total disability was not established by any of the other methods set forth under 20 C.F.R. §718.204(b)(2)(i)-(iii). Specifically, he found that the new pulmonary function studies and blood gas studies were non-qualifying for total disability, and that there was no evidence of cor pulmonale with right-sided congestive heart failure.

whether claimant has an impairment, Dr. Zaldivar testified that "[h]e has a mild—Well, he does have [a] pulmonary impairment. He has a mild airway obstruction. He has a diffusion abnormality. But we do not know the extent of how it will affect exercise." Employer's Exhibit 6 at 33. When asked whether claimant's impairment would prevent him from performing his usual coal mine employment, Dr. Zaldivar responded, "No. There is no evidence that it would. He was a mechanic in the surface mine. He might. If he has to do very heavy labor, it may interfere with his work based on the diffusion abnormality which has nothing to do with pneumoconiosis." *Id*.

The record also contains Dr. Hippensteel's medical report and deposition, submitted by employer. Employer's Exhibits 4, 6. Dr. Hippensteel opined that the medical testing performed did not reflect the presence of a pulmonary impairment sufficient to prevent claimant from performing his work in the mines. Employer's Exhibits 4, 5.

The administrative law judge initially found that claimant's "last coal mining positions required heavy manual labor." Decision and Order at 19. He then found that total disability was established, based on the opinions of Drs. Rasmussen and Zaldivar:

> Both Dr. Rasmussen and Dr. Zaldivar opined that [claimant's] diffusion impairment would or might prevent him from performing his last coal mine work, although they disagree as to its cause. While I find Dr. Rasmussen's conclusion somewhat speculative, I am swayed by Dr. Zaldivar's comment about the reduced diffusion capacity. Moreover, the miner has testified about his shortness of breath and inability to hunt, walk far, climb stairs, etc. Thus, despite the non-qualifying [objective studies], I find he has established total respiratory disability.

Decision and Order at 20.

Initially, we reject employer's argument that the administrative law judge's finding must be reversed. Employer's Supplemental Brief at 6. As summarized above, the record contains medical evidence which, if properly credited, may establish that claimant has a respiratory impairment that prevents him from performing his usual coal mine employment. *See* 20 C.F.R. §718.204(b)(1)(i),(b)(2)(iv). Contrary to employer's contention, the fact that Dr. Zaldivar did not express his opinion as "a definitive diagnosis of disability," Employer's Supplemental Brief at 6, does not necessarily preclude the administrative law judge from relying on it. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763-64, 21 BLR 2-587, 2-605-06 (4th Cir. 1999). Further, although employer notes that claimant's pulmonary function and blood gas studies did not support a finding of total disability, the physicians linked their opinions to the results of claimant's

diffusion capacity study. *See Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-24-25 (4th Cir. 1991). Thus, we decline employer's request to reverse the administrative law judge's finding.

There is merit, however, in employer's argument that the administrative law judge did not consider Dr. Hippensteel's opinion that claimant's objective testing, including the diffusing capacity test, "did not show evidence of enough pulmonary impairment . . . to keep him from going back to his work in the mines. . . ." Employer's Exhibit 5 at 19; Employer's Exhibit 4; *see* 30 U.S.C. §923(b). Further, we agree with employer that the administrative law judge did not adequately consider Dr. Zaldivar's opinion, in its entirety, before relying on it to find total respiratory disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Specifically, the administrative law judge indicated that he was "swayed by Dr. Zaldivar's comment about the reduced diffusion capacity." Decision and Order at 20. But the record reflects that Dr. Zaldivar made several comments about the diffusion capacity study, including that (1) it was artificially lowered by claimant's smoking, (2) it may reflect that claimant has had part of one lung removed, (3) if it reflected a real diffusion impairment, there was no evidence that the impairment would be totally disabling, and (4) the impairment may interfere with claimant's ability to perform his coal mine work if he had to perform "*very heavy* labor." Employer's Exhibit 6 at 33 (emphasis added). Because the administrative law judge did not analyze all of Dr. Zaldivar's opinion regarding the diffusion capacity study, or integrate the doctor's opinion regarding claimant's ability to perform "very heavy" labor with his own finding that claimant had to perform "heavy" labor, substantial evidence does not support the administrative law judge's finding of total disability. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Based on the foregoing, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §§718.204(b)(2)(iv), and remand this case to him for further consideration of the new medical opinions. On remand, the administrative law judge must consider Dr. Hippensteel's opinion, along with those of Drs. Rasmussen and Zaldivar. The administrative law judge must consider the documentation and reasoning underlying the medical opinions, along with the physicians' qualifications, and explain whether the medical opinions, when considered in light of the exertional requirements of claimant's usual coal mine employment, establish the existence of a totally disabling respiratory impairment. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Further, the administrative law judge must take into account the qualified language of Dr. Zaldivar's opinion, *see Perry*, 469 F.3d at 366, 23 BLR at 2-386; *Mays*, 176 F.3d at 763-64, 21 BLR at 2-605-06, and must explain the bases for his credibility determinations. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

In light of our determination to vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), we additionally vacate his finding that the new evidence establishes total disability at 20 C.F.R. §718.204(b)(2), 725.309(d). After considering the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), on remand, the administrative law judge must weigh all relevant new evidence together under 20 C.F.R. §§718.204(b)(2), 725.309(d), to determine whether total disability is established, and must explain his credibility determinations.

Application of Section 411(c)(4):

Because this case was filed after January 1, 2005, and claimant was credited with twenty-two years of coal mine employment, [8] the administrative law judge, on remand, must consider whether the new evidence establishes that claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411 (c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

Finally, in light of our determination to remand this case for further findings relevant to the Section 411(c)(4) presumption, and for the submission of additional evidence by the parties to address the change in law, we must also vacate the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), or that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Therefore, we decline to address, as premature, claimant's arguments relevant to these findings.

[8] Employer notes that claimant must still establish that he has at least fifteen years of underground or "substantially similar" coal mine employment. Employer's Supplemental Brief at 3 n.3, 5.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge