U.S. Department of Labor

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

BRB No. 20-0109 BLA

JOHNIE R. ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PLOWBOY COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/22/2020
and	)	
	)	
CONNECTICUT INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Johnie R. Anderson, Kingsport, Tennessee.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] Administrative Law Judge Theodore W. Annos's Decision and Order Denying Benefits (2017-BLA-05901) rendered on a claim filed on May 1, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant does not have complicated pneumoconiosis and therefore is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Based on the parties' stipulation of nine years and four months of coal mine employment, he also found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering Claimant's entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant did not establish total disability and denied benefits. 20 C.F.R. §718.204(b).

On appeal, Claimant generally challenges the administrative law judge's denial. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Benefits Review Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on Claimant's behalf that the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

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

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(3) Presumption

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The administrative law judge accurately found none of Claimant's x-rays were interpreted as positive for large opacities of pneumoconiosis, Category A, B. or C. Decision and Order at 11, 13. A bronchial washing conducted on April 26, 2016, did not reveal any evidence of complicated pneumoconiosis. Decision and Order at 10, 13; Claimant's Exhibit 8; Employer's Exhibit 4. Further there is no medical opinion or CT scan evidence for complicated pneumoconiosis and Claimant was never treated for the disease. Decision and Order at 13, 16. We therefore affirm the administrative law judge's finding that Claimant did not invoke the Section 411(c)(3) presumption.

Section 411(c)(4) Presumption

Claimant has never alleged he has at least fifteen years of coal mine employment as required to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. On his application for benefits, he alleged only eleven years. Director's Exhibit 2. Moreover, the administrative law judge permissibly relied on the parties' stipulation of nine years and four months of coal mine employment. Decision and Order at 3; Hearing Transcript at 5. We therefore affirm the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

20 C.F.R. Part 718 – Total Disability

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *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).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 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 evidence supporting a finding of total disability against the 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).

Pulmonary Function Studies

The record contains nine pulmonary function studies.[4] The two earliest, conducted on April 9, 2015, and June 22, 2015, were non-qualifying.[5] Director's Exhibit 12; Employer's Exhibit 4. A February 2, 2016 pulmonary function study produced qualifying values before bronchodilation; the post-bronchodilation testing is incomplete as only an FEV1 value was reported. Claimant's Exhibit 11; Employer's Exhibit 2. An April 22, 2016 pulmonary function study had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Claimant's Exhibit 11. The next three pulmonary function studies conducted on October 20, 2016, May 10, 2017, and March 12, 2018, produced non-qualifying values.[6] Director's Exhibit 20; Claimant's Exhibit 6; Employer's Exhibit 4. An April 15, 2019 study performed without administration of a bronchodilator

[4] The administrative law judge noted the pulmonary function studies reported differing heights for Claimant of 70, 70.98 and 71 inches, and permissibly found "the average of Claimant's three reported heights is 70.66 inches." Decision and Order at 6; *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). As there was no value for a height of 70.66 inches in the charts at 20 C.F.R. Part 718, Appendix B, he correctly used the nearest greater height of 70.9 inches in determining whether Claimant's pulmonary function studies were qualifying.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The October 20, 2016 and May 10, 2017 studies were conducted before and after administration of a bronchodilator, while the March 12, 2018 study has only pre-bronchodilator values.

produced qualifying values, while an April 17, 2019 study produced non-qualifying values both before and after the administration of a bronchodilator.[7] Claimant's Exhibit 7; Employer's Exhibit 3.

The administrative law judge found "a preponderance of the [pulmonary function study] evidence was non-qualifying, as five of the nine [studies] resulted in non-qualifying values." Decision and Order at 14. He noted that "[w]hile the most recent [studies], dated April 15, 2019 and April 17, 2019, yielded qualifying values, they were performed around the time Claimant was possibly suffering from an acute respiratory illness." *Id*. Specifically he observed that Dr. Fino read a chest x-ray on April 17, 2019, as "concerning for pneumonia." *Id*.

The administrative law judge reasoned "illness may have tainted the April 2019 [pulmonary function study] results, rendering them of little probative value." *Id*. He found "[e]xcluding the possibly tainted April 2019 [pulmonary function study] results, the three most recent [studies] are all non-qualifying" and are the "most persuasive as more weight is generally given to the most recent evidence due to the progressive and irreversible nature of pneumoconiosis." *Id*. Thus, the administrative law judge concluded Claimant did not establish total disability based on the weight of the pulmonary function study evidence.

