BRB No. 10-0186 BLA

JOHNNY SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAWKEYE COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 11/24/2010
	)	
ARCH COAL, INCORPORATED C/O UNDERWRITERS SAFETY & CLAIMS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits on Second Modification of a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Barry H. Joyner (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:

Employer appeals the Decision and Order – Award of Benefits on Second Modification of a Subsequent Claim (2008-BLA-5084) of Administrative Law Judge Larry S. Merck, issued 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).[1] In his Decision and Order dated October 26, 2009, the administrative law judge credited claimant with at least seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that, based on the newly submitted evidence, claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and, therefore a change in an applicable condition of entitlement at 20 C.F.R. §§725.309(d), 725.310. On the merits, the administrative law judge determined that claimant established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not properly consider whether claimant established "a change in his condition" under 20 C.F.R. §725.309(d), or whether he satisfied the requirements for modification under 20 C.F.R. §725.310. Employer's Brief at 11-15. Employer further asserts that the administrative law judge erred in finding Dr. Rasmussen's opinion to be sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4),

[1] Claimant filed his initial claim for benefits on April 29, 1999, which was denied by Administrative Law Judge Daniel J. Roketenetz on May 30, 2002, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on September 30, 2002, which was treated as a request for modification. *Id*. In a Decision and Order issued on June 22, 2004, Administrative Law Judge Gerald M. Tierney denied benefits, finding that while claimant established total disability, he failed to establish the existence of pneumoconiosis. *Id*. No further action was taken until claimant filed his current subsequent claim on August 11, 2005. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on June 1, 2006, finding that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 46. On December 6, 2006, claimant filed a request for modification, which was denied by the district director on March 14, 2007. Director's Exhibits 50, 61. Claimant filed his second request for modification on May 15, 2007, which the district director again denied on August 23, 2007. Director's Exhibits 62, 73. Claimant requested a hearing and the case was assigned to Administrative Law Judge Larry S. Merck (the administrative law judge).

and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Employer asks the Board to reverse the award as a matter of law or, in the alternative, to remand the case for further consideration. Neither claimant nor the Director, Office of Workers' Compensation Programs, has responded to employer's appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. Proper Legal Standard

Employer asserts that the administrative law judge erred in failing to apply the requirements for modification pursuant to 20 C.F.R. §725.310. Employer states that because the district director's most recent denial was issued on March 14, 2007, the administrative law judge erred in failing to consider whether evidence developed subsequent to that date, established a change in conditions or whether claimant established a mistake in fact with regard to the district director's denial of benefits. Employer's Brief at 13.

Contrary to employer's assertion, the administrative law judge was not required to consider whether the evidence was sufficient to establish modification of the district director's denial of claimant's subsequent claim. The Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed in the administrative law judge's decision on the merits, and that the administrative law judge is not constrained by any rigid procedural

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 8. 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 (1989)(*en banc*).

process in adjudicating claims in which modification of the district director's decision is sought. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Employer also argues that the administrative law judge erred in failing to apply the principles of *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and *res judicata* to his consideration of claimant's subsequent claim. Employer asserts that, because claimant has failed to demonstrate a material worsening of his condition since Judge Tierney's denial of benefits in 2004, he has not satisfied the requirements of 20 C.F.R. §725.309. Employer, however, misstates the legal standard applicable for consideration of a subsequent claim. In this subsequent claim, claimant must establish 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. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3). Therefore, Dr. Rasmussen's opinion, addressing the existence of legal pneumoconiosis, if credited, is sufficient to establish a change in an applicable condition of entitlement under the requirements of 20 C.F.R. §725.309.[3]

II. The Existence of Legal Pneumoconiosis

A. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Jarboe, and King, along with certain hospital and medical treatment records. The administrative law judge determined that Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease (COPD)/emphysema was due to coal dust exposure and cigarette smoking, was reasoned and documented as it was based on a physical examination, claimant's symptom of chronic productive cough, the results of objective testing and an understanding of claimant's smoking and work histories. Decision and Order at 14-15; Director's Exhibit 14.

