BRB No. 07-0655 BLA

K.J.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 06/30/2008
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

K.J.M., Coeburn, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Benefits (2004-BLA-00122) of Administrative Law Judge Linda S. Chapman with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case has a lengthy procedural history, which is set forth in the Board's prior decision in [*K.J.M.*] *v. Clinchfield Coal Co.*, BRB No. 05-0901 BLA, slip op. at 1-5

(Aug. 30, 2006) (unpub.). In that decision, the Board addressed claimant's appeal of the denial of his request for modification pursuant to 20 C.F.R. §725.310 (2000).[1] The Board affirmed the administrative law judge's finding that the prior denial of benefits did not contain a mistake in a determination of fact and her finding that the newly submitted evidence was insufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2)(ii)-(iv). *Id*. at 8-10. The Board further held, however, that the administrative law judge did not properly consider whether claimant established a change in conditions pursuant to 20 C.F.R. §718.204(b)(2)(i), based upon the newly submitted pulmonary function studies. *Id*. at 8. The Board remanded the case to the administrative law judge with instructions to render a finding as to claimant's height. The Board also directed the administrative law judge to determine whether the newly submitted pulmonary function studies produced qualifying values, in light of the fact that claimant's age at the time that the studies were performed exceeded the parameters of the tables set forth in Appendix B to 20 C.F.R. Part 718. *Id*.

On remand, the administrative law judge concluded, based upon her calculations of claimant's height and the appropriate FEV1 value, that the valid, newly submitted pulmonary function studies were nonqualifying and, therefore, insufficient to establish total disability at Section 718.204(b)(2)(i). The administrative law judge found, therefore, that claimant did not establish a change in conditions under Section 725.310 (2000) and denied claimant's request for modification of the prior denial of benefits.

In this appeal, claimant generally argues that the administrative law judge erred in determining that he did not prove that he is totally disabled. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), initially submitted a letter indicating that he would not file a brief in this appeal.

The Board subsequently requested the Director's opinion on the issue of the administrative law judge's extrapolation of pulmonary function study values in this case. Accordingly, the Board issued an Order in which the Director was asked to address the question of whether an administrative law judge can extrapolate appropriate pulmonary function study values for miners who are more than 71 years old and, if not, whether an administrative law judge should treat such studies as qualifying if the values are qualifying for a 71 year old. *K.J.M. v. Clinchfield Coal Co.*, BRB No. 07-0655 BLA

[1] The Department of Labor has revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*.. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The revised version of 20 C.F.R. §725.310 does not apply in cases, such as the present one, in which the claim was pending on the effective date of the new regulations.

(April 30, 2008) (unpub. Order). The Director responds, contending that it is improper for an administrative law judge to extrapolate values and that the administrative law judge should be instructed to treat the pulmonary function studies in question as qualifying because the results were below the table values for a 71 year old male. Employer has filed a reply brief in which it asserts that the Board should affirm the administrative law judge's findings at Section 718.204(b)(2)(i). Employer maintains that the method that the administrative law judge used produced values virtually identical to those produced by applying the equations that the Department of Labor relied upon in creating the tables set forth in Appendix B.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

The record contains newly submitted pulmonary function studies obtained by Dr. Agarwal on November 16, 2004 and by Dr. Castle on March 23, 2005. Claimant's Exhibit 1; Employer's Exhibit 8. On the November 16, 2004 pre-bronchodilator study, claimant produced an FEV1 of 1.88, an FVC of 2.56, and an MVV of 62. Claimant's Exhibit 1. Following the inhalation of a bronchodilator, claimant produced an FEV1 of 1.85, an FVC of 2.30, and an MVV of 66. *Id*. On the March 23, 2005 pre-bronchodilator study, claimant produced an FEV1 of 1.88, an FVC of 2.63, and an MVV of 58. Employer's Exhibit 8. The post-bronchodilator FEV1 was 1.55 and the FVC was 2.05. *Id*. Dr. Castle, the administering physician, indicated that the post-bronchodilator results reflected less than maximal effort and, as a result, claimant "was unable to produce acceptable data for the post-bronchodilator spirometry." *Id.*

Pursuant to the Board's remand instructions, the administrative law judge initially reviewed the pulmonary function study evidence to determine claimant's height. The administrative law judge noted that on the pulmonary function studies conducted since July 1987, claimant's height was recorded as 69, 70, or 71 inches. The administrative law judge stated that:

> I agree with [e]mployer that, given the numerous different reports of height, the most reasonable method for assessing the pulmonary function study

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's qualifying coal mine employment was in Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 11.

> results is to average the reported heights. Doing so results in an average height of 70.08 inches.

Decision and Order at 2. The administrative law judge then rounded this figure to 70.1 inches to conform to the nearest height appearing in the tables set forth in Appendix B to 20 C.F.R. Part 718. *Id*. With respect to the FEV1 value applicable to a male of claimant's age and height, the administrative law judge indicated that because claimant's age was 75 when the studies at issue were performed and the table values end at age 71, she had to extrapolate the qualifying value for a 75 year old male from the qualifying values for a 71 year old male.[3] *Id*. The administrative law judge then calculated the decrease in the FEV1 values between the ages of 67 and 71 for a male who is 70.1 inches tall and subtracted this number from the FEV1 value for a 71 year old male of that height. The administrative law judge concluded that the FEV1 value is 1.81 liters for a 75 year old male who is 70.1 inches tall.[4] *Id*.

Using the FEV1 value of 1.81, the administrative law judge found that the post-bronchodilator FEV1 value obtained by Dr. Agarwal on November 16, 2004 was nonqualifying, as was the pre-bronchodilator FEV1 value obtained by Dr. Castle on March 23, 2005. Decision and Order at 2-3. With respect to the post-bronchodilator FEV1 of 1.55 that claimant produced on the March 23, 2005 test, the administrative law judge considered Dr. Castle's statements regarding claimant's effort and the physician's status as a Board-certified pulmonologist, and concluded that the post-bronchodilator pulmonary function study was "not reliable" for determining whether claimant is totally disabled pursuant to Section 718.204(b)(2)(i). *Id*. at 3. The administrative law judge found, therefore, that the newly submitted pulmonary function studies were insufficient to establish total disability at Section 718.204(b)(2)(i). *Id*.

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[3] For a pulmonary function study to be "qualifying," it must produce an FEV1 value that is equal to, or less than, the applicable table value in Appendix B of 20 C.F.R. Part 718 for an individual of claimant's gender, age, and height. 20 C.F.R. §718.204(b)(2)(i). In addition, a pulmonary function study must reflect FVC or MVV values that are equal to, or less than, the applicable table values in Appendix B of 20 C.F.R. Part 718, or a percentage of 55% or less when the results of the FEV1 test are divided by the results of the FVC test. Thus, a pulmonary function study is "nonqualifying" if the FEV1 exceeds the table value, regardless of the FVC and MVV values, or if the FEV1 is qualifying, but the FVC, MVV, and FEV1/FVC ratio exceed the relevant table values. *Id*.

[4] The FEV1 value for a 71 year old male who is 70.1 inches tall is 1.88 liters. *See* Appendix B to 20 C.F.R. Part 718. The FEV1 value for males of that height decreases by 0.07 between the ages of 67 and 71. *Id*. Subtracting 0.07 from 1.88 results in a value of 1.81.

With respect to the administrative law judge's consideration of claimant's height, we hold that the administrative law judge acted within her discretion as fact-finder in determining that claimant's height, for the purposes of assessing the newly submitted pulmonary function studies, was 70.1 inches based upon the averaging of the different figures recorded on the pulmonary function studies of record. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). We also affirm the administrative law judge's conclusion that the newly submitted post-bronchodilator study obtained by Dr. Castle did not support a finding of total disability, despite the fact that claimant's FEV1 was below 1.81, as Dr. Castle indicated that the study reflected less than maximal effort and, therefore, did not produce acceptable data. *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

The remaining issue is whether the administrative law judge properly extrapolated the qualifying FEV1 value for a male miner over the age of 71 from the existing table values. Since the inception of the federal black lung benefits program, the Department of Labor has used pulmonary function studies as a means by which a miner can establish that he or she is totally disabled. Prior to March 31, 1980, however, qualifying pulmonary function study values were determined by reference to a table that set forth FEV1 and MVV values according to height alone. *See* 20 C.F.R. §§410.426, 410.490(b)(1)(ii), 727.203(a)(2). In promulgating 20 C.F.R. Part 718, which has been in effect since March 31, 1980, the Department of Labor (DOL) determined that the criteria for establishing total disability by pulmonary function study should more closely resemble the criteria used by experts in pulmonary medicine. DOL determined that an acceptable benchmark for establishing total disability would be if a miner's pulmonary capacity, as measured by FEV1, FVC and MVV, was 60% of the predicted normal values. 45 Fed. Reg. 13711 (Feb. 29, 1980). DOL derived predicted normal values by gender, height, and age for adults from a study published in *The American Review of Respiratory Disease*.[5] 43 Fed. Reg. 17729-31 (Apr. 25, 1978), *citing* R.J. Knudson, *et al*., *The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age***,** 113 Am. Rev. Respir. Dis. 587-660 (May 1976). DOL then created tables of values that were 60% of the predicted normal for FEV1, FVC, and MVV, according to gender, height, and age, with 71 being the maximum age for which figures are reported. 20 C.F.R. Part 718, Appendix B.

There have been numerous cases involving pulmonary function studies conducted on miners who are more than 71 years of age since the effective date of 20 C.F.R. Part

[5] The Knudson study used data from 746 non-smokers, who did not have any symptoms or history of cardiorespiratory disease, to determine normal prediction equations. R.J. Knudson, *et al*., *The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age***,** 113 Am. Rev. Respir. Dis. 587-660 (May 1976).

718.[6] In the majority of cases in which the administrative law judge's total disability finding has been at issue on appeal, the Board has held that an administrative law judge may extrapolate the appropriate qualifying values for older miners. *See, e.g.*, *Leedy v. Superior Mining & Minerals*, BRB No. 06-0177 BLA (Nov. 29, 2006) (unpub.); *Wilson v. Peabody Coal Co.*, BRB No. 06-0211 BLA (Nov. 20, 2006) (unpub.); *Freeman v. Director, OWCP*, BRB No. 06-0377 BLA (Sept. 22, 2006) (unpub.); *Boggs v. Jericol Mining, Inc.*, BRB No. 05-1002 BLA (July 26, 2006) (unpub.); *Gregory v. T & E Coal Co.* [*Gregory II*], BRB No. 05-0677 BLA (May 25, 2006) (unpub.); *Shertzer v. McNally-Pittsburgh Mfg. Co.*, BRB No. 05-0289 BLA (Sept. 21, 2005) (unpub.); *Spivey v. Mountain Clay, Inc.*, BRB No. 03-0338 BLA (Feb. 26, 2004) (unpub.); *Horne v. Director, OWCP*, BRB No. 02-0466 BLA (Mar. 24, 2003) (unpub.); *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 01-0822 BLA (June 13, 2002) (unpub.); *Spivey v. Mountain Clay, Inc.*, BRB No. 01-0754 BLA (June 12, 2002) (unpub.); *Gregory v. T & E Coal Co.*, BRB No. 01-0505 BLA (Apr. 5, 2002) (unpub.); *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (Nov. 24, 2000) (unpub.); *Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA (Dec. 20, 1996) (unpub.). Until recently, the Director has not expressed a view contrary to the Board's holding. Indeed, in *Gregory II* and *Horne*, the Director appeared to support the proposition that an administrative law judge can derive pulmonary function study values for older miners from the existing tables.[7]

In *M.D.R. v. Peabody Coal Co.*, BRB No. 06-0923 BLA, slip op. at 9 (Dec. 23, 2007) (unpub.), however, the Director asserted that it was improper for an administrative law judge to, *sua sponte*, select and apply a mathematical formula to extrapolate an FEV1 value for a male over 71 years old. The Director further indicated that it was appropriate to instruct the administrative law judge to treat the pulmonary function study in question as qualifying because the values were below the table values for a 71 year old male. The Board concurred with the Director's position. *M.D.R.*, slip op. at 10, *citing Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994).

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[6] Nevertheless, when the Part 718 regulations concerning total disability were extensively revised in 2001, the Department of Labor failed to alter the tables appearing in Appendix B.

[7] In *Gregory v. T & E Coal Co.* [*Gregory II*], BRB No. 05-0677 BLA (May 25, 2006) (unpub.), the Director, Office of Workers' Compensation Programs (the Director), urged the Board to affirm the administrative law judge's finding that claimant established total disability based, in part, upon pulmonary function studies that the administrative law judge determined were qualifying in light of extrapolated values. In *Horne v. Director, OWCP*, BRB No. 02-0466 BLA (Mar. 24, 2003) (unpub.), the Director accepted the premise that an administrative law judge can derive appropriate qualifying values for an older miner from the existing tables.

In this case, the Director has essentially reiterated the arguments that he made in *M.D.R.* Employer contends in response that the administrative law judge's extrapolation of a qualifying FEV1 of 1.81 for the miner in this case was appropriate, as it is virtually identical to the value of 1.819 produced by applying the Knudson equations used to create the pulmonary function study tables in Appendix B.[8]

After reviewing the administrative law judge's Decision and Order, the relevant evidence, and the arguments made by the Director and employer, we vacate the administrative law judge's finding under Section 718.204(b)(2)(i) and remand the case to her for reconsideration of the pulmonary function study evidence in accordance with the Director's position. The Director, as the agent of the Secretary of Labor, is the party responsible for the administration of the Act. Accordingly, deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP* [*Taskey*], 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). The solution that the Director has proposed to rectify the omission of table values for miners over the age of 71 is to treat the pulmonary function studies performed by such miners that produce qualifying values for a 71 year old as qualifying for the purposes of Section §718.204(b)(2)(i). The Director asserts that the party opposing entitlement would not be prejudiced by this practice, stating:

> Utilizing the qualifying values of a 71 year old for older miners is reasonable because the existence of a qualifying test does not require a finding of total disability. Regardless of the age of the miner, a qualifying test is sufficient to establish total disability only in the absence of contrary probative evidence. 20 C.F.R. §718.204(b)(2). In the case of older miners, an opposing party may offer medical evidence to prove that ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling pulmonary impairment. In response, a claimant may provide medical evidence supporting a disability finding based on the test results and the miner's actual age.

Director's Letter Brief at 2. In the absence of a revision to Appendix B to account for older miners, we are persuaded that the Director has presented a reasonable method for resolving the problem of the table values ending at age 71. However, we take exception to the Director's position regarding when an administrative law judge should address

[8] According to employer, the predicted normal FEV1 for men over the age of 24 is derived from the following Knudson formula: 0.1321 x height (in inches) – 0.0270 x age (in years) – 4.203. Attachment to Employer's Reply Brief. The threshold FEV1 is then calculated by multiplying the predicted normal by 0.60.

medical evidence proffered to show that the qualifying pulmonary function study values for a 71 year old are not indicative of total disability in an older miner. The Director has indicated that this evidence should be considered when the administrative law judge determines whether the evidence of record, as a whole, is sufficient to establish total disability pursuant to Section 718.204(b)(2). *Id*. We disagree. Because this evidence relates to the credibility of the pulmonary function study results as an indicator of total disability, it is similar to a report challenging the technical validity of a pulmonary function study. Thus, it should be considered by the administrative law judge when he or she is making her initial determination as to whether the pulmonary function study evidence supports a finding of total disability at Section 718.204(b)(2)(i). *See DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Accordingly, we vacate the administrative law judge's finding that claimant did not prove that he is totally disabled under Section 718.204(b)(2)(i) and her finding that claimant did not demonstrate a change in conditions pursuant to Section 725.310 (2000). On remand, the administrative law judge must reconsider the pulmonary function study evidence based upon the table values for a 71 year old male of claimant's height. The administrative law judge must also reopen the record to allow employer to submit evidence, like the Knudson equations cited by employer on appeal, indicating that the "ventilatory function tests that yield qualifying values for age 71 are actually normal or otherwise do not demonstrate a totally disabling pulmonary impairment."[9] Director's Letter Brief at 2. The administrative law judge must weigh this evidence at Section 718.204(b)(2)(i).

If the administrative law judge finds total disability established by the pulmonary function study evidence, she must weigh the different types of evidence relevant to Section 718.204(b)(2) together to determine whether the evidence supportive of a finding of total disability outweighs the contrary probative evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). If the administrative law judge finds that claimant has established total disability at Section 718.204(b)(2), she must then address the merits of entitlement. *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

[9] In cases in which the evidentiary limitations set forth in 20 C.F.R. §725.414(a) apply, this evidence would be admissible under the rebuttal provisions at 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii) or the "good cause" exception set forth in 20 C.F.R. §725.456(b)(1). The evidentiary limitations are not applicable in this case, however, as it was pending on the effective date of the revised regulations. 20 C.F.R. §725.2(c); Director's Exhibit 111.

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