U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0225 BLA

RENDELL N. BARTLEBAUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 04/29/2021
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (Sutter Williams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2019-BLA-5335) rendered on a claim filed on December 21, 2017, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 30.5 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. Therefore, he found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] The administrative law judge also found Employer failed to rebut the presumption, and awarded benefits.

On appeal, Employer asserts the administrative law judge erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption, and further erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding, based on the parties' stipulation, that Claimant established 30.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 5; Hearing Transcript at 11-12; Employer's Brief at 8, 13.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 11-12.

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found the pulmonary function and blood gas studies non-qualifying and that there is no evidence of cor pulmonale. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 17-19. He also considered three medical opinions regarding whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found "Drs. Zlupko and Basheda opined that Claimant was unable to perform his last coal mining job, and Dr. Rosenberg agreed that Claimant's oxygen desaturation was disabling" based on the results of Dr. Basheda's pulse oximetry test. Decision and Order at 21. Weighing all of the evidence together, the administrative law judge found that Claimant established total disability and invoked the Section 411(c)(4) presumption. *Id*. at 22.

Employer contends the administrative law judge mischaracterized Drs. Zlupko's, Basheda's, and Rosenberg's opinions to find Claimant totally disabled. We disagree.

Dr. Zlupko evaluated Claimant on behalf of the Department of Labor on February 28, 2018. Director's Exhibit 14. He noted Claimant complained of an inability to "do moderate to heavy exertion like he used to [do]," and, in the context of assessing the degree of Claimant's disability, diagnosed a mild obstructive impairment, further stating that he "would not return [him] to his employment as a roof bolter." *Id*. at 3-4. As Dr. Zlupko related Claimant's inability to work to his obstructive impairment the administrative law judge permissibly construed his opinion as diagnosing a totally disabling impairment. *See* 20 C.F.R. §718.204(b)(2)(iv).

Dr. Basheda examined Claimant on July 23, 2019, and reviewed the medical records. Employer's Exhibit 2. He conducted a pulmonary function study that showed a moderate obstructive respiratory impairment with improvement after bronchodilators. *Id*. A blood gas study conducted at rest was normal. *Id*. Dr. Basheda used a pulse oximetry test to assess Claimant's oxygenation after he walked for six minutes on a treadmill. He found Claimant exhibited "nadir oxygen saturation of 88%" which "would qualify [Claimant] for oxygen therapy." *Id*. at 25. Dr. Basheda concluded that "[t]his level of

hypoxemia would prevent [Claimant] from performing his last coal mining work" as a roof bolter, which required him to regularly lift bags of rock dust weighing more than fifty pounds. *Id*. at 26.

During a deposition, Dr. Basheda acknowledged that Claimant's oxygen desaturation shown on the pulse oximetry "is an outstanding data point that doesn't quite fit with [Claimant's] pulmonary picture."[4] Employer's Exhibit 6 at 18-20. Although Dr. Basheda explained that if Claimant were his patient he would retest Claimant's pulse oximetry to assess whether his change in oxygenation status may be caused by cardiovascular disease, Dr. Basheda maintained his opinion, "to a reasonable degree of medical certainty," that Claimant's oxygen desaturation with exercise renders him totally disabled. *Id.* at 19, 29-30. He neither invalidated the July 2019 oximetry nor stated that its results are unreliable. Employer's Exhibits 2, 6. The administrative law judge therefore accurately construed Dr. Basheda's opinion as diagnosing a totally disabling pulmonary impairment.

With regard to Dr. Rosenberg's opinion, the administrative law judge accurately observed that he opined Claimant could return to his usual work, but also "admitted that if Claimant exhibited the oxygen desaturation that Dr. Basheda found [on examination] . . . Claimant would have a disabling pulmonary impairment." Decision and Order at 21; Employer's Exhibit 7 at 28-29. Thus, we reject Employer's contention the administrative law judge misconstrued Dr. Rosenberg's opinion on total disability.

We agree with Employer, however, that the administrative law judge erred in failing to explain his finding that the medical opinion evidence, as a whole, supports finding Claimant is totally disabled. Despite finding Dr. Zlupko opined Claimant is unable to return to his usual work as a roof bolter, the administrative law judge incongruently found Dr. Zlupko did not consider the exertional requirements of Claimant's usual coal mine employment, then summarily credited his opinion as supporting a total disability finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 20-22.

The administrative law judge also failed to explain how he resolved the conflict in the opinions of Drs. Basheda and Rosenberg as to whether the arterial blood gas study e, or pulse oximetry, evidence better reflects Claimant's pulmonary condition. Dr. Basheda concluded Claimant's pulse oximetry test reliably demonstrated a totally disabling

[4] Dr. Basheda noted the January 19, 2018 and March 30, 2019 blood gas studies showed no oxygen impairment with exercise. Employer's Exhibit 2 at 7-8, 11; *see* Director's Exhibit 14; Claimant's Exhibit 3.

impairment while Dr. Rosenberg stated he would not rely on a pulse oximetry test to assess Claimant's disability because there are "two sets of blood gases that either stay[ed] constant with exercise or went up with exercise."[5] Employer's Exhibit 7 at 29. He concluded that Claimant is not totally disabled based on the results of the pulmonary function and blood gas studies. *Id*. at 23-24.

Because the administrative law judge's finding that the medical opinion evidence establishes a totally disabling impairment is not adequately explained, we vacate it.[6] 20 C.F.R. §718.204(b)(2)(iv); *see Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997) (noting that the absence of explanation in certain portions of administrative law judge's Decision and Order renders meaningful review impossible by appellate court); *Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion).

Consequently, we also vacate the administrative law judge's findings that Claimant established total disability, invoked the Section 411(c)(4) presumption, and established entitlement to benefits.[7] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

---

[5] Dr. Rosenberg testified that multiple factors may artificially lower pulse oximetry test results. Employer's Exhibit 7 at 27-28. Because pulse oximetry results are difficult to verify, he prefers blood gas confirmation when conducting a disability evaluation. *Id*. at 28. He agreed that Claimant would be disabled if Dr. Basheda's pulse oximetry "were a truly valid measurement" of Claimant's oxygenation. *Id*. at 28-29.

[6] Our colleague points out Dr. Basheda's statements that Claimant's pulse oximetry "doesn't quite fit" with Claimant's "pulmonary picture" and might have been "for some reason, not good." Employer's Exhibit 6 at 18, 30-31. However, those statements and his related comment that Claimant's oxygen desaturation could have been due to a heart condition were made in the context of his views on the potential *cause* of Claimant's disabling oxygenation impairment, 20 C.F.R. §718.204(c), rather than its existence, 20 C.F.R. §718.204(b)(2). When specifically asked whether Claimant is totally disabled based on the test, he reaffirmed that the pulse oximetry reflected "significant exercise hypoxemia" and that Claimant is totally disabled by it. Employer's Exhibit 6 at 18-19, 29-30. Thus, the administrative law judge accurately found that Dr. Basheda diagnosed total disability based on the pulse oximetry. Employer's Exhibit 6 at 19, 29-30.

[7] Because we have vacated the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's challenges to the administrative law judge's rebuttal findings. We note,

Remand Instructions

On remand, the administrative law judge must reconsider the medical opinion evidence to determine if Claimant established total disability. 20 C.F.R. §718.204(b)(2)(iv). He should address whether each physician accurately understood the exertional requirements of Claimant's usual coal mine employment. *Id*. Further, he must resolve the conflict in Dr. Rosenberg's and Dr. Basheda's opinions regarding the reliability of Claimant's pulse oximetry testing, assess the credibility of their conclusions in light of their underlying reasoning and documentation, and weigh those opinions against Dr. Zlupko's diagnosis of disability. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97 (3d Cir. 2002). In rendering his credibility findings, the administrative law judge must explain his rationale as the Administrative Procedure Act requires.[8] *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge again finds the medical opinions sufficient to establish total disability, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *Defore*, 12 BLR at 1-28-29; *Rafferty*, 9 BLR at 1-232. If Claimant establishes total disability, the administrative law judge may reinstate his determination that Claimant invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(1)(i), (ii). If the administrative law judge finds the evidence does not establish

---

however, the administrative law judge's statement that the preamble to the 2001 regulations "links COPD . . . to coal mine dust exposure." Decision and Order at 15. While the preamble credits medical studies that "link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease," Employer correctly states that COPD is legal pneumoconiosis only to the extent that it arises out of coal mine employment. Employer's Brief at 5; *see* 65 Fed. Reg. 79,939 (Dec. 20, 2000); *see also* 20 C.F.R. §718.201(a)(2) (defining "legal pneumoconiosis" as including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment;" this definition includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment"). Therefore, the relevant inquiry on rebuttal is whether the physicians have credibly explained why Claimant's lung disease or impairment is not significantly related to or substantially aggravated by coal mine dust exposure.

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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 30 U.S.C. §932(a).

total disability, benefits are precluded under 20 C.F.R. Part 718 because Claimant will have failed to establish a requisite element of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Accordingly, we vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

I concur with my colleagues' decision to vacate the administrative law judge's total disability determination and to remand the case for further consideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). However, I would instruct the administrative law judge on remand to properly consider the entirety of Dr. Basheda's statements regarding the July 2019 pulse oximetry and to further explain the basis for his finding that Dr. Zlupko determined the miner to be totally disabled.

Although Dr. Basheda opined Claimant's pulse oximetry showed a disabling pulmonary impairment, he also stated that it is "the outstanding data point that doesn't quite fit with [his] pulmonary picture." Employer's Exhibit 6 at 18. He questioned whether the pulse oximetry might, "for some reason, not [have been] good" or whether Claimant had cardiovascular disease." *Id*. at 30-31. He further stated that setting aside the oximetry study, the objective evidence demonstrates a mild to moderate obstructive

impairment that would not preclude Claimant from performing his usual coal mine work. *Id*. at 28, 31-32.

An administrative law judge must consider the whole of a physician's rationale and the underlying documentation that supports his conclusions. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (factfinder is required to examine the validity of the reasoning of a medical opinion in light of the objective evidence upon which the opinion is based). Because the administrative law judge has not addressed all the relevant evidence, I would instruct him to consider the whole of Dr. Basheda's statements in determining whether Claimant is totally disabled. 30 U.S.C. §923(b); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); *see also Balsavage v. Director, OWCP*, 295 F.3d 390, 396- 397 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). Additionally, I would have him explain the basis upon which he found Dr. Zlupko's statement, "I would not return him to employment as a roof bolter" constitutes an opinion of total disability rather than a recommendation.[9] Further, I would instruct the administrative law judge on remand to explain the bases for all of his credibility determinations, setting forth in detail how he resolves the conflict in the evidence, as the Administrative Procedure Act requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[9] The administrative law judge cited a section of Dr. Zlupko's report in making his finding of total disability; however, the section in question relates to the proportion of the impairment attributable to each diagnosis, not the extent of impairment. He should explain how this constitutes an appropriate basis for his finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989)