In contrast, the administrative law judge gave little weight to Dr. Jarboe's opinion, that claimant's impairment was not due, in part, to coal dust exposure, because he found

[3] Judge Tierney found that claimant failed to establish the existence of either clinical or legal pneumoconiosis. Director's Exhibit 1.

that it was not well-reasoned or well-documented. Decision and Order at 15-28; Director's Exhibits 17, 18, 67; Employer's Exhibits 1, 2, 3. The administrative law judge determined that Dr. Jarboe's statement, that emphysema due to coal mine dust exposure only occurs in the presence of clinical pneumoconiosis, was contrary to the findings of the Department of Labor (DOL), that "most evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life [i.e. chronic bronchitis, emphysema, or asthma] . . . and this may occur independently of [clinical pneumoconiosis] CWP." Decision and Order at 15-16, *quoting* 65 Fed. Reg. 79,939 (Dec. 20, 2000). The administrative law judge also indicated that Dr. Jarboe's conclusion, that claimant's preserved FVC and substantially reduced FEV1 are characteristic of an impairment due to cigarette smoking, was "unpersuasive" because it implied that coal dust exposure rarely causes disabling obstructive lung disease, contrary to the DOL's determination that "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners," and that "this causality is [not] merely rare." Decision and Order at 16, *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008) (*citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000)). In addition, the administrative law judge found that Dr. Jarboe's reliance on the reversibility of claimant's impairment after bronchodilator administration, to determine that coal dust exposure was not a cause of the impairment, was in error. *Id*. at 19. The administrative law judge noted that claimant's post-bronchodilator pulmonary function study still produced qualifying results, which demonstrated that a portion of claimant's impairment is irreversible. *Id*. Further, the administrative law judge determined that Dr. Jarboe did not adequately explain why coal dust exposure did not contribute, at least in part, to claimant's impairment. *Id*.

The administrative law judge gave little weight to Dr. King's opinion, that claimant suffered from legal pneumoconiosis, because he found that it was not sufficiently reasoned or documented since Dr. King did not identify the objective medical evidence he relied on, except for a sleep apnea test, in reaching his conclusions. Decision and Order at 31; Director's Exhibit 68. Regarding the hospital and treatment records, the administrative law judge gave them little weight, as he found that none of the physicians adequately explained whether claimant's COPD was due, in part, to coal dust exposure. Decision and Order at 33; Director's Exhibits 63, 70, 71; Claimant's Exhibit 3. Consequently, crediting Dr. Rasmussen's opinion that claimant has legal pneumoconiosis, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Decision and Order at 34.

In reviewing all of the evidence of record as to whether claimant established the existence of legal pneumoconiosis, the administrative law judge indicated that he adopted, unless otherwise noted, the medical evidence summaries and the findings and conclusions of Judge Roketenetz and Judge Tierney, rendered in the prior claims.