The administrative law judge's analysis is flawed for two reasons. First, he erred in finding the April 2019 studies unreliable. The regulations state pulmonary function studies should "not be performed during or soon after an acute respiratory illness." 20 C.F.R. Part 718, Appendix B. Based on Dr. Fino's identification of markings on Claimant's x-ray "concerning" for chronic pneumonia or possible malignancy, the administrative law judge inferred Claimant "possibly" was suffering from an acute respiratory illness when the April

[7] The administrative law judge mischaracterized the pre-bronchodilator results Dr. Fino obtained on April 17, 2019, as qualifying when they are non-qualifying. Decision and Order at 7. The April 17, 2019 pulmonary function study was performed when Claimant was 68 years old. Employer's Exhibit 3. A 68 year old miner is totally disabled if his FEV1 value is at or below 1.99 for a height of 70.9 inches *and* he has a qualifying FVC or MVV value or a FEV1/FVC value equal to or less than 55 percent. 20 C.F.R. Part 718, Appendix B. Dr. Fino recorded FEV1 values of 2.00 and 2.11 on the pre-bronchodilator and post-bronchodilator portions of the April 17, 2019 pulmonary function study. Employer's Exhibit 3. Because the FEV1 values are above the qualifying table value, both the pre-bronchodilator and post-bronchodilator portions of the April 17, 2019 pulmonary function study are non-qualifying.

17, 2019 study was conducted.[8] However, Dr. Fino did not describe an acute condition and no physician has indicated those studies are unreliable for any reason.[9] Employer's Exhibit 3. Dr. Ramakrishnan also read the April 17, 2019 x-ray and made no mention of pneumonia. Claimant's Exhibit 4. Further, there are no treatment records indicating Claimant was diagnosed with pneumonia in April 2019. Therefore, the administrative law judge's inference is an improper substitution of his opinion for that of a medical expert, and his determination that the April 15 and 17, 2019 studies are unreliable is not supported by substantial evidence. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Second, the administrative law judge found the October 20, 2016, May 10, 2017, and March 12, 2018 non-qualifying studies "are most persuasive as more weight is generally given to the most recent evidence due to the progressive and irreversible nature of pneumoconiosis." Decision and Order at 14. But the United States Court of Appeals for the Fourth Circuit has held it rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993). Conversely, it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows a miner's condition has improved given the irreversible nature of the disease. *See Adkins*, 958 F.2d at 51-52. In such situations, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier." *Id.* at 52. Here, there are qualifying pulmonary function studies prior and subsequent to the non-qualifying studies the administrative law judge credited. Thus, his rationale for crediting the non-qualifying studies based on their recency conflicts with *Adkins*. *Id*.

Because the administrative law judge erred in discrediting the April 2019 studies, and did not adequately explain his credibility findings in accordance with the

[8] Dr. Fino conducted the April 17, 2109 study and commented in his report that an x-ray obtained in conjunction with his examination showed "[i]ncreased markings in the middle and lower lung zones on the right side [that] are concerning for pneumonia or possible malignancy." Employer's Exhibit 3. Dr. Fino recommended that Claimant have the x-ray reviewed by his primary care physician to determine whether the markings represent "a *chronic* pneumonia or possibly even a malignancy." *Id*. (emphasis added)

[9] Dr. Fino specifically diagnosed a moderate respiratory impairment based on the April 17, 2019 study but opined Claimant was not totally disabled by it. Employer's Exhibit 3.

Administrative Procedure Act,[10] we vacate his determination that Claimant did not establish total disability based on the pulmonary function study evidence.[11] 20 C.F.R. §718.204(b)(2)(i); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998) (an administrative law judge must consider all relevant evidence and adequately explain his or her rationale for crediting certain evidence); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Decision and Order at 14.

Medical Opinions

The administrative law judge noted correctly that neither Dr. Ajjarapu nor Dr. Fino opined that Claimant is totally disabled.[12] Decision and Order at 15; Director's Exhibits 12, 20; Employer's Exhibit 3. However, he did not address Dr. Girish's treatment notes[13]

[10] 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 30 U.S.C. §932(a).

[11] The administrative law judge accurately found that the three arterial blood gas studies, conducted on June 22, 2015, October 20, 2016, and April 17, 2019, are non-qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8, 15; Director's Exhibits 12, 20.

