U.S. Department of Labor

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

BRB No. 19-0324 BLA

TERRY WALDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY BEAR RUN SERVICES, LLC	)	DATE ISSUED: 07/23/2020
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Allman Law LLC), Indianapolis, Indiana, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2017-BLA-05958) of Administrative Law Judge Steven D. Bell rendered on a claim filed on April 21, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found Claimant timely filed his claim and credited him with at least twenty-five years of underground coal mine employment. He determined the evidence did not establish total disability and thus found Claimant did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] or establish entitlement to benefits under 20 C.F.R. Part 718. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, Claimant argues the administrative law judge properly found his claim timely filed but erred in finding he is not totally disabled. Employer responds in support of the denial of benefits but alternatively argues the claim was untimely filed. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The 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.[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 (1965).

Timeliness of Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308 (a), (c). To rebut this presumption, an employer must show, by a preponderance of the evidence, that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 997 (7th Cir. 2005).

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes 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) (2012); 20 C.F.R. §718.305.

[2] Claimant's coal mine employment occurred in Indiana. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Employer argues Claimant received a diagnosis of total disability due to pneumoconiosis more than three years before he filed his claim on April 21, 2016.[3] Employer relies on Claimant's testimony that Dr. Reynolds told him in 2011 that he had "hard metal lung disease" and should not go back to work in the mines. Claimant's Exhibit 2; Hearing Transcript at 18-19. Employer also relies on two letters Dr. Reynolds wrote in 2011 relating to Claimant's treatment for "lung disease" and Claimant's statements to Dr. Cohen during his Department of Labor complete pulmonary evaluation. Employer's Response Brief at 18, *citing* Claimant's Exhibit 2. Employer contends the administrative law judge failed to "piece all of the information together" and, therefore, erred in concluding the claim was timely filed. Employer's Response Brief at 17. We disagree.

Dr. Reynolds wrote a letter dated December 22, 2011, addressed "To Whom It May Concern," indicating Claimant was referred to him "on October 18, 2011 for evaluation regarding respiratory symptoms including cough and shortness of breath." Claimant's Exhibit 2. He noted "chest imaging revealed bilateral interstitial infiltrates" and an "open lung biopsy" showed "giant cell pneumonitis consistent with an occupational exposure." ·*Id*. He further noted Claimant's "employment reveals multiple potential etiologies [for his respiratory symptoms] as he is presently a coal mine operator, but has additional significant dust exposures as he has been a rock grinder." *Id*. Dr. Reynolds stated: "[g]iven the pathologic finding on his lung biopsy of giant cell pneumonitis and its association with hard metal lung disease as well as his current respiratory limitations, I have asked [Claimant] to not work further. He is very limited in his functional activity at this time due to shortness of breath and cough." *Id.*

In a March 27, 2012 letter, again addressed "To Whom it May Concern," Dr. Reynolds stated [C]laimant has "interstitial lung disease consistent with occupational pneumoconiosis" and "giant cell interstitial pneumonitis findings consistent with coal mining exposure and rock drilling." Claimant's Exhibit 2. Dr. Reynolds further stated Claimant's "lung disease is consistent with pneumoconiosis from his occupational exposures, particularly that of his coal mining environment." *Id*.

When counsel questioned Claimant at the hearing about Dr. Reynolds' letters, he could not remember seeing them but testified he knew he had been diagnosed with "hard metal lung disease" and that Dr. Reynolds "in good conscience" did not want him to return to work in the mines. Hearing Transcript at 17-19. Claimant further testified Dr. Cohen first told him he was totally disabled due to pneumoconiosis during his 2016 Department of Labor medical examination. *Id*. at 19. Contrary to Employer's contention, the

[3] Because we reject Employer's statute of limitations argument on the merits, we need not address whether it should have raised it in a cross-appeal rather than a response brief. *See* 20 C.F.R. §§802.201(a)(2), 802.212(b).

administrative law judge rationally found Dr. Reynolds' letters insufficient to trigger the statute of limitations because they "are not addressed to Claimant, were written at different times, and neither specifies that Claimant was totally disabled due to pneumoconiosis." Decision and Order at 5; *see Williams*, 400 F.3d at 997.

Moreover, the administrative law judge permissibly credited Claimant's hearing testimony as establishing only that Claimant knew in 2011 he should not go back to work based on a biopsy finding of giant cell pneumonitis, not because he was diagnosed as totally disabled due to pneumoconiosis. *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); Decision and Order at 5. The administrative law judge also accurately noted that while Claimant told Dr. Cohen he "left mining in 2011 due to his lung disease[,]" he did not identify his lung disease as pneumoconiosis. Decision and Order at 4, Director's Exhibit 16 at 11.

Whether evidence is sufficient to rebut the presumption of timeliness involves factual findings and credibility determinations by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the record is insufficient to establish a medical determination of total disability due to pneumoconiosis was communicated to Claimant more than three years prior to the filing of his claim. We therefore affirm Employer did not rebut the presumption that Claimant timely filed his claim. *Williams*, 400 F.3d at 997.

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

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 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). Claimant asserts the administrative law judge erred in discrediting Dr. Cohen's opinion on total disability.[4] 20 C.F.R. §718.204(b)(2)(iv). We agree.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that Claimant did not establish total disability based on the pulmonary function and blood gas studies, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)- (iii); s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

Dr. Cohen conducted Claimant's Department of Labor complete pulmonary evaluation and indicated Claimant's pulmonary function studies show an obstructive defect and diffusion capacity impairment. Director's Exhibit 16. He also opined his blood gas studies show mild resting hypoxemia and a gas exchange impairment with exercise, and a moderate diffusion capacity impairment. *Id*. Dr. Cohen opined Claimant is totally disabled from performing heavy manual labor associated with his usual coal mine employment (lifting 90-200 pounds) based on Claimant's blood gas exchange abnormalities and diffusion impairment which would prevent him working in his usual coal mine employment. Claimant's Exhibit 3 at 6.

The administrative law judge found "Dr. Cohen fails to adequately explain his reliance on the gas exchange abnormality considering the fact that none of the [blood gas studies] were qualifying." Decision and Order at 26. He further found that "although [Dr. Cohen] relies in part on Claimant's diffusion capacity, he also relies on his obstructive impairment, but fails to adequately explain why this is disabling despite the fact that neither his own [pulmonary function tests], nor Dr. Selby's was qualifying." *Id.* at 26-27. The administrative law judge concluded that Dr. Cohen's opinion was "not well-reasoned" to the extent it relies on non-qualifying evidence and thus did not support finding Claimant is totally disabled. *Id*. at 27. In contrast, he credited the contrary opinions of Drs. Selby and Spagnolo that Claimant is not totally disabled as "reasoned and documented" because they relied on the non-qualifying objective tests. *Id*.; Employer's Exhibits 5-8.

Contrary to the administrative law judge's findings, the regulations specifically provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevented him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Dr. Cohen explained why be believes Claimant is totally disabled from performing his usual coal mine work despite Claimant's non-qualifying pulmonary function and blood gas studies. Director's Exhibit 16; Claimant's Exhibit 3. He examined Claimant on July 21, 2016, and indicated his pulmonary function testing showed a "reduced FVC" and a "moderately severely [sic] reduced FEV1" and FEV1/FVC ratio. Director's Exhibit 16 at 12. He noted "there was a significant response to bronchodilator, however, the FEV1 remained moderately impaired." *Id*. He also opined Claimant had a moderate diffusion impairment and his arterial blood gases showed mild hypoxemia which worsened with

exercise."[5] *Id*. Dr. Cohen opined Claimant's "gas exchange abnormalities and his diffusion impairment indicate that he is totally disabled for his last coal mining job where he was required to carry parts that weighed over 100 [pounds], cutting edges which weighed from 90 to 200 [pounds], and pump hoses which also weighed up to 100 [pounds]." Claimant's Exhibit 3 at 14. Because the administrative law judge ignored Dr. Cohen's detailed explanation why Claimant is disabled, and solely rejected his opinion for relying on non-qualifying pulmonary function and blood gas studies, we vacate his determination that Dr. Cohen's opinion is not reasoned. *See Killman*, 415 F.3d at 721-22; *Wojtowicz*, 12 BLR at 1-165.

Moreover, Dr. Cohen stated the diffusion capacity measurement is "a significant predictor of work capability" and Claimant's moderate diffusion impairment "is in and of itself totally disabling." Claimant's Exhibit 3 at 12-13. As the administrative law judge noted, Dr. Cohen "criticized the [opinions] of Dr. Selby and Dr. Spagnolo that a normal DLCO/VA indicated a lack of diffusion impairment, finding it contradicts the 2005 [American Thoracic Society] statement on interpreting lung function testing."[6] Decision and Order at 17; Claimant's Exhibit 3. The administrative law judge failed to properly consider Dr. Cohen's opinion regarding the significance of Claimant's diffusion capacity measurements, independent of the non-qualifying pulmonary function and blood gas studies values, and resolve the conflict in the medical opinions as to whether Claimant is totally disabled based on those results. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We therefore vacate the administrative law judge's weighing of the medical opinion evidence and his determination that Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27. Thus, we vacate his finding that Claimant did not invoke the Section 411(c)(4) presumption and we vacate the denial of benefits.

On remand, the administrative law judge must reconsider the medical opinions on total disability taking into consideration the explanations for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988). If claimant establishes total disability based on the medical opinion evidence, the administrative law judge must determine whether he is totally disabled taking into consideration all relevant evidence. 20 C.F.R. §718.204(b)(2)(iv); *Rafferty*, 9 BLR at 1-232. If Claimant establishes total disability, he will invoke the Section 411(c)(4)

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[6] Dr. Cohen reviewed pulmonary function tests from September 28, 2012, March 17, 2014, October 2, 2014, March 11, 2015, April 8, 2016, July 21, 2016, October 7, 2016, and October, 5, 2017, and opined they "all show moderate diffusion impairment." Claimant's Exhibit 3 at 12. He stated the fact that Dr. Spagnolo and Selby describe the DLCO/VA as normal "does not negate that the DLCO is seriously abnormal." *Id*.

presumption[7] and the administrative law judge must then determine whether Employer is able to rebut it. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. If Claimant does not establish total disability, an essential element of entitlement, the administrative law judge may reinstate the denial 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). The administrative law judge must set forth his findings in detail, including the underlying rationale for his decision in accordance with the Administrative Procedure Act.[8] *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[7] We affirm, as unchallenged, the administrative law judge's finding that Claimant established at least twenty five years of qualifying coal mine employment. *Skrack*, 6 BLR at 1-711; Decision and Order at 25.

[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).