Decision and Order at 34. The administrative law judge specifically discussed two earlier medical reports by Drs. Ammisetty and Jarboe, summarized in Judge Tierney's decision. *Id*. at 36. The administrative law judge accorded little weight to Dr. Ammisetty's opinion, that claimant has a respiratory condition due, in part to coal dust exposure, as the doctor recorded a coal mine employment history of thirty-two years, while the administrative law judge found that claimant had seventeen years of coal mine employment. *Id*. The administrative law judge also gave little weight to Dr. Jarboe's older opinions, noting that the physician has applied the same rationale for excluding coal dust exposure as a cause of claimant's respiratory condition throughout this case, and the administrative law judge did not find it to be persuasive. *Id*. Therefore, relying on Dr. Rasmussen's opinion, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion, over that of Dr. Jarboe, in concluding that claimant established the existence of legal pneumoconiosis. Employer states that while the administrative law judge "gave passing reference to the invalidity of Dr. Rasmussen's x-ray reading to discredit his 'clinical' pneumoconiosis' finding, [he] never explained why this did not also weigh against the credibility of Dr. Rasmussen's 'legal' pneumoconiosis opinion." Employer's Brief in Support of Petition for Review at 17. Employer asserts that administrative law judge has not explained why Dr. Rasmussen's opinion is reliable since the administrative law judge "discounted Dr. Rasmussen's objective testing." *Id*. at 18. Employer maintains that "Dr. Rasmussen's opinion is not well[-]reasoned or well[-] explained as a matter of law," since he "did not bother to review all of the evidence of record" as did Dr. Jarboe, and, therefore, did not have a complete picture of claimant's health. *Id*. Employer further argues that the administrative law judge erred in failing to consider the physicians' credentials in resolving the conflict in the medical evidence, and that he failed to explain the bases for his credibility findings at 20 C.F.R. §718.202(a)(4), in accordance with the Administrative Procedure Act.[4]

Contrary to employer's contention, the administrative law judge reasonably considered Dr. Rasmussen diagnosis of COPD/emphysema, based on the objective test results and claimant's symptoms, separately from his diagnosis of clinical

[4] 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

pneumoconiosis, based on a positive x-ray. Decision and Order at 13-15; Director's Exhibit 14. Furthermore, the administrative law judge properly considered the credentials of the physicians and the amount of evidence each doctor reviewed in reaching his opinion.[5] Decision and Order at 12-28. We reject employer's contention that the administrative law judge erred by not giving greater weight to Dr. Jarboe's opinion, on the basis that he reviewed more evidence than Dr. Rasmussen, as it is within the administrative law judge's discretion as fact-finder to weigh the evidence, draw inferences and determine credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

The administrative law judge permissibly concluded that Dr. Rasmussen's opinion was reasoned and documented, insofar as Dr. Rasmussen attributed claimant's respiratory condition to both coal dust exposure and smoking. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We therefore affirm the administrative law judge's decision to accord Dr. Rasmussen's opinion probative weight at 20 C.F.R. §718.202(a)(4), and reject employer's argument that it is legally insufficient to satisfy claimant's burden of proof.[6]

There is also no merit to employer's assertion that the administrative law judge improperly substituted his opinion for that of a medical expert in rejecting Dr. Jarboe's opinion. The administrative law judge permissibly assigned Dr. Jarboe's opinion, that

[5] Dr. Rasmussen is Board-certified in internal medicine and forensic medicine. Director's Exhibit 14. Dr. Jarboe is Board-certified in internal medicine and pulmonary disease. Director's Exhibit 17. Dr. King's credentials are not in the record.

[6] Employer asserts that the administrative law judge "discounted Dr. Rasmussen's objective testing, but failed to address this factor before crediting his opinion." Employer's Brief in Support of Petition for Review at 18. Contrary to employer's contention, although the administrative law judge found that Dr. Rasmussen's qualifying objective tests were outweighed, in his consideration of the evidence at 20 C.F.R. §718.204(b)(2)(i), (ii), such findings do not preclude the administrative law judge from crediting Dr. Rasmussen's opinion as to the existence of legal pneumoconiosis, as there is no dispute in this record that claimant has an obstructive respiratory condition and Dr. Rasmussen's tests have not been invalidated.

claimant does not have a respiratory condition due to coal dust exposure, less weight on the ground that the doctor made statements that were in conflict with the science relied upon by the DOL in promulgating the regulatory definition of legal pneumoconiosis. *See* 65 Fed. Reg. 79,939 (Dec. 20, 2000); *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge also permissibly gave Dr. Jarboe's opinion less weight because he did not explain, to the satisfaction of the administrative law judge, why coal dust exposure was not a contributing cause of the residual portion of claimant's obstructive respiratory impairment on pulmonary function testing, which was qualifying for total disability and did not respond to bronchodilators. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483-484; *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004) (unpub).

We consider employer's arguments with respect to 20 C.F.R. §718.202(a)(4) to be a request that the Board reweigh the evidence, which we are not empowered to do. *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), based on Dr. Rasmussen's opinion and, thus, established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[7] We also affirm the administrative law judge's finding, based on his review of the record, as a whole, that claimant has pneumoconiosis.

[7] Employer further asserts that the administrative law judge erred in failing to "consistently" apply the most recent evidence rule to his consideration of the evidence in this case. Employer's Brief in Support of Petition for Review at 21 n.5. Because the administrative law judge cited to the chronology of the evidence as grounds for giving less weight to the opinions of Drs. Dineen, Lane, and Lockey, in the prior claim, employer contends that the administrative law judge was required to give controlling weight to Dr. Jarboe's opinion in this case, as he has performed the most recent examination of claimant. *Id*. The administrative law judge, however, reasonably found that the evidence submitted in conjunction with claimant's prior claim was less probative of claimant's current medical condition and, therefore, he relied upon the evidence submitted in conjunction with claimant's subsequent claim, dating from 2004-2007. *See Pate v. Alabama By-Products Corp*., 6 BLR 1-636 (1983*); Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). Furthermore, to the extent that the administrative law judge cited proper grounds for finding that Dr. Jarboe's opinion was not sufficiently reasoned, as to the issue of the existence of legal pneumoconiosis, the fact that Dr. Jarboe performed the most recent examination is moot. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

III. Total Disability

A. The Administrative Law Judge's Findings

The administrative law judge considered the evidence submitted in conjunction with claimant's subsequent claim to be the most probative of his condition and noted that there were four newly submitted pulmonary function studies of record, of which the October 20, 2005 and April 6, 2006 studies were qualifying, but the June 21, 2007 and June 19, 2008 studies were non-qualifying. Decision and Order at 38; Director's Exhibits 16, 18, 67; Claimant's Exhibit 1. The administrative law judge gave the most weight to the two most recent non-qualifying studies, and concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge considered three blood gas studies. Decision and Order at 38-39; Director's Exhibits 14, 1, 67. He found that a blood gas study obtained by Dr. Rasmussen on October 2, 2005, had non-qualifying values at rest, but qualifying values during exercise. He found that arterial blood gas testing conducted on Aril 6, 2006 and June 21, 2007 had non-qualifying results, at rest, and that "there was no exercise study in either test." Decision and Order at 39. Thus, the administrative law judge concluded that because "the majority" of the arterial blood gas studies are non-qualifying, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 39. The administrative law judge also found that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of record that claimant has cor pulmonale with right-sided congestive heart failure. *Id*.

In determining whether claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially considered the newly submitted medical opinions of Drs. Rasmussen and Jarboe. The administrative law judge found that Dr. Rasmussen's opinion, that claimant was totally disabled from returning to his last coal mine employment due to his marked loss of lung function, was well-reasoned and well-documented, as it was based on Dr. Rasmussen's "examination of [c]laimant, patient history, and objective medical evidence." Decision and Order at 39; Director's Exhibit 14. However, the administrative law judge gave little weight to Dr. Jarboe's 2007 opinion, that claimant has no respiratory disability, because it was inconsistent with his examination findings in the prior claim, that claimant had a totally disabling respiratory or pulmonary impairment. Decision and Order at 39-41; Director's Exhibits 17, 18, 67; Employer's Exhibits 1, 2, 3. Therefore, the administrative law judge concluded that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 41.

B. Arguments on Appeal

Employer contends that the administrative law judge failed to reconcile his finding that Dr. Rasmussen's opinion is sufficient to establish total disability, with his finding that the most recent pulmonary function studies and blood gas studies are non-qualifying. In addition, employer contends that the administrative law judge erred in finding that Dr. Jarboe did not explain the basis for his conclusion, based on the most recent examination of record, that claimant is not totally disabled. Further, employer argues that the administrative law judge did not properly address the exertional requirements of claimant's usual coal mine employment, in weighing the conflicting medical opinions regarding total disability.

Employer's assertions of error have merit. In determining that Dr. Rasmussen's diagnosis of a totally disabling respiratory impairment is well-reasoned, the administrative law judge did not address the significance of Dr. Rasmussen's reliance on qualifying objective studies obtained in 2005 to support his opinion that claimant is totally disabled, while the administrative law judge specifically credited the later pulmonary testing in 2007 and 2008, and the later arterial blood gas studies in 2006 and 2007, all of which were non-qualifying for total disability.[8] Further, although Dr. Rasmussen opined that claimant's moderate respiratory impairment disabled him from working, the administrative law judge did not address whether Dr. Rasmussen understood the exertional requirements of claimant's usual coal mine work when rendering his opinion. *Cornett*, 227 F.3d at 578, 22 BLR at 2-123-124. In addition, we agree with employer that the administrative law judge did not address Dr. Jarboe's explanation that his opinion regarding the extent of claimant's respiratory impairment has changed due to the improved results on the June 2007 pulmonary function and blood gas studies. *See Wojtowicz*, 12 BLR at 1-165.

Because the administrative law judge did not resolve all of the issues of fact and law presented under 20 C.F.R. §718.204(b)(2)(iv), his Decision and Order does not comply with the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988). Consequently, we vacate the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and remand this case for further consideration of that issue. Because we have vacated the administrative law judge's finding that claimant is totally disabled, we also vacate his finding that

[8] In assessing the credibility of the medical experts, the administrative law judge should consider that Dr. Rasmussen's October 20, 2005 arterial blood gas study results, obtained post-exercise, are qualifying and uncontradicted, as the April 6, 2006 and June 21, 2007 studies did not include exercise testing. Director's Exhibits 14, 18, 67.

claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, the administrative law judge is instructed to consider whether claimant has established total disability under any of the subsections of 20 C.F.R. §718.204(b)(2)(i)-(iv). If he determines that total disability has been established under one or more of the subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence and determine whether claimant has satisfied his burden of proof. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). The administrative law judge must also determine, as necessary, whether claimant has establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §781.204(c). *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

IV. Amendments to the Act

By Order dated April 29, 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. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[9] *Smith v. Hawkeye Coal Co.*, BRB No. 10-0186 BLA (Apr. 29, 2010)(unpub. Order). The Director and employer have responded.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005, and the administrative law judge credited claimant with more than fifteen years of coal mine employment. Employer contends that the amendments do not apply to this case because claimant's subsequent claim was finally denied by the district director on June 1, 2006, and, therefore, it was not a "pending" claim, as of March 23, 2010, and because claimant's 2007 modification request does not constitute a "claim"

[9] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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 is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

under the Act. Employer also contends that claimant does not have the requisite number of years of qualifying coal mine employment to establish invocation of the presumption, as the record establishes that claimant worked for less than fifteen years in underground coal mining. However, employer states that if the case is remanded for consideration under Section 411(cc), the record should be reopened so that employer has the opportunity to respond to the changes in the law.

Based on our review, we conclude that the case must be remanded to the administrative law judge for consideration of whether claimant has established invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4). In so doing, the administrative law judge should address employer's assertion that claimant does not have fifteen years in underground coal mine employment or qualifying surface coal mine work. If the administrative law judge finds that claimant has the requisite number of years of qualifying coal mine employment, and that he is totally disabled by a respiratory or pulmonary impairment, the administrative law judge shall conclude that claimant has established invocation of the presumption at Section 411(c)(4), and then he should consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). Any additional evidence submitted by the parties must be in accordance 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).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits on Second Modification of a Subsequent Claim is affirmed in part, 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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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