[12] Dr. Ajjarapu performed Claimant's Department of Labor (DOL)-sponsored pulmonary evaluation on June 22, 2015, and opined his pulmonary function study showed a moderate respiratory impairment and his blood gas study showed mild resting hypoxemia. Director's Exhibit 12. He check-marked a box on the DOL evaluation form indicating he had reviewed Claimant's employment history form dated May 5, 2015, (CM-911a) and opined Claimant "has the pulmonary capacity to do his previous coal mine employment." Director's Exhibit 12. Dr. Fino examined Claimant on October 20, 2016, and April 17, 2019, and also opined in each of his reports that Claimant is not totally disabled. Employer's Exhibit 3.

[13] Dr. Girish treated Claimant for chronic obstructive pulmonary disease, "mediastinal adenopathy with lung nodule in the setting of coal mine dust exposure," and sleep apnea. Claimant's Exhibit 11. He noted Claimant had shortness of breath when lying down and with exertion, which is worse when he bends over or when he walks on an incline, wheezing, and a daily cough with sputum production. *Id.* He prescribed breathing

and comments on the qualifying February 2, 2016 and April 22, 2016 pulmonary function study reports that Claimant has chronic obstructive pulmonary disease with "[m]oderately severe obstruction with bronchodilator response."[14] Claimant's Exhibit 11.

A medical opinion need not be phrased in terms of "total disability" before total disability can be established. An administrative law judge must consider all relevant evidence concerning a miner's respiratory capacity and may draw an inference of total disability from a physician's report as to the extent of a miner's impairment. *See Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985); *Cornett v. Benham Coal Co.*, 277 F.3d 569, 578 (6th Cir. 2000) (even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment.). Because the administrative law judge did not consider Dr. Girish's opinion in relation to whether Claimant is totally disabled from performing his usual coal mine work,[15] we vacate his finding that Claimant did not establish total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 15.

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medications and a CPAP machine. *Id*. He indicated that a bronchoscopy was negative for malignancy but showed anthracotic fibrous tissue. *Id*.

[14] As support for his finding that Claimant is not totally disabled, the administrative law judge stated Claimant had "consistently normal chest, respiratory and pulmonary exams contained in the treatment notes." Decision and Order at 16. However, he failed to reconcile his finding with Dr. Girish's treatment notes. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[15] The administrative law judge summarized Claimant's job duties. Decision and Order at 4. He noted Claimant worked underground in coal mines from 1979 until 1991 primarily as a roof bolter. Director's Exhibit 5. He operated the bolt machine and used steel rods to attach plates via the bolt machine; the bolts weighed around 25 pounds. Hearing Transcript at 9. Claimant also worked as a scoop operator and in general maintenance and supply, and stocked materials for the day including bolts, plates, and glue, on the pinner. *Id*. at 10. Claimant described the coal seam as between four and four and a half feet tall, requiring him to stoop or crawl, approximately eight hours a day. *Id.*; Director's Exhibit 4. He was sometimes required to shovel belt lines and rock dust. Hearing Transcript at 10. The rock dust bags weighed around 50 pounds and a shovelful of rock dust weighed about 60 pounds. *Id*. at 11.

Remand Instructions

The administrative law judge must reconsider whether Claimant established total disability based on the pulmonary function studies[16] and adequately explain how he resolves the conflict in the evidence. 20 C.F.R. §718.204(b)(2)(i). He must then determine whether Claimant established total disability based on Dr. Girish's opinion when considered in conjunction with the exertional requirements of Claimant's usual coal mine employment. *See Raines*, 758 F.2d at 1534; *Cornett*, 277 at 578. The administrative law judge should also reconsider Claimant's treatment records as a whole relevant to whether he is totally disabled. If the administrative law judge determines total disability has been demonstrated by Claimant's pulmonary function studies, treatment records/medical opinions or both, he must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record and determine whether Claimant is totally disabled. *See Defore*, 12 BLR at 1-28-29. If Claimant does not establish total disability, however, the administrative law judge may reinstate the denial of benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. In reaching his credibility determinations on remand, the administrative law judge must set forth his findings in detail and explain his underlying rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[16] The administrative law judge must correct his pulmonary function study chart to reflect the pre-bronchodilator and post-bronchodilator portions of the April 17, 2019 pulmonary function study are non-qualifying, and reweigh the evidence accordingly.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge